

**Employment**  
*and*  
**Personnel Management**

*Ohio Association of Public Treasurers*  
**Kalahari Resort & Conference Center**  
**Sandusky, Ohio**  
**June 16, 2017**

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## Agenda

- Unemployment and Workers' Compensation
- Civil Service and Collective Bargaining
- FMLA and ADA
- Medical Marijuana
- Ban the Box
- Off Duty Conduct
- Social media
- Proper Documentation & Workplace investigations
- PERRP

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## Unemployment

- Varying circumstances where UE can be paid or denied.
- Lots of forms. Important to make sure all of the proper information is gather and presented to the Unemployment Commission.
- Several levels of review. Wise to consult with counsel early, but usually not involved until gets to the Unemployment Compensation Review Commission level where additional evidence and testimony is taken
- Appeal to Court of Common Pleas and usual Appellate Review.

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## Worker's Compensation

- Established by the Ohio Constitution. Article 2, Section 35.
- Where an injury to an employee occurs in the course and scope of employment.
- Employer can be either self-insured or participate in the State Fund.
- Employers will have both an Managed Care Organization (MCO) for both proper medical management of the claim and a Third-Party Administrator (TPA) who is the employer advocate in claim management and proper treatment issues.
- When a claim or part of it is contested, Counsel will be required for a variety of issues that can arise.
- Claim management extremely important to rates.

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### Worker's Compensation

- Comment upon or give opinions with respect to the evidence, credibility of the witnesses, the nature and weight of the evidence, or the legal significance of the contents of the file;
- Provide legal advice to injured workers or employers;
- Give or render legal opinions, or cite case law or statutes to injured workers and employers before, at or after the time when claims are initially certified or denied certification as valid claims by the employer upon the presentation of claim applications by employees;
- Provide stand alone representation at hearing by charging a fee specifically associated with such hearing representation without providing other services.

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### Worker's Compensation

Why does a public entity need a lawyer for a workers' compensation hearing?

- I. **Because TPAs are not lawyers and they are prohibited from practicing law.**
  - The Ohio Supreme Court prohibits TPAs from performing the following actions during a hearing:
    - Examine, cross-examine the claimant or any witness directly or indirectly;
    - Cite, file or interpret statutory or administrative provisions, administrative rulings or case law;
    - Make and give legal interpretations with respect to testimony, affidavits, medical evidence in the form of reports or testimony, or file any brief, memorandum, reconsideration or other pleading beyond the forms actually provided by the Commission or Bureau;

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### Worker's Compensation

#### **II. The TPA cannot provide representation in the employer's three defenses to a workers' compensation claim.**

- Legal defenses ----TPA cannot cite the law or give legal advice.
- Medical defenses -----TPA cannot give legal interpretation with respect to the medical evidence in the form of testimony, brief, or any other legal pleading.
- Factual defenses -----TPA cannot cross examine the employee, cannot comment on the evidence and cannot provide stand alone representation.

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### Worker's Compensation

#### **III. The TPA cannot represent the public entity in court.**

- When a lawsuit is filed the TPA disappears. The TPA will issue a letter to the public entity advising the employer to seek legal representation.
- The Attorney General's office does not represent the public entity.
- The AG will defend whatever order has been issued by the IC, whether or not that order benefited the employer.
- The very best way for a lawyer to know the public entity's claim is to attend the IC hearing before the lawsuit is filed. Being involved at the hearing allows the lawyer to have access to all of the evidence before a lawsuit is filed.

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### Worker's Compensation

#### **IV. The employee has a lawyer, the TPA has lawyer and Bureau of Workers' Compensation has a lawyer.**

- The TPA's lawyer is not the public entity's lawyer. The TPA lawyer's client is the TPA.
- The AG is not the public entity's lawyer. The AG's client is the Bureau of Workers' Compensation.
- Would the public entity with a legal issue ever handle that issue without a lawyer when every party involved has a lawyer?

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### Worker's Compensation

#### **V. The employee has a lawyer, the TPA has lawyer and Bureau of Workers' Compensation has a lawyer.**

- The TPA's lawyer is not the public entity's lawyer. The TPA lawyer's client is the TPA.
- 
- The AG is not the public entity's lawyer. The AG's client is the Bureau of Workers' Compensation.
- 
- Would the public entity with a legal issue ever handle that issue without a lawyer when every party involved has a lawyer?

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### Civil Service

- Ohio Constitution, Article 15, Section provides:
  - Appointments and promotions in the civil service of the state, the several counties, and cities, shall be made according to merit and fitness, to be ascertained, as far as practicable, by competitive examinations. Laws shall be passed providing for the enforcement of this provision.
- The Charter can establish a Civil Service Commission, its composition, terms of office, the ability to establish rule and duties.
- Council by Ordinance can establish the Class System and the positions that are classified and unclassified.
- Civil Service Commission can generally establish rules and regulations by which it will conduct entry or promotion examinations.

