



GARRETT HEMANN ROBERTSON P.C.

# LABOR & EMPLOYMENT UPDATE

September 25, 2023

Presented by Rebekah Jacobson and Elizabeth Polay, Attorneys

Garrett Hemann Robertson, P.C.



## AGENDA

- ▶ OSEA Demand to Bargains
  - ▶ SB 283-Just Cause
  - ▶ SB 756- SPED IAs Rights
- ▶ Other Legislative Updates
- ▶ *Project Veritas* & Two Party Consent Law

# Expedited Bargaining

- ▶ When the District is proposing a change to a mandatory subject of bargaining, it must provide written notice to the Association of the proposal
- ▶ The Association has 14 days from the day the notice of the proposed change is sent to demand to bargain.
- ▶ If a timely demand is sent, the District must bargain for 90 days (starting with the date the District sent the notice) before implementing.

- 
- ▶ In the case of the Association demanding to bargain a change caused by the Legislature, count 90 days from the date the demand is sent.
  - ▶ If in successor bargaining, it gets folded into successor bargaining unless the parties agree to bargain it as a side issue.

Recently, the Oregon Legislature passed Senate Bill 283 (SB 283). In accordance with SB 283, classified school employees employed by a school district or education service district in Oregon have the right to “just cause” for any form of discipline, including but not limited to, discharge. The pertinent language in SB 283 provides:

**SB 283 §18-20 (2023) “A classified school employee shall have the right to be dismissed, demoted or disciplined only for just cause.”**

This change in the law is effective July 1, 2023. On and after July 1, 2023, any contract language or policy that is not in compliance with SB 283 is illegal. After a careful review of the collective bargaining agreement between OSEA and the District, it appears that the following provisions are rendered illegal by SB 283:

**OSEA DEMAND TO BARGAIN: SB 283**

# OSEA DEMAND TO BARGAIN: SB 283

SB 283 SECTION 18. ORS 332.544 is amended to read: 332.544.

As used in this section, “classified school employee” includes all employees of a [public] school district except those for whom a teaching or administrative license is required as a basis for employment in a [*public*] school district.

*[(2) A classified school employee who has been demoted or dismissed shall be entitled to a hearing before the school board if a written request is filed with the board within 15 days of the dismissal or demotion.]*

**(2) A classified school employee shall have the right to be dismissed, demoted or disciplined only for just cause.**

(3) School district employees subject to the civil service provisions of ORS [*chapter 242*] 242.310 to 242.640 are exempt from the provisions of this section.

**SECTION 20. (1) As used in this section, “classified school employee” includes all employees of an education service district except those for whom a teaching or administrative license is required as a basis for employment in an education service district. (2) A classified school employee shall have the right to be dismissed, demoted or disciplined only for just cause.**

# OSEA DEMAND TO BARGAIN: SB 283

## Considerations for MOUs:

- ▶ Preserve sections regarding probationary employees
- ▶ Preserve helpful language re: disciplinary processes
- ▶ Consider amending grievance procedure to limit appeal rights of probationary employees
- ▶ Remove language requiring a post-dismissal Board Hearing

# What is Just Cause?

1. **The employee shall have had reasonable notice of the policy or expectation.**
  - A. Employee Orientation
  - B. Staff Meeting
  - C. Email from Supervisor
2. **The policy or expectation shall be reasonably related to the operation of the District.**
  - A. Typically this is a non-issue.
3. **The District shall conduct a fair and thorough investigation.**
  - A. Ensure no emails predetermining matter.
  - B. Have all witnesses been interviewed and documents been reviewed prior to making decision?
  - C. Is a third-party investigator needed to remove any concerns about bias?

# What is Just Cause?

- 4. The District shall demonstrate that the employee has engaged in the conduct that is alleged.**
  - A. This is very similar to Test #3; include an analysis of why the allegation is substantiated by the evidence gathered.
  
- 5. The District shall apply its rules and expectations consistently or provide a reasonable rationale for treating the immediate situation differently from prior situations.**
  - A. Listen to the union when they discuss comparators. Describe why this employee is being treated differently than other employees in grievance responses.
  
- 6. The District shall administer discipline in a progressive manner, where appropriate given the seriousness of the offense and in accordance with the past record of the employee.**
  - A. More tenure=more process.

# Progressive Discipline



Letter of Directive- Non-disciplinary



Oral Reprimand (?)



