

Training Requirements under Adult Services Certification Rule



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SERVING PEOPLE WITH
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OAC 5123:2-5-01

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- (C)(1)(d):
 - Commencing in the second year of employment as an adult services worker, the employee shall annually complete at least eight hours of continuing professional education.
- (C)(1)(e)(iii):
 - The employee shall have successfully completed at least forty hours of continuing professional education during the period of the initial adult services worker certification.

OAC 5123:2-5-01

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- What happens if employee does not meet requirement to have eight (8) hours of training annually?
 - No clear answer.
 - Will depend on the facts.

OAC 5123:2-5-01: FAQ on rules

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- **Comment:**

- The rule requires eight hours of training annually. Does this allow for flexibility as long as the employee has completed the 40 hours in five years requirement? Under the current draft there is not a way for an employee who does not meet the eight hours per year requirement to “fix” the problem.

- **DODD's Response:**

- The requirement for Adult Services Workers to complete eight hours of continuing professional education per year mirrors the Medicaid adult day services rules. The requirement is clear and should be easy to meet.

OAC 5123:2-5-01: Response from DODD

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- Employee needs to reapply for certification
 - Employee would need to meet the new requirements, which includes the new employee orientation amongst other things. It would be costly and would take a substantial amount of time for that employee
- DODD feels the burden is on the Board to ensure this does not happen.

OAC 5123:2-5-01

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- (D) Written plan of training priorities
 - The superintendent shall ensure that a written plan identifying training priorities for employees who hold adult services worker and adult services supervisor certification is developed and implemented. ... The written plan of training priorities shall be updated at least once every twelve months and shall identify who is responsible for arranging or providing the training and projected timelines for completion of the training.
- (E) Annual training requirements
 - The superintendent shall ensure that employees who hold adult services worker and adult services supervisor certification annually complete training in accordance with the written plan of training priorities. ...

Questions ???

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Thanks for attending!

Disclosure of Employee Medical Information



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Introduction

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- Can a county board of developmental disabilities disclose an employee's medical information to supervisors or mid-level management?
 - R.C. §124.38, the Americans with Disabilities Act of 1990 ("ADA"), and the Family and Medical Leave Act of 1993 ("FMLA") authorize and limit the collection, maintenance and use of an employee's medical information.

R.C. §124.38

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- Permits a county employee to use sick leave, upon approval of the responsible administrative officer, for absence due to
 - personal illness,
 - pregnancy,
 - injury,
 - exposure to contagious disease that could be communicated to other employees, and
 - illness, injury, or death in the employee's immediate family.

R.C. §124.38

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- The appointing authority shall require an employee to furnish a satisfactory written, signed statement to justify the use of sick leave.
- **If medical attention is required, a certificate stating the nature of the illness from a licensed physician shall be required to justify the use of sick leave.**
 - Falsification of either a written, signed statement or a physician's certificate shall be grounds for disciplinary action, including dismissal.

Americans with Disabilities Act

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- Limits “medical examinations and inquiries” for applicants and employees.
- Employer cannot require a medical examination and cannot make inquiries of **an employee** as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

Americans with Disabilities Act

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- Information obtained regarding the medical condition or history of employee is to be collected and maintained on separate forms and in separate medical files and treated as a confidential medical record, except that—
 - supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;
 - first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and
 - government officials investigating compliance with this Act shall be provided relevant information on request.

Americans with Disabilities Act

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- Does R.C. §124.38's requirement for an employee to state "the nature of the illness" to justify use of sick leave constitute a "medical inquiry" covered by the ADA?
 - According to the United States Sixth Circuit Court of Appeals, the answer is no.
 - ✦ *Lee v. City of Columbus*, 636 F.3d 245 (6th Cir. 2011).

Lee v. City of Columbus

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- Columbus Police Department policy required employees' returning to regular duty following sick leave, injury leave, or restricted duty to submit a copy of their physician's note to the employee's immediate supervisor, stating the "nature of the illness" and whether the employee is capable of returning to regular duty.
- Employees claimed this violated the confidentiality provisions of the Rehabilitation Act of 1973, 29 U.S.C. §790 *et seq.*
 - ✦ District found violation; Sixth Circuit reversed.

Lee v. City of Columbus

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- Court of Appeals found that providing a general diagnosis – or a mere statement regarding the “nature” of an employee’s illness – is not an inquiry “as to whether such employee is an individual with a disability or as to the nature or severity of the disability”.
- Court also noted that it applied to all employees, and EEOC guidance supported the Police Department’s policy.

Lee v. City of Columbus

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- **May an employer request that an employee provide a doctor's note or other explanation when the employee has used sick leave? (Question 15)**
 - Yes. An employer is entitled to know why an employee is requesting sick leave. An employer, therefore, may ask an employee to provide a doctor's note or other explanation, as long as it has a policy or practice of requiring all employees to do so. *Questions and Answers: Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act (ADA)*, 2000 WL 33407183, at *4.

Lee v. City of Columbus

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- Court of Appeals also addressed providing information to supervisor:
 - ADA permits an employer (including a supervisor as an “agent” of the employer) to make inquiries and receive medical information in accordance with 42 U.S.C. §12112(d).
 - Nothing in ADA prohibits the City from designating an employee’s immediate supervisor as the initial contact for purposes of administering its sick leave benefits.
 - ADA neither expressly nor implicitly restricts the role of supervisory personnel in receiving and processing an employee’s medical information.
- Police Department policy mirrored the sick-leave policy for employees of the EEOC.