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### Civil Service

- Any matter not addressed by Charter or Ordinance may require reference to the Ohio Revised Code, Chapter 124.
- Possible topics include examinations, appointment, layoff procedures, removal/demotion, abolishment of positions.
- CSC is the charged with the responsibility of holding hearings and making a final determination, i.e. discipline. Decisions can be appealed to the Court of Common Pleas. (Ohio Revised Code Chapter 2506).
- Township with population greater than 10,000 can appoint a CSC.

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## Civil Service

- Is employee or position covered by a collective bargaining agreement ("CBA")? (Caveat: The CBA may incorporate provisions of municipal civil service regulations, state code, or municipal ordinance provisions on various issues.) CBA provisions supersede local law on issues that are covered by the CBA, even municipal charter provisions.
- CBA will often dictate rules on promotional exams, i.e., whether exams will be only written or have another component.

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## Collective Bargaining

Ohio Revised Code Chapter 4117 -The Basics  
Public Employees' Collective Bargaining

- Establishes the guidelines for employees to organize and bargain collectively with public employers, how representation of a group is established and the election procedure.
- Establishes the State Employment Relations Board – SERB
- Sets forth the subject of bargaining,
- Sets forth the rights of public employees and the restrictions on public employers.

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## Collective Bargaining

- The content and scope of written collective bargaining agreements.
- Outlines Unfair Labor Practices (ULP) for both the employer and the employee organization or its agents, representatives or public employees, the remedies available for a ULP and review in the Court of Common Pleas for temporary relief or restraining order.
- Section 4117.14 – governs the Negotiation process of collective bargaining agreements.
  - Negotiation Process
  - Fact Finding
  - Conciliation, including judicial review in very limited circumstances.

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## Health Care

- Where is the market today? Great Question!!
- Still seeing increases in premiums in the double digits although slowed some.
- Just get rid of health insurance and go to the exchange? What will be best for the entity? Will that be an option going forward
- Where are you on premium contributions?
  - Equality of contributions between union and non union employees.
- Plan Design?
- Trends in the Public Sector.
- [http://www.serb.state.oh.us/sections/research/reports/Health\\_Insurance\\_Report\\_2016.pdf](http://www.serb.state.oh.us/sections/research/reports/Health_Insurance_Report_2016.pdf)

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## Preparation for Negotiations

- Do you need a lawyer? Saying no is never popular!
- Can be helpful in guiding the process, giving advice in the background, being available for dispute resolution (fact finding/conciliation).
- Historically, contracts have been very giving since the beginning of collective bargaining in Ohio.
- Is now the next round the time to start looking for changes to the CBA? There may not be another opportunity to wrest away prior concessions.
- If so, fact finding will likely be needed to accomplish those goals.

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## Negotiations

- Fact Findings & Conciliations are very much like trials. It is an evidenced based process.
- Have to consider retaining services for expert financial analysis, especially for the safety forces – they do!
- Know the end goals and financial parameters within which you have to work. The 2-3 year predictions are much harder than in the past.
- After negotiations, having a relationship with counsel familiar with the CBA can provide useful back up in the grievance and arbitration process.

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## What does the future hold??

- Troubled financial times from 2008 – economic downturn
- Change in the Statehouse = \$\$\$ issues for local government.
- Change at the national level has caused uncertainty.
- Will there be another run at legislation similar to SB5?
- Subcontracting – elimination of trash pick up, building department functions, other service elements
- Starting to see some recovery from several years with little economic change for employees. Impact??

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## Other Employment Related Items

Regionalization: it's not a bad word! OR is it??

- Regional dispatch centers.
- Sharing of personnel & equipment.
- Expansion of traditional mutual aid.
- Attempts to regionalize fire or police operations.
- Human resource functions.
- Some counties have made an effort in this area, including in health care, which is a program to consider.
- Is it time to revisit fire districts?

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## FMLA

- Do not terminate workers absent due to work-related injuries while they're on leave without carefully reviewing the entire situation and/or seeking legal counsel;
- Obtain copies of everything submitted in employees' workers' compensation claim files and stay apprised of the proceedings (or make sure the third-party administrator keeps the employer informed);
- Work closely with the employer's third-party administrator to make sure there is coordination with the employer's human resources department.
- <https://www.dol.gov/whd/fmla/>

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## FMLA

In order to qualify for FMLA leave of a maximum of twelve workweeks of unpaid leave in a twelve month period, an employee must:

- Be employed at a work site which has at least fifty employees within seventy-five miles of that work site; and
- Be employed for at least twelve months by the employer; and
- Have worked 1250 hours in the twelve-month period preceding the leave.
- The regulations also clarify that an employee who is *not* eligible for FMLA protection at the beginning of the leave *may be* entitled to leave once eligibility requirements have been met.
- Time spent on leave, including vacation or sick leave, will apply towards the 12-month requirement, if the employee remains on the employer's payroll and is receiving other benefits.
- This revised regulation is contrary to several court cases, which held that an employer may determine an employee's leave eligibility on the date the initial leave begins.

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## FMLA

- **FMLA-qualifying reasons for leave:**
  - because of a serious health condition;
  - to care for a spouse, child or parent who has a serious health condition; or
  - the birth or adoption or placement for foster care of a child.