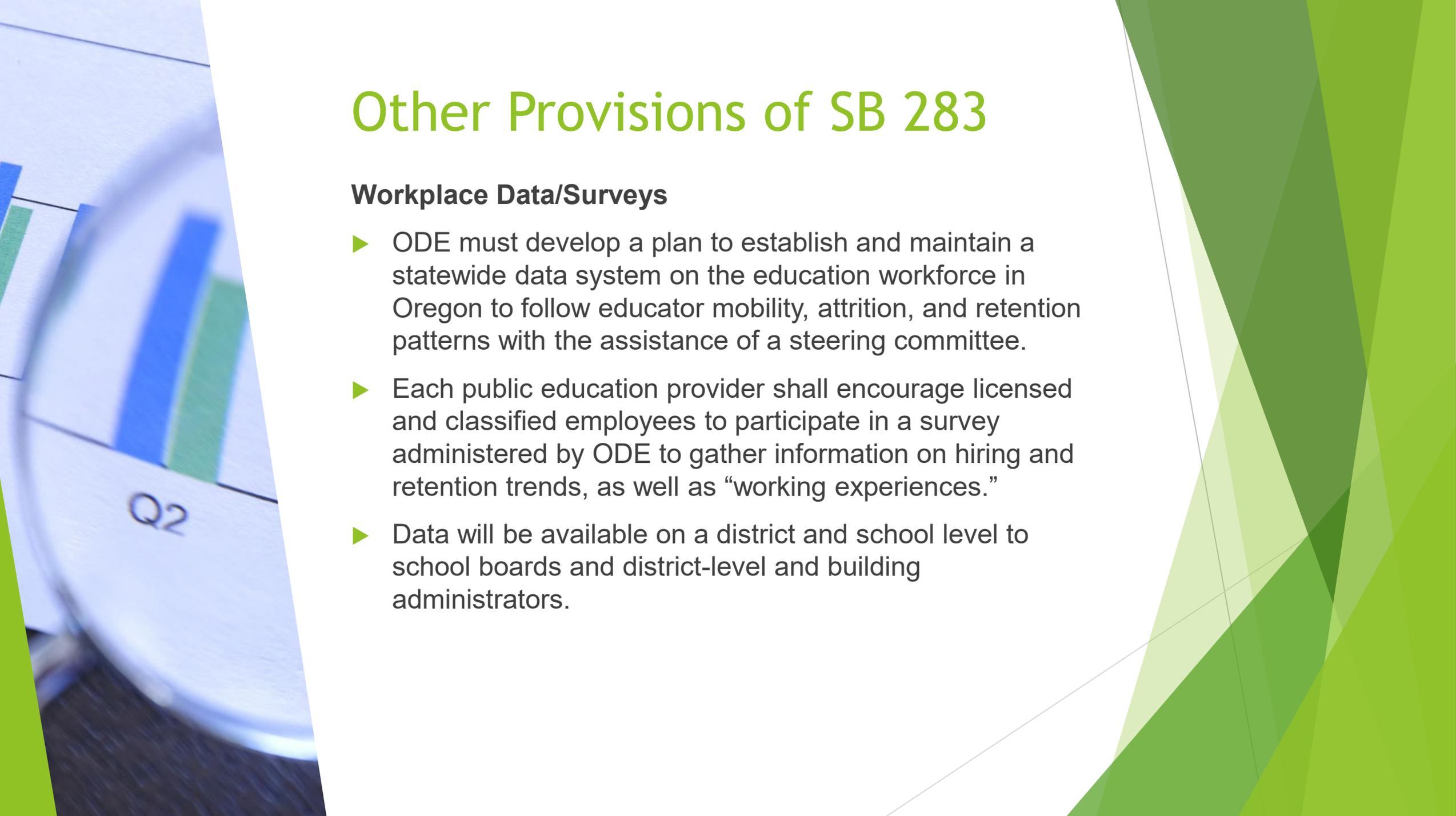
Letter of Reprimand



Suspension without pay (1-5 days)