FMLA

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- If requested by the employer, the FMLA requires the employee to provide a copy of certification of the medical condition issued by a health care provider.
- 29 C.F.R. 825.306 requires certification to include, *inter alia* :
 - Contact information for health care provider and description of practice.
 - A statement or description of appropriate medical facts regarding the patient's health condition for which FMLA leave is requested. Medical facts must be sufficient to support the need for leave and may include information on symptoms, diagnosis, hospitalization, doctor visits, whether medication has been prescribed, any referrals for evaluation or treatment (physical therapy, for example), or any other regimen of continuing treatment.

FMLA

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- Confidentiality provision:
 - Records and documents relating to certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files (have to follow GINA and ADA also), except:
 - ✦ Supervisors/managers **may** be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
 - ✦ First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and
 - ✦ Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.

FMLA

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- At least two courts have held that the FMLA does not prohibit an employee's supervisor from reviewing the medical information regarding the employee that is submitted in support of the employee's request for FMLA leave:
 - *O'Reilly v. Rutgers*, 2006 U.S. Dist. LEXIS 2341 (D.Ct.New Jersey) (rejecting the plaintiff's argument that the FMLA prohibited her employer from requiring that she submit medical information to her department head in support of her request for FMLA leave);
 - *Kitts v. Gen. Tel. N., Inc.*, 2005 U.S. Dist. LEXIS 20421, No. 04-173, 2005 WL 2277438 (S.D. Ohio Sept. 19, 2005) (rejecting the plaintiff's argument that the defendant violated the FMLA by compelling her to disclose privileged medical information to unauthorized personnel).

Best Practice

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- While permissible to tell front-line supervisors or the next level manager that an employee is absent from work due to approved-FMLA leave for purposes of ensuring coverage for work-related purposes or approval of a leave form, it is often neither necessary nor appropriate for these individuals to have knowledge of or access to the employee's FMLA certification form and medical information **as a matter of course**.
 - More appropriate to have such information doled out to supervisors/managers on a case-by-case basis.
- To the extent possible, FMLA certifications should be handled by the human resources department directly, or that employee (or group of employees) who performs human resource functions for the County Board.

Best Practice

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- Supervisors and mid-level management employees can be informed as to an employee's disability/serious health condition when necessary to do so because of work restrictions imposed by the healthcare provider (such as intermittent leave) or to consider reasonable accommodations.
- Although not required to do so, a County Board could also ensure that the physician statements required by R.C. §124.38 are also provided directly to the Human Resources Department or the equivalent.
- Any medical information received from an employee to justify the use sick leave under R.C. §124.38 should be treated the same as medical information received under the ADA or the FMLA. Such medical information should be maintained as confidential medical records in files/records separate from the customary personnel files.

Best Practice

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- What to tell other employees if an employee is absent for an extended period of time or is provided an accommodation?
- EEOC: Cannot tell employees that providing an accommodation, but Board can “explain that it is acting for legitimate business reasons or in compliance with federal law.”
- EEOC: can tell a supervisor that a persona has a disability if the accommodation is a reassignment to another position.
- Sample comments:
 - “In order to comply with federal law, the Board has made a modification for “Employee X,” but federal law prohibits the Board from further disclosure.”
 - “Board has a policy of assisting any employee who has difficulties in the workplace, but many of the workplace issues encountered by an employee are personal, and, under the circumstances, the Board s policy is to respect the employee s privacy.”

Questions ???

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Thanks for attending!

HR Responsibilities under County Board Administrative Rule



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Introduction

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- OAC 5123:2-1-02 has been significantly revamped and will likely have an effective date of January 1, 2015.
- Addresses Boards from a programmatic perspective more than the prior rule.

Volunteers

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- Can use volunteers.
- Background investigations must be completed for volunteers:
 - Rule does not define “background investigation” or refer to either ORC 5123.081 or OAC 5123:2-2-02.
 - Safe approach would be to do a criminal background check in accordance with OAC 5123:2-2-02.
- Volunteers are not considered in the calculation of staffing ratios.

Records

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- The county board shall adopt written policies and procedures which address confidentiality, access, duplication, dissemination, and destruction of personnel records.
 - For the most part, personnel records are “public records”, so duplication, dissemination and access would be addressed in the Board’s public records policy.
 - Destruction of personnel records is governed by the Board’s records retention schedule.

Records

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- Board is no longer required under the rule to ensure employee has a physical examination current within sixty (60) days of the date of hire.

Records

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- The county board shall adopt written policies and procedures which address confidentiality, access, duplication, dissemination, and destruction of records of individuals served in accordance with the Health Insurance Portability and Accountability Act and, as applicable, the Family Educational Rights and Privacy Act.

Health

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- When the Board is directly providing facility-based services, the Board shall adopt written policies and procedures that ensure the general health and well-being of all individuals served and address:
 - Providing first aid and emergency treatment;
 - Securing emergency squad or ambulance services or the services of the individual's personal physician;

Health

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- Providing first aid training, cardiopulmonary resuscitation training, and training in universal precautions for infection control including hand-washing and disposal of bodily waste to county board personnel engaged in direct services positions in accordance with OAC 5123:2-2-01;
- Providing suitable first-aid facilities, equipment, and supplies;
- Providing for the management of communicable diseases, handling of illness on-site, and return after an illness or other health condition; and
- Posting emergency numbers by each telephone.