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## FMLA

- What is a serious health condition?
- Must involve an illness, injury, impairment, or physical or mental condition that involves **either inpatient care or continuing treatment by a health care provider. Continuing treatment must be more than three days and consist of at least two treatments.**
- What is a serious health condition?
  - Inpatient care (i.e., an overnight stay) in a medical facility, including any period of incapacity or subsequent treatment in connection with such inpatient care; or
  - Continuing treatment by a health care provider, which includes a period of incapacity lasting more than three consecutive, full calendar days, and any subsequent treatment or period of incapacity relating to the same condition that also includes treatment two or more times by or under the supervision of a health care provider (i.e., in-person visits, the first within 7 days and both within 30 days of the first day of incapacity); or one treatment by a health care provider (i.e., an in-person visit within 7 days of the first day of incapacity) with a continuing regimen of treatment (e.g., prescription medication, physical therapy); or

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## FMLA

- What is a serious health condition?
  - Any period of incapacity related to pregnancy or for prenatal care. A visit to the health care provider is not necessary for each absence; or
  - Any period of incapacity or treatment for a chronic serious health condition which continues over an extended period of time, requires periodic visits (at least twice a year) to a health care provider, and may involve occasional episodes of incapacity; or
  - A period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective; or,
  - Any absences to receive multiple treatments for restorative surgery or for a condition that would likely result in a period of incapacity of more than three days if not treated.

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## FMLA

### Serious Health Conditions

- Under the old regulations, a serious health condition was defined in part as three consecutive full calendar days of incapacity plus “a regiment of continuing treatment.” The new regulations provide that the regiment of treatment must include two subsequent visits to a healthcare provider that must occur within 30 days from the beginning of employee’s incapacity. The new regulations also provide that the first healthcare visit must take place within seven days of the first day of incapacity.
- The new regulations clarify that the employee must make at least two “periodic visits” for chronic serious health conditions each year.

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## FMLA

The FMLA law was amended on January 28, 2008 to provide for two new leave entitlements.

1. Leave to Care for an Injured Servicemember
  - Effective January 28, 2008, eligible employees are entitled to take up to 26 weeks of leave in a single 12-month period to care for a spouse, child, parent or next of kin who is a *covered servicemember*. “Military Caregiver Leave.”

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## FMLA

- A covered servicemember is a current member of the Armed Forces, National Guard or Reserves who has a “serious health illness or injury that occurred while on active duty and that rendered the servicemember unable to perform the duties of his or her office, grade, rank or rating. It also includes veterans who are undergoing medical treatment for a qualifying serious injury or illness sustained in the line of duty in certain circumstances.
- Serious health illness or injury means the covered servicemember is: (1) undergoing medical treatment, recuperation, or therapy; (2) otherwise an outpatient; or (3) on the temporary disability retired list.
- Also includes service related aggravation of existing or preexisting injuries.

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## FMLA

- The regulations clarify that an eligible employee may take up to 26 work weeks in a single 12-month period.
- The period *must* be measured from the *first day the eligible employee takes FMLA leave* to care for an injured or recovering servicemember regardless of how the employer generally calculates the 12-month period for other FMLA leave.
- This provision is likely to cause administrative difficulties when employers decide how much FMLA caregiver leave an employee is entitled to receive in a particular 12-month period if other FMLA leave is calculated on a calendar year bases.

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## FMLA

- Further, the regulations define *next of kin* as the nearest blood relative other than the covered servicemember's spouse, parent, son or daughter in the following order: blood relatives who have been granted legal custody of the servicemember by court decree or statutory provisions, brothers and sisters, grandparents, aunts and uncles and first cousins.
- a covered servicemember may choose and specifically designate in writing another blood relative as his or her *next of kin* for purposes of military caregiver leave.

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## FMLA

- When such a designation has been made, the designated individual will be considered the covered servicemember's only next of kin.
- When no such designation is made and there is more than one family member with the same level of relationship to the covered servicemember, all family members shall be considered as the covered servicemember's next of kin. Each individual, therefore, may take FMLA leave to provide care to the covered servicemember either consecutively or simultaneously.
- The employer is permitted to obtain details about the servicemember's medical condition and the amount of time the servicemember will require care.
- A separate certification form for caregiver leave is available through the Department of Labor website.

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## FMLA

## 2. Leave for Qualifying Exigency

- This leave entitles an employee to take up to 12 weeks of leave due to a "qualifying exigency" arising out of the fact that the employee's spouse, child or parent is a member of the regular Armed Forces, National Guard or Reserves and is being deployed to a foreign country .
- It does not apply to family members of those who serve in the regular armed forces.

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## FMLA

- The regulations specifically define **“qualifying exigencies”** as:
  - short notice deployment (limited to seven calendar days from the date of deployment notification);
  - military events and related activities;
  - child care and school activities;
  - financial and legal arrangements;
  - counseling;
  - rest and recuperation (limited to fifteen days for each instance);
  - post-deployment activities; and
  - additional activities agreed to by both employer and employee.