Dismissal



# Other Provisions of SB 283

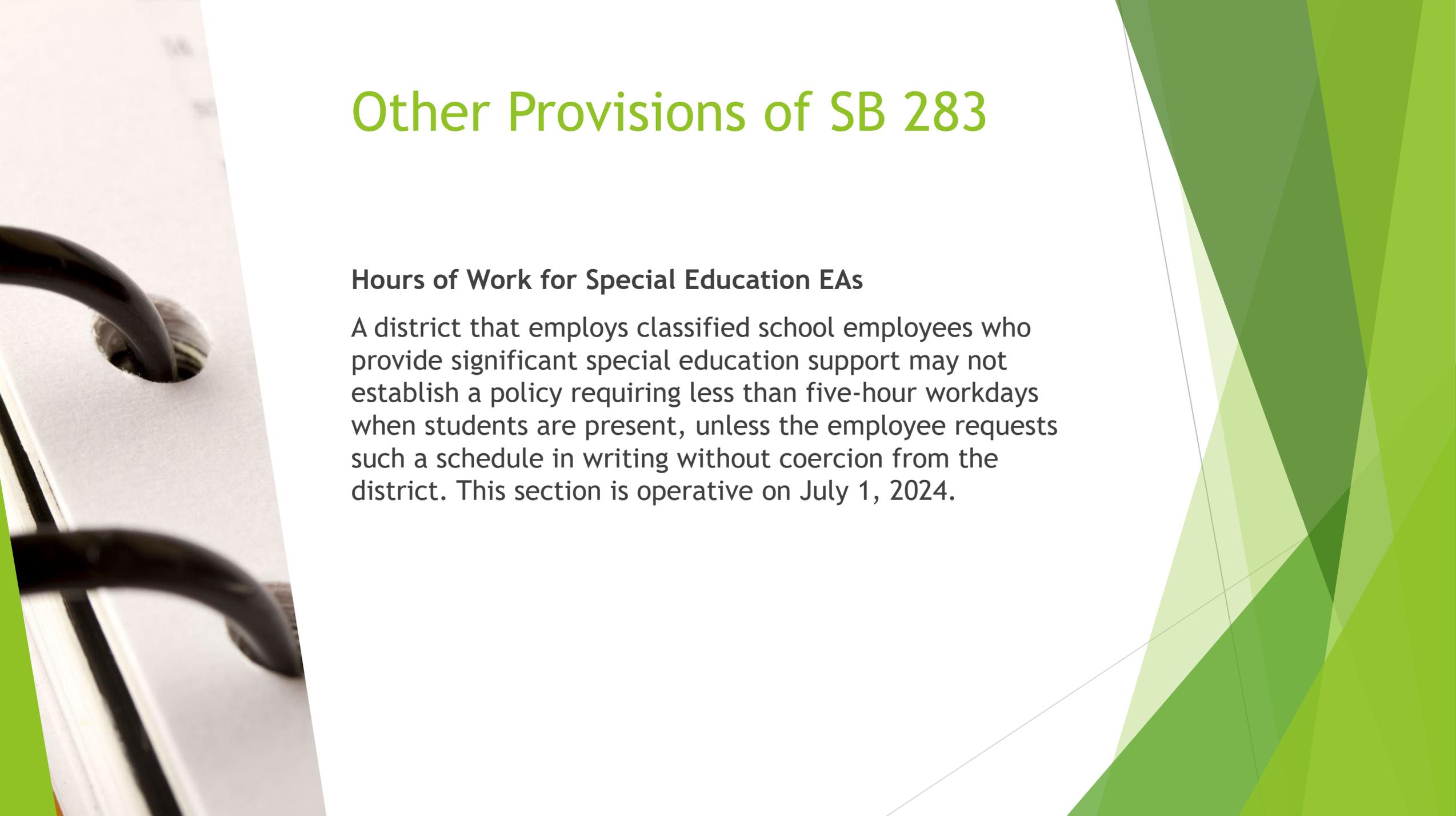
## Workplace Data/Surveys

- ▶ ODE must develop a plan to establish and maintain a statewide data system on the education workforce in Oregon to follow educator mobility, attrition, and retention patterns with the assistance of a steering committee.
- ▶ Each public education provider shall encourage licensed and classified employees to participate in a survey administered by ODE to gather information on hiring and retention trends, as well as “working experiences.”
- ▶ Data will be available on a district and school level to school boards and district-level and building administrators.

# Other Provisions of SB 283

## Special Education Differential

For each licensed educator or classified school employee who provides significant special education support of 75% or more of the employee's caseload, districts *may provide* an unspecified salary or wage increase, in the form of an additional percentage of an employee's salary/hourly wage or a one-time payment.



# Other Provisions of SB 283

## Hours of Work for Special Education EAs

A district that employs classified school employees who provide significant special education support may not establish a policy requiring less than five-hour workdays when students are present, unless the employee requests such a schedule in writing without coercion from the district. This section is operative on July 1, 2024.