Health

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- The written policies and procedures shall be communicated to all personnel, individuals served, parents, guardians, and providers of services, and shall be available in each Board facility upon request.
- The Board shall adopt a written policy consistent with applicable statutes concerning administration of medication by Board personnel.
- All medication administered by Board personnel shall be pharmacy-labeled to indicate owner, contents, required dosage, and schedule.
- Such medication shall be secured in a locked cabinet and removed by designated **and qualified** personnel.

Copies of State laws and rules

- The Board shall upon request, assist any interested party to locate and secure a copy of provisions of Chapter 5126. of the Revised Code and the administrative rules of the Department.
- The Board shall ensure that employees of the Board and entities under contract with the Board receive information about revisions to the Revised Code and administrative rules of the Department that are pertinent to their roles.

Questions ???

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Thanks for attending!

Americans with Disabilities Act: Interactive Process and Leave as a Reasonable Accommodations



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- In addition to prohibiting discrimination based upon a disability, the Americans with Disabilities Act imposes a duty on an employer to provide a reasonable accommodation to an employee to assist the employee in the performance of the essential functions of the job.
- Failure to provide a reasonable accommodation constitutes discrimination under the ADA.

Interactive Process

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- Employer's obligation to engage in interactive process is triggered when:
 - Employee requests an accommodation; or
 - Employer knows about disability and the need for an accommodation.

Interactive Process

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- “Meaningful dialogue with the employee to find the best means of accommodating the disability.”
 - Meet with the employee to discuss what accommodations might be needed;
 - Quickly respond to employee request;
 - Ensure that request has been fulfilled (if employer agrees to accommodation);
 - Discuss alternatives.

Leave as accommodation

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- Has been generally accepted that unpaid leave is a reasonable accommodation in particular circumstances.
 - No bright line rule on length of leave.
 - Definite period of leave, not indefinite.
 - ✦ 6th Cir. (2003): indefinite leave could be a reasonable accommodation unless employer can show undue hardship.
 - ✦ 6th Cir. (2012): “open-ended, indefinite requests for leave are not request for reasonable accommodation.”

Is 6 months enough or not enough?

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- Many Boards have a policy allowing for up to six (6) months of unpaid leave in discretion of Superintendent.
- Six months is beyond what FMLA requires, but what about ADA?
 - Depends on the facts
 - *Hwang v. Kansas State University* (2014)
 - ✦ KSU had an inflexible policy allowing no more than six months' sick leave.
 - ✦ Hwang had cancer and needed treatment. She requested more than six months' leave, but KSU refused.

Is 6 months enough or not enough?

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- 10th Circuit Court of Appeals:
 - “It perhaps goes without saying that an employee who isn’t capable of working for so long isn’t an employee capable of performing a job’s essential functions — and that requiring an employer to keep a job open for so long doesn’t qualify as a reasonable accommodation. After all, reasonable accommodations — typically things like adding ramps or allowing more flexible working hours — are all about enabling employees to work, not to not work.

Is 6 months enough or not enough?

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- 10th Circuit Court of Appeals:
 - Nothing inherently discriminatory in the fact the University's six-month leave policy is "inflexible"
 - Inflexible leave policy can be attacked if it provides unreasonably short leave periods, thereby not providing sufficient accommodation for employees who are capable of performing their jobs' essential functions with just a little more forgiven absence, or the employer's supposedly inflexible sick leave policy is really a sham and other employees are routinely granted dispensations that disabled employees are not.

What does *Hwang* mean for you?

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- 10th Circuit does not cover Ohio so it is only instructive.
- *Hwang* does not say unpaid leave cannot be a reasonable accommodation, acknowledged that it can be under certain circumstances.
 - 10th Circuit had previously ruled in 2001 and 2012 that 6 months was too long to be a reasonable accommodation.
- Focus on return to work date of employee. If allow six months as a matter of policy, any extension should be limited to a specific date of return.
- Also, to extent you have a policy that provides up to 6 months of leave to non-disabled individuals, you have to consider such leave for disabled individuals.

Questions ???

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Thanks for attending!

LAYOFF OF CLASSIFIED EMPLOYEES

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Layoff rules rescinded

- ▣ Since no rules for county layoffs exist, have to follow the procedures set forth in state law.
- ▣ Subject to the provisions of R.C. §§124.321 to 124.327, the County Board has the implied power to adopt its own layoff procedures.

General Power

- ▣ R.C. §124.321(A) provides that, whenever it becomes necessary for an appointing authority to reduce its work force, the appointing authority shall lay off employees or abolish their positions in accordance with R.C. §§124.321 to 124.327.
 - Can lay off classified civil servants due to lack of funds, lack of work, and abolishment of positions.

Order of Layoff

- If abolishment results in a reduction of the work force, Board shall follow the layoff procedures, subject to the following modifications:
 - Employee whose position has been abolished shall have the right to fill an available vacancy within the employee's classification.
 - If the employee whose position has been abolished has more retention points than any other employee serving in the same classification, employee with the fewest retention points shall be displaced.

Order of Layoff

- If the employee whose position has been abolished has the fewest retention points in the classification, employee shall have the right to fill an available vacancy in a lower classification in the classification series.
- If the employee whose position has been abolished has the fewest retention points in the classification, employee shall displace the employee with the fewest retention points in the next or successively lower classification in the classification series.

R.C. §124.322-Layoff Procedures

- ▣ Whenever a reduction in the work force is necessary, the appointing authority shall decide in which classification or classifications the layoff or layoffs will occur and the number of employees to be laid off within each affected classification.
- ▣ Old rules required order of layoff to be based in part on length of service and may include efficiency in service, appointment type, or similar other factors DAS considered appropriate.
 - If DAS established relative efficiency as a criterion to be used in determining order of layoff for county employees, credit for efficiency may be other than ten per cent of total retention points.