## FMLA

### The Details

- The leave is based on a 12-month period.
- The employer can designate the 12-month period much as it would for employees with serious health conditions.
- The employer is permitted to require certification. A form is available on the Department of Labor’s website. <https://www.dol.gov/whd/fmla/forms.htm>

### Designation of Leave

- It is employer’s responsibility to designate leave as FMLA qualifying and to designate whether it will be paid or unpaid, and to give written notice of the designation to the employee (within five business days absent extenuating circumstances).
- If employer has sufficient information as to reason for absence, employer may designate as FMLA leave (employee doesn’t choose).
- Employee doesn’t need to ask for “FMLA” - no magic words required.
- Employers with constructive notice of an employee’s potential need for leave have an affirmative duty to notify their employee of the right to FMLA leave even if the employee is unaware that they suffer from a “serious health condition” or is entitled to leave.
- Look for inconsistent behavior that could be attributable to a serious health condition (OR disability – more on that soon) and when appropriate, inquire if the behavior is impacting performance.

## FMLA

### Employer’s Notice to Employee

#### Retroactive designation of leave is prohibited

- This is why it is so important for you to notify employee in writing if the leave counts against the employee’s FMLA entitlement.
- Exception: If, despite employer’s best efforts, the employer does not learn that leave is for an FMLA purpose until after the leave has begun, or until after the employee has returned to work, then and only then, the leave may be retroactively counted as FMLA leave, provided this is done promptly (generally two business days).
- **FMLA leave and workers’ compensation leave can run together**, provided the reason for the absence is due to a qualifying serious illness or injury and the employer properly notifies the employee in writing that the leave will be counted as FMLA leave.
- You cannot substitute sick days or vacation for temporary total disability for Workers Compensation
- Other considerations:
  - Required to maintain an employee’s benefits while on leave.
  - FMLA leave cannot be counted under “no fault” attendance policies.
  - Military leave (caregiver leave, qualifying exigency leave).

## FMLA

### • INTERMITTENT LEAVE

- Only the amount of leave actually taken while on intermittent/reduced schedule leave may be charged as FMLA leave. (For example, if normally use increments of six minutes for tardy employees, must use same increments to account for intermittent FMLA leave taken at the beginning of the shift.
- Employees needing intermittent/reduced schedule leave for **foreseeable medical treatment** must work with their employers to schedule the leave so as not to unduly disrupt the employer’s operations.
- If leave foreseeable, employer may transfer the employee temporarily to an alternative job with equivalent pay and benefits.
- If intermittent leave unforeseeable, alternative job option is not available (for example, frequent, unpredictable absences for a chronic condition).

## FMLA

### RESTORATION TO POSITION

- The FMLA generally requires that employees be restored to the same or an equivalent position when returning from leave.

### Job Restoration Exceptions

- Employees who are unable to return to work and have exhausted their 12 weeks of leave lose the right to job restoration. However, you still must account for the ADA.
- Employees who give unequivocal notice that they do not intend to return to work lose their right to job restoration.
- Employees who would have been laid off or otherwise had their employment terminated had they continued to work are not entitled to job restoration.
- Employer may delay reinstatement to employee who fails to provide certification of fitness for duty, if properly requested (note: CBAs).
- **Bonuses and Other Incentive Awards**
  - The regulations expressly provide that, if an employer bases incentive payment on achievement of a specified goal such as hours worked, products sold, or attendance, and an employee has not met these goals because of a FMLA leave, the employer may deny the incentive payment so long as it is also denied to other employees on equivalent leave status for a reason that does not qualify as FMLA leave.

## FMLA

- What happens when an employee answers emails, texts, phone calls when on FMLA?
- Is employer denying leave? Interfering with leave?
- Generally, courts find that occasional calls and e-mails that relate to an employee's job while on leave does not interfere with FMLA leave. Thus, a few work-related communications likely will not constitute interference with an employee's FMLA rights.
- One court held that when an employee is passing on "institutional knowledge" or providing closure on open assignments, employers do not violate the FMLA.

### Insights for Employers

- General rule: an employee on leave should be fully relieved of their work and not asked to perform work while on leave.
- Exceptions:
  - As demonstrated by the cases, it is unlikely to be an FMLA violation when an employer makes sporadic calls to an employee posing general questions (where they can find the employer business plans, for example) or to wrap up a job the absent employee was working on.
  - It is also unlikely to be an FMLA violation where the employee is working behind the boss's back.