# Other Provisions of SB 283

## **Crisis Response**

- ▶ ODE must establish the Safe School Culture Grant program to develop a network of instructors who are certified in nonviolent crisis intervention methods to ensure that for every 50 students in a school district/ESD, at least one staff person of the district is certified in nonviolent crisis intervention methods
- ▶ To qualify for grant, a district must require each newly certified instructor conduct at least three complete trainings of at least 10 staff persons each year, provide space for training, in consultation with unions to determine priority and compensation in wages.
- ▶ To qualify for grant, an ESD must ensure at least one complete nonviolent crisis intervention training of at least 10 staff persons, provide space for training, not charge fee to a school district.

# Other Provisions of SB 283

## Substitute Teachers

- ▶ Task force on substitute teachers to be created to review service models including third-party contractors and ESDs.
- ▶ Updates ORS 342.610, to clarify that the state will calculate the statewide average salary for the purposes of substitute pay by using the salaries of a "beginning teacher who holds a bachelor's degree."
- ▶ Requires districts to classify a substitute teaching assignment as a temporary position when the district determines that a teacher will be employed as a substitute teacher for 60+ consecutive days in any one assignment, or 48+ days for districts on four-day weeks.
- ▶ Allows any person who has held a teaching license to convert it to a substitute teaching license within three years of retirement.
- ▶ Requires district to pay for any training "that is required for that teacher to apply for or be assigned to a substitute teaching assignment."

# Other Provisions of SB 283

## **Teacher Salary**

- ▶ A Task Force on Statewide Educator Salary Schedules is established to study the benefits and challenges of implementing a statewide salary schedule for educators

## **Apprenticeship and Mentorship Grants**

- ▶ The Legislature allotted an additional \$10,000,000 to ODE to award grants to promote registered apprenticeships for educators and to promote beginning teacher and administrator mentorship program.

## **ESD Superintendent Protections**

- ▶ Extends protections to ESD superintendents to require 12 months' notice of a no-cause termination, and to prohibit boards from directing an ESD superintendent to take an action that conflicts with the law.

# OSEA DEMAND TO BARGAIN: SB 756

Recently, the Oregon Legislature passed Senate Bill 756 (SB 756). In accordance with SB 756, classified school employees assigned to work with a student who has specialized needs must:

- Have access to the individualized education program (IEP), 504 Plan, behavior intervention plan, medical support protocols or any other documentation related to the employee's responsibilities to assist with the student's educational, behavioral, medical, health or disability-related support needs.
- Be consulted when the education plan for the student is being developed, reviewed or revised, including being invited to and compensated for attending meetings regarding the student's IEP, 504 Plan or behavior intervention plan and meetings regarding the student when the meetings are related to the responsibilities of the employee to support the student or when the employee has unique information about the student's needs and present level of performance.
- Be provided adequate training to safely carry out the duties assigned to the employee related to the implementation of an IEP, 504 Plan, behavior intervention plan or medical support protocol.

These requirements go into effect on Sept. 24, 2023. On and after that date, the District must come into compliance with the legal requirements described above.

## OSEA DEMAND TO BARGAIN: SB 756

- How classified employees will gain access to the IEP, 504 Plan, behavior intervention plan and other documents.
- When IEP meetings and other meetings described above will be scheduled so that classified employees can attend those meetings with compensation.
- What training is required to come into compliance, including any training classified employees may need on the safeguarding of confidential information.
- How/when employees will be provided with paid worktime to review the information contained in an IEP, 504 Plan, behavior intervention plan and related documents.
- How the District will provide notice to licensed staff and any special education supervisors about the requirement to include classified employees in meetings and consult with classified employees when reviewing the student's education plan.

# SB 756: School Employee Access to Special Education Student Records

- Requires that school district employees who work with students who have IEPs, 504 plans, or behavior intervention plans be provided access to student records related to the employees' responsibilities to assist the student.
- Requires that school districts consult with employees assigned to work with students with specialized needs when that student's education plan is being developed, reviewed, or revised.
- If school district employees are invited to meetings regarding IEPs, 504 plans, behavior intervention plans, or meetings about the students when decisions are related to that particular school employee's responsibilities or that employee has "unique information" about the student, then the employee must be compensated for attendance at those meetings.



## *Cont: SB 756*

- Requires that school districts provide adequate training to employees so they may safely carry out each of their specialized duties.
- School districts will incur additional costs to train new employees and compensate employees for attending meetings. The fiscal report stated that the estimated fiscal impact to school districts is anticipated to be minimal but will vary depending on number of staff requiring training and number of students in special education. The costs to school districts appeared to be the biggest concern to representatives who voted against it.
- Effective date: September 24, 2023.