R.C. §124.323 – Order of Layoff

- ▣ Part-time probationary;
- ▣ Part-time permanent;
- ▣ Full-time probationary;
- ▣ Full-time permanent.

R.C. §124.324 – Displacement Rights

- A laid-off employee has the right to displace the employee with the fewest retention points in the following order:
 - (1) Within the classification from which the employee was laid off;
 - (2) Within the classification series from which the employee was laid off;
 - (3) Within the classification the employee held immediately prior to holding the classification from which the employee was laid off, except that the employee may not displace employees in a classification if the employee does not meet the minimum qualifications of the classification or if the employee last held the classification more than three (3) years prior to the date on which the employee was laid off.

R.C. §124.324 – Displacement Rights

- ❑ Employees must notify the appointing authority of their intention to exercise their displacement rights, within five (5) days after receiving notice of layoff.
- ❑ No employee shall displace an employee for whose position or classification there are certain position-specific minimum qualifications, as established by the appointing authority, or as established by bona fide occupational qualification, unless the employee desiring to displace another employee possesses the requisite position-specific minimum qualifications for the position or classification.

R.C. §124.325 – Retention Points

- ▣ Still have to calculate retention points.
- ▣ If two or more employees have an identical number of retention points, employees having the shortest period of continuous service shall be laid off first.
- ▣ Since the statutes do not say how to calculate those retention points, the Board has the implied power to come up with its own formula and layoff procedures, provided that are in accordance with R.C. §§124.321 to 124.327.

R.C. §124.327 –Layoff Lists

- ❑ Board must establish lay-off lists for those employees who have been laid off or have, by virtue of exercising their displacement rights, been displaced to a lower classification in their classification series.
- ❑ Those employees with the most retention points within each category of order of layoff, shall be placed at the top of the layoff list to be followed by employees ranked in descending total retention order.
- ❑ Laid-off employees shall be placed on layoff lists for each classification in the classification series equal to or lower than the classification in which the employee was employed at the time of layoff.

R.C. §124.327 –Layoff Lists

- ▣ An employee who is laid off retains reinstatement rights to the Board.
- ▣ Reinstatement rights continue for one (1) year from the date of layoff.
- ▣ During this one-year period, the Board shall not hire or promote anyone into a position within that classification until all laid-off persons on a layoff list for that classification who are qualified to perform the duties of the position are reinstated or decline the position when it is offered.

R.C. §124.328- Right to appeal

- ▣ A classified employee may appeal a layoff, or displacement which is the result of a layoff, to the State Personnel Board of Review no later than ten (10) days after receipt of the layoff notice or after the date the employee is displaced.

Paper Layoff

- ▣ A county appointing authority may establish a paper lay-off process under which employees who are to be laid off or displaced may be required, before the date of their paper layoff, to preselect their options for displacing other employees.

Computation of retention points

- ▣ Calculation is set forth in OAC 123:1-41-09.
- ▣ Don't have to follow this exactly, but a good place to start.

Notice to Employee

- ❑ Reason for layoff or displacement;
- ❑ Effective date of the layoff or displacement;
- ❑ Employee's accumulated retention points;
- ❑ Right of the employee to appeal a layoff or displacement to SPBR and that the appeal must be filed or postmarked within ten (10) calendar days after the employee is notified that he or she is to be laid off or displaced;
- ❑ Statement advising the employee of the right to displace another employee and that the employee must exercise displacement rights within five (5) calendar days of the date the employee is notified of the displacement or layoff;
- ❑ Statement advising the employee of the right to reinstatement or reemployment;
- ❑ Statement that, upon request by the employee, the Board will make available a copy of the applicable layoff procedures; and
- ❑ Statement that the employee is responsible for maintaining a current address with the Board.

Questions?

THANKS FOR ATTENDING!

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ATTORNEY-CLIENT PRIVILEGED AND CONFIDENTIAL COMMUNICATION

MEMORANDUM

Background

This memorandum addresses the current state of Ohio law regarding layoff of classified civil servants.

Discussion

A. General discussion of layoff procedures

The rules previously applicable to county layoffs have been rescinded, despite the fact that R.C. §124.322 requires the Director of Administrative Services to adopt rules, under R.C. Chapter 119, establishing a method for determining layoff procedures and an order of layoff of, and the displacement and recall of, laid-off county employees. While rules for state employees still exist, no such rules exist for county employees. Since no rules for county layoffs exist, we must look to the procedures set forth in state law, and we would conclude that, subject to the provisions of R.C. §§124.321 to 124.327, the County Board has the implied power to adopt its own layoff procedures.¹

R.C. §124.321(A) provides that, whenever it becomes necessary for an appointing authority to reduce its work force, the appointing authority shall lay off employees or abolish their positions in accordance with R.C. §§124.321 to 124.327. R.C. §124.321(B), (C), and (D), respectively, allow the County Board to lay off classified civil servants due to lack of funds, lack of work, and abolishment of positions.

¹ Under the circumstances, however, in the absence of a new Board policy regarding layoffs, where appropriate, this memorandum will provide advice related to the administrative rules that used to apply to the Board.

A “lack of funds” means an appointing authority has a current or projected deficiency of funding to maintain current, or to sustain projected, levels of staffing and operations. A “lack of work” means an appointing authority has a current or projected decrease in workload that requires a reduction of current or projected staffing levels in its organization or structure.