## FMLA

- If your employee is on FMLA leave and the employer learns that the employee is performing work (including regularly answering work-related e-mails and/or calls), it's best course to reduce the risk of any FMLA liability is to put an end to the work.
- Watch out for possible FLSA issues where an employee performs work while on leave.
- Caring for v. compassion (falling short of "caring for")
- Recent case (7<sup>th</sup> Cir.) (Illinois, Indiana, Wisconsin) *Ballard v. Chicago Part District*
- *Employee who sought leave to take her terminally ill mother on a trip to Las Vegas was "caring for" her mother*
- *Tayag v. Lahey Clinic Hosp* (1<sup>st</sup> Cir.)—employee's seven week spiritual pilgrimage to the Philippines with her ailing husband which was unrelated to his medical treatment did not qualify as "care" protected by FMLA;
- Parent may take FMLA to care of an adult child with a disability if the child (i) is incapable of self-care due to the disability, (ii) has a serious health condition, and (iii) is in need of care due to the serious health condition.
- FMLA regulations adopt the ADA's definition of "disability."
- FMLA regulations state that an adult child is "incapable of self-care because of mental or physical disability" when she or she "requires active assistance or supervision to provide daily self-care in three or more of the 'activities of daily living' or 'instrumental activities of daily living'."
- ADLs include caring for one's grooming and hygiene, bathing, dressing and eating. IADLs include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephone and directories, and using a post office

## FMLA

### Care for an adult child

- *Gienapp v. Harbor Crest* (7<sup>th</sup> Cir.).
  - Employee took a leave because her adult daughter was undergoing treatment for cancer.
  - She was not "caring for" her daughter but she was caring for her daughter's children (her grandchildren)
  - Court—took a "load off her daughter's mind and feet" and counted as permissible care.
  - Providing psychological care to her daughter
- *Williams-Grant v. Wisconsin Bell, Inc.* (2016)
  - *FMLA Fraud*
  - *Pattern of calling in sick but not when FMLA exhausted*
  - *Hired PI*
  - *Employee denied activities*
  - *Terminated*
  - *Sued for interference and retaliation*
  - *Honest suspicion that she was misusing her leave*

## FMLA

### *Bento v. City of Milford (2016)*

- Certification due to “severe anxiety” from primary physician-under care of psychiatrist and therapist.
- Employer asked for certification from psychiatrist and fitness for duty which employee provided
- Employee resigned and sued claiming employer shouldn’t have asked for certification from psychiatrist-court said this was ok to cure the ambiguities
- Court also found that a generic note stating the employee can return to work is not good enough-employer has right to insist that doctor review the job description and confirm the employee can perform the job

### *Dalpiaz v. Carbon County (2014).*

- Utah-employee lied about extent of injuries. Employee refused to submit to IME. Termination upheld.

### *Hamilton v. Republic Airways Holdings (2014)*

- employee lied about reason for leave. Had intermittent leave for migraines. Refused to accept assignment, flippantly stating, “well I have a migraine then.” Termination upheld.

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## ADA

- In many cases, a “work related injury” is also a “disability” under the ADA.
- If so, remember that you are obligated to engage in the “interactive process” to determine whether there is a “reasonable accommodation.”
- More flexibility under work comp and ADA than FMLA

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- Do not terminate workers absent due to work-related injuries while they’re on leave without carefully reviewing the entire situation and/or seeking legal counsel;
- Obtain copies of everything submitted in employees’ workers’ compensation claim files and stay apprised of the proceedings (or make sure your Third Party Administrator keeps the employer informed);
- Work closely with the employer’s third party administrator to make sure there is coordination with the employer’s Human Resources department.

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## Medical Marijuana

### Drugs in the Workplace: Legalization of Medical Marijuana & Post-Accident Drug Testing

- On June 8<sup>th</sup>, Ohio became the 25<sup>th</sup> state to enact medical marijuana legislation.
- DOJ no longer attempts to prosecute medical marijuana distributors.
- DOJ also will not challenge state laws.
- But who knows what will happen after the election
- Ohio Legalized Medical Marijuana
- Governor Kasich signed HB 523 on June 8.
  - Effective **September 8, 2016**
- Licensed physician may “recommend” medical marijuana to or more of 20 qualifying conditions or diseases.



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### Qualifying Diagnoses

- (a) Acquired immune deficiency syndrome;
- (b) Alzheimer's disease;
- (c) Amyotrophic lateral sclerosis;
- (d) Cancer;
- (e) Chronic traumatic encephalopathy;
- (f) Crohn's disease;
- (g) Epilepsy or another seizure disorder;
- (h) Fibromyalgia;
- (i) Glaucoma;
- (j) Hepatitis C;
- (k) Inflammatory bowel disease;
- (l) Multiple sclerosis;
- (m) Pain that is either of the following:
  - (i) Chronic and severe;
  - (ii) Intractable.
- (n) Parkinson's disease;
- (o) Positive status for HIV;
- (p) Post-traumatic stress disorder;
- (q) Sickle cell anemia;
- (r) Spinal cord disease or injury;
- (s) Tourette's syndrome;
- (t) Traumatic brain injury;
- (u) Ulcerative colitis;
- (v) Any other disease or condition added by the state medical board under section 4731.302 of the Revised Code.

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### General Provisions

- Bill went into effect on September 8, 2016.
- Marijuana smoking is not permitted.
- Permitted uses:
  - Vaporization, tinctures (medicine made by dissolving a drug in alcohol), edibles, patches, plant materials, and oils
- Must be fully operational by September 2018.
- State licensure of medical marijuana cultivators, processors, retail dispensaries, and testing laboratories and the registration of physicians that recommend treatment with medical marijuana.
- Bill 523 establishes the Medical Marijuana Advisory Committee to enact regulations for medical marijuana. The Committee will be a part of the State Board of Pharmacy and the Department of Commerce.
- Municipalities are not entitled to a member on the Committee.