**Action Items: Inform special education administrators about the information access, consultation, compensation, and training aspects of this new law.**



# OSEA DEMAND TO BARGAIN: SB 756



What working conditions has this actually changed?



Is OSEA attempting to bargain over an impact to other bargaining unit members?



FERPA still applies

# Other Labor & Employment Legislation

The background features abstract, overlapping geometric shapes in various shades of green, ranging from light lime to dark forest green. These shapes are primarily located on the right side of the slide, creating a modern, layered effect. The text is positioned on the left side of the slide, set against a plain white background.

# SB 489: Repeals Prohibitions on Unemployment Insurance Benefit Payments During School Breaks

- Repeals language in ORS 657.221 which prohibited the receipt of unemployment insurance benefits during school breaks including summer months.
- All school employees, except those who perform instructional or research services, or who serve as an administrator, may apply for and receive benefits during school breaks.
- Removes provisions requiring reasonable assurance of employment for following school year.
- Effective date: January 1, 2024.

**Action Items: Review classified CBA language re: providing spring “reasonable assurances of employment.” If not required by CBA, districts can discontinue sending these notices. Consider offering summer work as much as possible to mitigate unemployment claims.**



# SB 790: Adding Unlawful Restraints to Definition of Child Abuse

- Adds the use of unlawful restraint or seclusion and corporal punishment to the definition of child abuse.
- If DHS substantiates a child abuse report in the event of a school employee's unlawful restraint and seclusion, the *district* rather than employee will be found “responsible” if:
  - The district failed to provide a sufficient number of employees trained in the use of restraint and seclusion to comply with the student's IEP, 504 plan and behavior intervention plan and the employee was not aware of the student's IEP, 504 plan and behavior intervention plan.
  - A superior ordered the employee to impose the restraint or seclusion and the employee believed they would be disciplined if they did not comply.
  - The district failed to provide “appropriate” training on restraint and seclusion, the employee believed the action was necessary to maintain safety, and it was not a restraint prohibited by ORS 339.288.



# SB 790: Adding Unlawful Restraints to Definition of Child Abuse

- DHS will submit a report on child welfare within public education programs to committees of the Legislative Assembly on the first day of every calendar quarter, which will include publicly available information about the name of the education provider, the date and nature of abuse, and whether an injury was sustained.
- Effective date: July 1, 2023

**Action Items: Continue to train personnel on appropriate restraints and seclusion.**



# HB 2296: Extends Timeline for Retired Public Employees to be Reemployed to 2034

- Retired members of the Public Employees Retirement System may be reemployed without reduction in pension benefits until 2034. The provisions of SB 1049 were previously scheduled to sunset on December 31, 2024.
- Effective date: January 1, 2024

**Action Items: Update policy on rehire of retired employees.**



# MOU or Policies On Rehire of Retirees

- Ensure District addresses:
  - No obligation to post position
  - Clarify the contract status of rehired teachers (temporary teachers?)
  - Clarify which CBA rights apply to rehired retiree, particularly as it relates to the lay off article





# Project Veritas

- ▶ *Project Veritas v. Schmidt*, 72 F.4th 1043 (9th Cir 2023) (Opinion on July 3, 2023) is the 9th Circuit Court Case that discusses ORS 165.540(1)(c) two-party consent law as it related to recordings made in the course of undercover journalism.
- ▶ In *Veritas*, the 9th Cir. held that Oregon does not have a compelling interest in protecting individuals' conversational privacy from other individuals' protected speech in places open to the public, even if that protected speech consists of creating audio or visual recordings of other people.
- ▶ The end result is putting the two-party consent law in flux until the Oregon Legislature can amend it to remove those provisions that violate the First Amendment.

# What was the two-party consent law?

- ▶ ORS 165.540 is currently a two-party consent law for in-person or Zoom conversations unless:
  - ▶ The recording party notifies others that a recording is being made;
  - ▶ The party uses an unconcealed recording device in the following settings:
    - ▶ Public or semipublic meetings such as hearings before governmental or quasi-governmental bodies, trials, press conferences, public speeches, rallies and sporting or other events;
    - ▶ Regularly scheduled classes or similar educational activities in public or private institutions; or
    - ▶ Private meetings or conferences if all others involved knew or reasonably should have known that the recording was being made.

# Questions?

Rebekah R. Jacobson, Attorney

[rjacobson@ghrlawyers.com](mailto:rjacobson@ghrlawyers.com)

Elizabeth L. Polay, Attorney

[epolay@ghrlawyers.com](mailto:epolay@ghrlawyers.com)



GARRETT HEMANN ROBERTSON P.C.