Under the law, “abolishment” means the deletion of a position or positions from the organization or structure of the appointing authority. An appointing authority may abolish positions for any one or any combination of the following reasons:

- (1) as a result of a reorganization for the efficient operation of the appointing authority;
- (2) for reasons of economy; or
- (3) for lack of work.

Reasons of economy permitting an appointing authority to abolish a position and to lay off the holder of that position shall be determined at the time the appointing authority proposes to abolish the position. The reasons of economy shall be based on the appointing authority’s estimated amount of savings with respect to salary, benefits, and other matters associated with the abolishment of the position, except that the reasons of economy associated with the position’s abolishment instead may be based on the appointing authority’s estimated amount of savings with respect to salary and benefits only, if, for the County Board, either the appointing authority’s operating appropriation has been reduced by an executive or legislative action, or the appointing authority has a current or projected deficiency in funding to maintain current or projected levels of staffing and operations.

When either the appointing authority’s operating appropriation has been reduced by an executive or legislative action, or the appointing authority has a current or projected deficiency in funding to maintain current or projected levels of staffing and operations, the following principles apply based on the appointing authority’s estimated amount of savings with respect to salary and benefits only:

- (i) The position’s abolishment shall be done in good faith and not as a subterfuge for discipline.
- (ii) If a circumstance affects a specific program only, the appointing authority only may abolish a position within that program.
- (iii) If a circumstance does not affect a specific program only, the appointing authority may identify a position that it considers appropriate for abolishment based on the reasons of economy.

If an abolishment results in a reduction of the work force, the appointing authority shall follow the procedures for laying off employees, subject to the following modifications:

(a) The employee whose position has been abolished shall have the right to fill an available vacancy within the employee's classification.

(b) If the employee whose position has been abolished has more retention points than any other employee serving in the same classification, the employee with the fewest retention points shall be displaced.

(c) If the employee whose position has been abolished has the fewest retention points in the classification, the employee shall have the right to fill an available vacancy in a lower classification in the classification series.

(d) If the employee whose position has been abolished has the fewest retention points in the classification, the employee shall displace the employee with the fewest retention points in the next or successively lower classification in the classification series.

Moreover, notwithstanding any contrary provision of the displacement procedure described in R.C. §124.324 for employees to displace other employees during a layoff, a county appointing authority may establish a paper lay-off process under which employees who are to be laid off or displaced may be required, before the date of their paper layoff, to preselect their options for displacing other employees.

R.C. §124.322 sets forth very minimal layoff procedures. First, whenever a reduction in the work force is necessary, the appointing authority shall decide in which classification or classifications the layoff or layoffs will occur and the number of employees to be laid off within each affected classification. The statute requires the order of layoff in the rules to be adopted by the Director of Administrative Services to be based in part on length of service and may include efficiency in service, appointment type, or similar other factors the Director considers appropriate. If the Director of Administrative Services establishes relative efficiency as a criterion to be used in determining order of layoff for state and county employees, credit for efficiency may be other than ten per cent of total retention points. As noted previously, however, the administrative rules no longer apply to county appointing authorities.

R.C. §124.323 establishes the order of layoff:

Employees shall be laid off in the order set forth in this section within the primary appointment categories of part-time probationary, part-time permanent, full-time probationary, and full-time permanent. Whenever a reduction in force is necessary within each of the primary appointment categories, first part-time probationary, then part-time permanent, then full-time probationary, and then full-time permanent employees shall be laid off.

With respect to displacement rights, R.C. §124.324 provides:

A laid-off employee has the right to displace the employee with the fewest retention points in the following order:

- (1) Within the classification from which the employee was laid off;
- (2) Within the classification series from which the employee was laid off;
- (3) Within the classification the employee held immediately prior to holding the classification from which the employee was laid off, except that the employee may not displace employees in a classification if the employee does not meet the minimum qualifications of the classification or if the employee last held the classification more than three (3) years prior to the date on which the employee was laid off.

So you will need to determine whether any particular employee has the ability to displace other employees.

If, after exercising displacement rights, an employee is subject to further layoff action, the employee's displacement rights shall be in accordance with the classification from which the employee was first laid off. Further, following the order of layoff, an employee laid off in the classified civil service shall displace another employee within the same appointing authority in the following manner:

- (1) Each laid-off employee possessing more retention points shall displace the employee with the fewest retention points in the next lower classification or successively lower classification in the same classification series.
- (2) Any employee displaced by an employee possessing more retention points shall displace the employee with the fewest retention points in the next lower classification or successively lower classification in the same classification series.

This process shall continue, if necessary, until the employee with the fewest retention points in the lowest classification of the classification series of the same appointing authority has been reached and, if necessary, laid off.

Employees must notify the appointing authority of their intention to exercise their displacement rights, within five (5) days after receiving notice of layoff (except as modified with respect to a paper lay-off process established under R.C. §124.321(E)). No employee shall displace an employee for whose position or classification there are certain position-specific minimum qualifications, as established by the appointing authority, or as established by bona fide occupational qualification, unless the employee

desiring to displace another employee possesses the requisite position-specific minimum qualifications for the position or classification.

As can be seen from the foregoing, the Board must still calculate retention points. For example, R.C. §124.325(C) states that if two or more employees have an identical number of retention points, employees having the shortest period of continuous service shall be laid off first. Nevertheless, since the statutes do not say how to calculate those retention points, the Board has the implied power to come up with its own formula and layoff procedures, subject to the provisions of R.C. §§124.321 to 124.327.