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## Medical Marijuana Cards

- Individuals may apply for a medical marijuana card.
- Ohio will not accept applications for several months.
- May have defense to criminal prosecution before applications accepted with physician's certification.

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## Impact on Employers

Safeguards in the law protect employers.



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### Accommodation and Adverse Employment Action

- Employers are not required to permit or accommodate an employee's use, possession, or distribution of medical marijuana.
  - Law regarding ADA accommodations is likely to evolve as use becomes more prevalent.
- Employer may refuse to hire, discharge, discipline, or take an other adverse employment action due to an employee's marijuana use, or possession or distribution of medical marijuana.
- Employees and applicants may not sue employers for adverse action based on medical marijuana use;
- Employers may establish and enforce drug free workplace policies;
- DOT and workers' compensation may be enforced;

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### Drug-Free Workplace Programs

- Employers may establish or maintain a formal drug-free workplace program.
- "Just cause" if discharged for violating drug-free workplace policy by using medical marijuana.
  - Ineligible for unemployment compensation.



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### Worker's Compensation Considerations

- The Administrator of Workers' Compensation may still grant rebates and discounts to employers with a drug-free workplace program.
- BWC will not be required to pay for patient access to marijuana.
- An employer may defend against workers' compensation claims when medical marijuana contributes to or results in injury.
- Rebuttable presumption: positive drug test defeats claim only if drug not prescribed by healthcare provider.
- Argument-medical marijuana prescribed
- Causation-drug use proximate causation; usually evidenced by high level of drug in the employee's system; difficult with marijuana

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### Next Steps for Employers

- Review and update drug-free workplace programs.
  - Define illegal drugs to include drugs illegal under federal, state, or local law.
- Employers may treat the use of medical marijuana similar to use of legally prescribed drugs.
- Careful-disability
  - Is it "illegal" drug use?
  - Do you have to engage in the interactive process?
  - Do you have to reasonably accommodate?
- How might you reasonably accommodate?
- PLAN-have a policy in writing
- Notify employees how you will handle medical marijuana
- Stay abreast of changes in the federal law, workers' compensation decisions, other administrative decisions and case law

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## Federal Re-Classification

- Last summer, the DEA decided not to re-classify marijuana as a Schedule II drug. Classified as Schedule I.
- However, this still may happen in the future.
- This would make Marijuana available as a prescription.
  - Not subject to sales tax.
- Potentially, federal regulation could trump state and local regulation.
  - FDA approval would be necessary, which could take years and cost billions.

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## Next Steps for Employers

- Revise blanket post-injury drug testing policies.
  - Limit post-accident testing to instances when drug impairment is suspected, and/or could have reasonably contributed to the injury, and where the test could indicate impairment, rather than general drug use.
- Train staff and supervisors on the new policy.

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## The Real World

- Connecticut Supreme Court-reinstatement of University of Connecticut employee who was caught smoking marijuana during working hours.
- Termination was not the only appropriate disciplinary action.
- Arbitrator found that termination was too harsh a penalty.
- High level of deference to arbitration awards.
- New Mexico-No reasonable accommodation required
- Employers are not affirmatively required to provide reasonable accommodations for use of the prescribed marijuana, according to *Garcia v. Tractor Supply (2016)*. The court in *Garcia* held that an employer permissibly fired an employee legally using marijuana for medical conditions because federal law prohibited the use of the controlled substance

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## Case Study

- The employee, Garcia, was diagnosed with HIV/AIDS and prescribed medical marijuana pursuant to New Mexico's Compassionate Use Act.
- Hired by Tractor Supply, after informing it of his diagnosis and use of medical marijuana. Upon hiring, the employee failed a required drug test, testing positive for cannabis metabolites. Tractor Supply terminated the employee based on the positive test.
- The former employee sued in federal court in New Mexico claiming that his discharge violated the state law prohibiting disability discrimination, because his medical marijuana use was treatment for his medical condition and the employer should have reasonably accommodated his use.
- The employer argued that it was not required to provide any accommodations for use of a substance that remains illegal under federal law.
- The New Mexico court agreed with the employer and found that an employer is not required to accommodate an employee's illegal drug use because it would be permitting conduct that the Controlled Substance Act expressly prohibits.

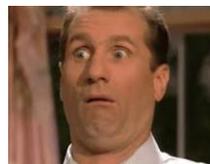
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## Ban the Box

- Changes the hiring process so that the “have you been” question is removed in the initial application process.
- Ohio adopted HB 56, which became effective March 23, 2016, prohibiting public employer from including questions about criminal convictions on job applications. Joined 27 other states and over 150 cities.
- Can still conduct criminal background checks;
- May inquire concerning felony convictions later in the hiring process;
- Employers should develop a process for inquiry; for certain positions (law enforcement, child care) earlier inquiry, otherwise, offers can be made but require a successful criminal background check.
- There are still EEOC based considerations and civil service requirements.

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## Off Duty Conduct



YOU DID WHAT??????