R.C. §124.327 requires the Board, as an appointing authority, to establish lay-off lists for those employees who have been laid off or have, by virtue of exercising their displacement rights, been displaced to a lower classification in their classification series. Those employees with the most retention points within each category of order of layoff, shall be placed at the top of the layoff list to be followed by employees ranked in descending total retention order. Laid-off employees shall be placed on layoff lists for each classification in the classification series equal to or lower than the classification in which the employee was employed at the time of layoff.

An employee who is laid off retains reinstatement rights to the Board. Reinstatement rights continue for one (1) year from the date of layoff. During this one-year period, the appointing authority shall not hire or promote anyone into a position within that classification until all laid-off persons on a layoff list for that classification who are qualified to perform the duties of the position are reinstated or decline the position when it is offered.

Any employee accepting or declining reinstatement to the same classification and same appointment type from which the employee was laid off or displaced shall be removed from the appointing authority's layoff list. An employee who does not exercise the option to displace under R.C. §124.324 shall only be entitled to reinstatement or reemployment in the classification from which the employee was displaced or laid off. Except when an employee, who was a full-time employee at the time of layoff or displacement, declines reinstatement in a part-time position, an employee who declines reinstatement to a classification lower in the classification series than the classification from which the employee was laid off or displaced, thereafter is only entitled to reinstatement to a classification higher, up to and including the classification from which the employee was laid off or displaced, in the classification series than the classification that was declined. Any employee reinstated or reemployed shall not serve a probationary period upon reinstatement or reemployment, except that an employee laid off during an original or promotional probationary period shall begin a new probationary period.

Pursuant to R.C. §124.328, a classified employee may appeal a layoff, or displacement which is the result of a layoff, to the State Personnel Board of Review no later than ten (10) days after receipt of the layoff notice or after the date the employee is displaced.

B. Computation of retention points

Employees shall be assigned a base of one hundred retention points. Computation of retention points for continuous full-time service shall be made by crediting each employee with one retention point for each bi-weekly pay period of continuous service. For the purposes of calculating retention points, full-time service shall include service as a full-time permanent, full-time seasonal, full-time interim, or full-time temporary employee. For full-time seasonal, full-time interim, or full-time temporary service, credit will be given only for those pay periods in which the employee was scheduled to work. If an employee is in a full-time position at any time during a pay period, they are considered full-time for the entire pay period. Retention points for continuous service for other than full-time service shall be calculated on the basis of one-half (0.50) point for each bi-weekly pay period of continuous service.

Retention points computed for full-time continuous service and other than full-time continuous service, whenever applicable, shall be combined to determine an employee's total retention points. Overtime shall not be considered for purposes of computation of retention points for continuous service.

In the event two or more employees have identical retention points, the tie shall be broken by utilizing the following methods, in the following order:

- (1) First, employees having most recent date of continuous service from which no break in service has occurred shall be laid off or displaced first; and
- (2) Second, the appointing authority shall determine the employee to be laid off or displaced first.

C. Notice to employee

Each employee to be laid off shall be given advance written notice by the appointing authority after the employee's retention points have been verified. Such written notice shall be hand-delivered to the employee or mailed by certified mail to the employee's last known address on file with the appointing authority. If hand-delivered, such notice shall be given **at least fourteen (14) calendar days** before the effective date of layoff or displacement and the day of hand-delivery shall be the first day of the fourteen-day period. If mailed, such notice shall be mailed **at least seventeen (17) calendar days** before the effective date of the layoff or displacement. The day the letter is mailed shall be the first day of the seventeen-day period.

Each notice of layoff or displacement shall contain the following information:

- (1) The reason for layoff or displacement;
- (2) The effective date of the layoff or displacement;

- (3) The employee's accumulated retention points;
- (4) The right of the employee to appeal a layoff or displacement to the State Personnel Board of Review and that the appeal must be filed or postmarked within ten (10) calendar days after the employee is notified that he or she is to be laid off or displaced;
- (5) A statement advising the employee of the right to displace another employee and that the employee must exercise displacement rights within five (5) calendar days of the date the employee is notified of the displacement or layoff;
- (6) A statement advising the employee of the right to reinstatement or reemployment;
- (7) A statement that, upon request by the employee, the appointing authority will make available a copy of the applicable layoff procedures; and
- (8) A statement that the employee is responsible for maintaining a current address with his or her appointing authority.

Conclusion

The Board should review this memorandum in conjunction with its layoff policy to ensure compliance with Ohio law.

Pregnancy Discrimination Act and Light Duty Work

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Latowski v. Northwoods Nursing Center

- ◆ Northwoods had a policy that provided light duty work only for employees who were injured on the job.
- ◆ When Northwoods learned Latowski – a certified nursing assistant – was pregnant, it asked for a doctor's note regarding any work restrictions.
 - Doctor restricted her from lifting over 50 pounds.

Latowski v. Northwoods Nursing Center

- ◆ Northwoods informed Latowski that she had resigned and was escorted from the facility.
- ◆ Northwoods' managers made comments regarding her pregnancy and the accompanying restrictions placed on her work, stating that her belly would be in the way of her work, and that Northwoods didn't want to be liable for any harm to Latowski's unborn child if Latowski continued to work.

Latowski v. Northwoods Nursing Center

- ◆ Latowski filed a lawsuit under the PDA, the ADA, and the FMLA.
- ◆ The trial court found for Northwoods on all claims, reasoning that its policy was pregnancy blind and that there was no evidence that Northwoods harbored discriminatory animus towards [Latowski's] pregnancy.