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## Off Duty Conduct

- Can an employer discipline for off-duty conduct??  
The answer.....it depends, but in many instances, yes.
- Requires a balance of legitimate business interests and the employee’s desire for (and often legally protected) privacy and freedom from the job
- Always good to focus on whether the off-duty conduct has a direct, negative impact upon the organization or the employee’s performance
- Double standard”?  
– Yes, supervisors are held to a higher threshold of expectations than hourly employees.

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## Off Duty Conduct

- Drinking/Drugs
- Marijuana – use/growing
- Arrests/convictions
- Extramarital affairs
- Political speech or campaigns
- Political “extremism”
- Harassment of a co-worker
- Discriminatory statements (race, religion, etc.)

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# BIGGEST ISSUE NOWADAYS IS IN THE OFF-DUTY CONDUCT ARENA?



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Facebook, MySpace,  
YouTube and Twitter ...



Oh My!



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## KMOV Anchorman Fired Over Facebook Post

Story Comments Print Font Size

Posted: Thursday, May 23, 2013 8:42 am

Associated Press |

ST. LOUIS (AP) — A veteran TV anchorman has been fired in the wake of comments he made on Facebook claiming "pressure" by the IRS following his 2012 interview with President Barack Obama.

KMOV-TV announced the firing of Larry Conners on its website Wednesday. Conners later told the St. Louis Post-Dispatch that his Facebook posting simply raised questions about the possibility of an Internal Revenue Service vendetta. The posting followed national stories about the IRS targeting conservative political groups.

The KMOV statement from Mark Pimentel, president and general manager, says that the posting of a personal political opinion on one of the station's Facebook pages "creates an appearance of bias that is inconsistent with important journalistic standards."



Larry Conners

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Taylor Palmisano (@taylorp) 8:56 PM  
I had dinner that night men cheering in the library. Stop banging  
hanging chairs around and turn off your Vietnam  
Expand

Taylor Palmisano (@taylorp) 3 Jan 11  
This bus is my world. Nothing happens. Nobody speaks English &  
there go spots know how 2 control their kids. #no2009  
#legislators  
Expand



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"When you tweet like I did, you can't see the sarcasm. It's not a good joke. You can't tell if it was pure hate or sarcasm." No, "not a good joke."  
Former MLB pitcher and *former* radio announcer, and Dallas Mavericks fan.



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## Employee Rights

- U.S. Constitution, State laws protecting public employees, property right in employment, due process – process and substance, privacy rights, collective bargaining agreements, 1<sup>st</sup> Amendment Rights
- United States Supreme Court - June 2016 - *Heffernan v. City of Paterson, New Jersey*. Police Officer demoted for what supervisors thought was "overt involvement" in a political campaign.
- Of importance to the Court was the fact that the employer *thought* the employee was engaged in protected political activity stating "the government's reason for demoting Heffernan is what counts here." The Court found that the demotion did deprive Heffernan of a right "secured by the Constitution."
- Government employers should exercise caution in taking action against employees where First Amendment issues may be involved.
- Whether the employee's speech was made by as citizen or a public employee. Cases involve 1<sup>st</sup> amendment retaliation claims.

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## Off Duty Conduct

Employers often have legitimate reasons for punishing workers for illegal off-duty behavior, especially if it is related to their jobs

*For example*, an employee-driver's recent conviction for drunk driving



Wa

## Limited Right to Regulate Conduct

- Your right to prohibit off-the-job activities is limited.
- State courts - reluctant to allow regulation of employee off-duty conduct unless the employer can show the existence of an actual conflict with the organization's best interests

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## Off-Duty Conduct

- Typically the following analysis:
  - Is there a relationship between the off-duty conduct and the employee's job
  - Does the off-duty conduct put the business in an unfavorable light with the public
  - Is there potential to harm the business

## Social Media

 You have a friend request.



Your Boss

Would you like to confirm Your Boss as your friend?

You have no friends in common.

Add to a Friend List

Confirm (And Suffer)

Ignore (Career Suicide)

facebookcraze.com

## Social Media

2012

- Facebook – hit 1 BILLION active users in October 2012.....that's with a "B." Facebook added 245 million users in 12 months.
- LinkedIn – more than 150 million members worldwide and in 10 languages.
- Blog readers in 2011, 122.6 Million and growing (emarketer.com) More than 177 Million out there (The Nielsen Co.)
- Facebook is the most frequently accessed Website – 245 million photos per day are uploaded
- YouTube is the second largest search engine. 30B pieces of content shared per month
- 20M Facebook apps installed each day
- More than 350 million active users go to Facebook through a mobile device
- YouTube: Just as much potential for trouble, if not more; 3 billion videos watched per day, 8 million unique visits per month
- 48 hours uploaded every minute – 8 years of content each day, Avg. adult watches 186 online videos per month.
- Over 100 million people actively use Twitter, half of which tweet daily, almost 500 million registered users, 55 million tweets are written per day, 1 billion tweets every 5 days.