Latowski v. Northwoods Nursing Center

- ◆ On appeal to the Sixth Circuit, Latowski argued that the application of the facially non-discriminatory policy to her condition was discriminatory as she had demonstrated fitness for duty after pregnant but before restrictions imposed.
 - The Sixth Circuit agreed and reversed the dismissal of the PDA claim.

Latowski v. Northwoods Nursing Center

- ◆ Under the circumstances, there was genuine issue of fact regarding whether the comments made by management played a role in the decision to terminate Latowski's employment.
- ◆ The court differentiated between the analysis of typical Title VII claims and the analysis of a claim under the PDA, pointing out that [w]hile Title VII generally requires that a plaintiff demonstrate that the employee who received more favorable treatment be similarly situated in all respects, the PDA requires only that the employee be similar in his or her ability or inability to work.

Latowski v. Northwoods Nursing Center

- ◆ Latowski could easily show that Northwoods treated non-pregnant certified nursing assistants with similar lifting restrictions (and therefore, with abilities and inabilities to work that are similar to Latowski's) more favorably by allowing them to work light duty jobs, while precluding her from doing so.

Latowski v. Northwoods Nursing Center

- ◆ *Latowski* court did not address its previous decision in *Reeves v. Swift Transportation Co.*, 446 F.3d 637, 640 (6th Cir. 2006):
 - Found in favor of an employer who had a similar "pregnancy-blind" light duty policy.
 - No "stray" remarks.

Young v. UPS

- ◆ UPS policy limited light duty work to some employees - those injured on-the-job, those disabled within the meaning of the ADA, or those who had lost their DOT certification.
- ◆ Not available for pregnant workers and other employees.

Young v. UPS

- ◆ Trial Court and Fourth Circuit Court of Appeals found for UPS, rejecting argument that Young should be treated differently than other non-pregnant employees of UPS who also were not eligible under the light duty policy.
- ◆ Fourth Circuit Court of Appeals also rejected an argument that the PDA would require an accommodation, agreeing with the view of a majority of other courts of appeal.

Young v. UPS

- ◆ Young appealed to the United States Supreme Court, which accepted the case for review.
- ◆ The proceedings in the *Latowski* case were stayed pending the Supreme Court's decision.

Young v. UPS

- ◆ Young argued that PDA requires UPS to treat pregnant employees the same "as other persons not so affected but similar in their ability or inability to work."
- ◆ She claimed the lifting restrictions that prevented her from working affected her ability to work in the same manner as those employees who were injured on-the-job, who were disabled within the meaning of the ADA, or who had lost their DOT certification.

Young v. UPS

- ◆ UPS differentiated the various categories based upon the relevant facts (short term for those injured on the job and designed to get them back to work; those who lost their CDL were still required to perform their jobs except driving).
- ◆ UPS also claimed that pregnant employees were treated the same as other employees, just not those three categories.

Young v. UPS

- ◆ Supreme Court will hear oral argument today.
- ◆ UPS now offers lights duty to pregnant employees.

EEOC guidance – light duty

- ◆ **10. If a pregnant employee needs light duty (temporary work that is less physically demanding than her normal duties), is the employer required under the PDA to provide it?**
 - Yes, if it provides light duty for employees who are not pregnant but who are similar in their ability or inability to work. An employer may not treat pregnant workers differently from employees who are similar in their ability or inability to work based on the cause of their limitations. For example, an employer may not deny light duty to a pregnant employee based on a policy that limits light duty to employees with on-the-job injuries.

EEOC guidance – light duty

- ◆ **11. Does EEOC's interpretation of the PDA create preferential treatment for pregnant workers?**
 - No. Consistent with the language of the law, the EEOC's position is that the PDA requires only that an employer treat pregnant workers the *same as it treats workers who are not pregnant but who are similar in their ability or inability to work*. Thus, an employer may offer light duty to pregnant employees on the same terms that it offers light duty to other workers similar in their ability or inability to work. For example, if an employer's policy places certain types of restrictions on the availability of light duty positions, such as limits on the number of light duty positions or the duration of light duty, the employer may lawfully apply the same restrictions to pregnant workers as it applies to non-pregnant workers. If an employer does not provide light duty to employees who are not pregnant, it does not have to do so for pregnant workers.

EEOC guidance – leave

- ◆ **12. May an employer require a pregnant employee who is able to perform her job to take leave at any point in her pregnancy or after childbirth?**
 - No. An employer may not force an employee to take leave because she is or has been pregnant, as long as she is able to perform her job. Requiring leave violates the PDA even if the employer believes it is acting in the employee's best interest. If an employee has been absent from work as a result of a pregnancy-related condition and then recovers, her employer may not require her to remain on leave until the baby's birth; nor may an employer prohibit an employee from returning to work for a certain length of time after childbirth.

EEOC guidance – leave

- ◆ **13. May an employer impose greater restrictions on pregnancy-related medical leave than on other medical leave?**
 - No. Under the PDA, an employer must allow women with physical limitations resulting from pregnancy to take leave on the same terms and conditions as others who are similar in their ability or inability to work. Thus, an employer:
 - ◆ may not fire a pregnant employee for being absent if her absence is covered by the employer's sick leave policy;
 - ◆ may not require employees limited by pregnancy or related medical conditions to first exhaust their sick leave before using other types of accrued leave if it does not impose the same requirements on employees who seek leave for other medical conditions;

EEOC guidance – leave

- ◆ **13. May an employer impose greater restrictions on pregnancy-related medical leave than on other medical leave?**
 - ◆ may not impose a shorter maximum period for pregnancy-related leave than for other types of medical or short-term disability leave; and
 - ◆ must allow an employee who is temporarily disabled due to pregnancy to take leave without pay to the same extent that other employees who are similar in their ability or inability to work are allowed to do so.