## Social Media

2017

- Facebook – March 2017 – 1.94 Billion users.
- LinkedIn – more than 467 million members worldwide 70% outside of US, 2 new members per second.
- Facebook is the most frequently accessed Website – 245 million photos per day are uploaded.
- YouTube is the second largest search engine. Number 1 is??? At 100 Billion/searches per month.
- 30 billion pieces of content shared per month.
- 1.28 billion people per day log onto Facebook.
- More than 1.74 billion million active users go to Facebook through a mobile device.
- YouTube: 5 billion videos watched per day, 30 million visits per day, 1.3 billion users.
- 300 hours uploaded every minute, 3.25 billion hours per month of videos are watched, processes, 3 billion searches per month.
- 317 million people actively use Twitter, 100 million daily active users, 500 million tweets are written per day, 180 million from mobile devices.

## Social Media

- And the list goes on.....and on.....and on.....The source of many issues.....Social Media.
- Mobile devices + being "out on the town = trouble. The "retweet, share & live"
- Most recent example of a social mishap: Harvard. Though not an employment issue it is instructive.



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## General Employment

### Practical Tips on Proper Documentation



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## Documentation

- Goal should always be accurate, clear, timely, objective and complete documentation!
- Premise: if an action was not documented, it never happened (not true, but.....).
- Why is documentation important?
  - Prove and justify personnel decisions
  - Defend decisions when challenged in arbitration or litigation
  - Guide supervisors in making decisions and conducting investigations
- Elements of "good" documentation
  - Factual and Specific
    - Who was involved/witnessed?
    - What/when/where?
    - Employee's explanation of what happened.
    - Facts providing context.

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## Documentation

- Written and dated.
- Contemporaneous with an action
  - Document while "fresh" in your mind.
  - Do not worry about crafting a perfect memo/document.
- Objective
  - Focus on job-related behavior and standards
  - Do not guess/speculate why an employee took such actions
  - Do not focus on personalities
  - No editorial content, inappropriate remarks
- Effective documentation can...
  - Deter litigation/grievance/challenge and prepare for it.
  - Strengthen case to hearing officer, judge, jury or administrative agency
  - Aid the memory of decision makers if a decision is challenged
  - Provide notice to employees on needed improvement/issues

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### Documentation

- **Avoids conclusory statements**
  - "Employee X seemed hostile toward constructive criticism"
  - OR**
  - "Employee X raised her voice and slapped Employee Y during the conference"
- **Factual and Specific**
  - Who was involved/witnessed?
  - What/when/where?
  - Employee's explanation of what happened
  - Facts providing context
- **Consistent**
  - Use the proper forms
  - Treat similarly situated individuals and offenses in the same manner
  - Document legitimate business reason for difference
- Signed by supervisor
- Reviewed and signed by affected employee (or note refusal to sign)
- Allow/invite response and provide notice of same (depends on culture/practice)

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## Public Employment Risk Reduction Program (PERRP)

OSHA is not applicable to government employees, Ohio HB 308 incorporated all Federal Occupational Safety and Health Administration Regulations as the Ohio Employment Risk Reduction Standards. ORC Chapter 4167 and the Ohio Administrative Code.

- 1970 – Federal OSHA created (public employees exempted from coverage)
- 1973 – Governor's executive order signed providing safety and health protection for executive branch state employees (OPESH)
- 1992 – Ohio Public Employment Risk Reduction Act passed (House Bill 308); OPESH becomes PERRP extending coverage to most local government employees
- July 1994 – the Act went into full effect
- July 2005 – PERRP became part of the Ohio Bureau of Workers' Compensation\*

Sources: <https://www.bwc.ohio.gov/downloads/blankpdf/perrpintro.pdf>  
<http://codes.ohio.gov/orc/4167> Ohio Revised Code  
<http://codes.ohio.gov/oac/4167> Ohio Administrative Code

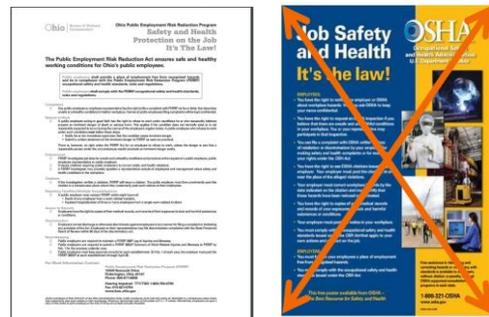
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### PERRP Purpose

- Ensure public employees in Ohio have a safe and healthy work environment by:
- Identifying workplace hazards and reducing those hazards through effective safety and health programs.
- Developing and enforcing mandatory job safety and health standards.
- Maintaining a reporting and recordkeeping system to monitor job-related injuries and illnesses.
- Providing assistance, training and other support programs to help public employers and workers understand their rights and responsibilities.
  - **Each public employer in Ohio must:**
    - Provide a place of employment free from recognized hazards.
    - This requirement is known as the, General Duty Clause.
  - **Each public employee in Ohio must:**
    - Comply with all safety and health regulations; and
    - Any reasonable safety and health policies developed by their employer.

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### In Government Workplaces, the Required PERRP Poster Replaces OSHA Posters!



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Thanks for Listening!



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