Questions ???

Thanks for attending!

RECORDS RETENTION BASICS

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Boards must have Retention Schedules

- ▣ Authorization for disposition of local government records is provided by applicable statutes, and by rules adopted by records commissions. R.C. §149.38 (Counties).
- ▣ Records commissions are responsible for reviewing applications for one-time disposal of obsolete records, as well as records retention schedules submitted by government offices within their jurisdiction. R.C. §149.381.

Destruction

- ▣ Records of a public office may be destroyed, but only if they are destroyed in compliance with a properly approved records retention schedule.
- ▣ “In cases in which public records, including e-mails, are properly disposed of in accordance with a duly adopted records retention policy, there is no entitlement to those records under the Ohio Public Records Act.” *State ex rel. Toledo Blade Co. v. Seneca Bd. of Comm’rs*, 120 Ohio St.3d 372, 2008-Ohio-6253, ¶23.

Destruction

- ▣ R.C. §149.351:
 - All records are the property of the public office concerned and shall not be removed, destroyed, mutilated, transferred, or otherwise damaged or disposed of, in whole or in part, except as provided by law or under the rules adopted by the records commissions provided for under sections 149.38 to 149.42 of the Revised Code Those records shall be delivered by outgoing officials and employees to their successors and shall not be otherwise removed, destroyed, mutilated, or transferred unlawfully.

Lack of a Schedule

- ▣ However, if the retention schedule does not address the particular type of record in question, the record must be kept until the schedule is properly amended to address that category of records. *Wagner v. Huron Cty. Bd. of Cty. Commrs.*, 6th Dist. No. H-12-008, 2013-Ohio-3961, ¶17 (public office must dispose of records in accordance with then-existing retention schedule and cannot claim that it disposed of records based on a schedule implemented after disposal of requested records).

Lack of a Schedule

- ▣ Also, if a public record is retained beyond its properly approved destruction date, it keeps its public record status until it is destroyed and is thus subject to public records requests. *Keller v. City of Columbus*, 100 Ohio St.3d 192, 2003-Ohio-5599; *State ex rel. Dispatch Printing Co. v. City of Columbus*, 90 Ohio St.3d 39, 41, 2000-Ohio-8 (police department violated R.C. §149.43 when records were destroyed in contravention of City's retention schedule).

Transient Records

- ▣ Adoption of a schedule for transient records – that is, records containing information of short term usefulness – allows a public office to dispose of these records once they are no longer of administrative value. *State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391, 2008-Ohio-4788, ¶24, n. 1.

Transient Records

- ▣ Examples of transient records include voicemail messages, telephone message slips, post-it notes, and superseded drafts.
- ▣ Local governments should file a Certificate of Records Disposal (RC-3) with the State Archives at the Ohio Historical Society at least fifteen (15) business days prior to the destruction in order to allow the Historical Society to select records of enduring historical value.

Document Destruction

- ▣ It is important for a government entity to internally track records disposals, particularly tracking which schedule the records were disposed under, the record series title, inclusive dates of the records, and the date of disposal.

Document Destruction

- ▣ Every record, public or not, that is kept by a public office must be covered by a records retention schedule. Without an applicable schedule dictating how long a record must be kept and when it can be destroyed, a public office must keep that record forever.

5 Steps to Create a Schedule

- ▣ Conduct a Records Inventory
 - The purpose of an inventory is to identify and describe the types of records an office keeps. Existing records retention schedules are a good starting point for determining the types of records an office keeps, as well as identifying records that are no longer kept or new types of records for which new schedules need to be created.

5 Steps to Create a Schedule

- ▣ Categorize Records in “Series”.
 - Records should be grouped according to record series. A record series is a group of similar records that are related because they are created, received or used for, or result from the same purpose or activity.
 - Record series descriptions should be broad enough to encompass all records of a particular type (“Itemized Phone Bills” rather than “FY07-FY08 Phone Bills” for instance), but not so broad that it fails to be instructive (such as “Finance Department e-mails”) or leaves the contents open to interpretation or “shoehorning.”

5 Steps to Create a Schedule

- ▣ Evaluate four (4) criteria for retention length:
 - **Administrative Value:** A record maintains its administrative value as long as it is useful and relevant to the execution of the activities that caused the record to be created.
 - **Legal Value:** A record has legal value if it documents or protects the rights or obligations of citizens or the agency that created it, provides for defense in litigation, or demonstrates compliance with laws, statutes, and regulations.

5 Steps to Create a Schedule

- **Fiscal Value:** A record has fiscal value if it pertains to the receipt, transfer, payment, adjustment, or encumbrance of funds, or if it is required for an audit. Examples include payroll records and travel vouchers.
- **Historical Value:** A record has historical value if it contains significant information about people, places, or events. The State Archives suggests that historical documents be retained permanently. Examples include board or commission meeting minutes and annual reports.

Length of Retention

- ▣ Retention periods should be set to the highest of these values and should reflect how long the record needs to be kept, not how long it can be kept.
- ▣ For reference, see the General Schedules established by DAS:
 - <http://apps.das.ohio.gov/rims/General/General.asp>

Length of Retention

- ▣ Personnel Records:
 - Bare minimum:
 - ▣ Ohio (wages):
 - Requires employers to keep a record for three (3) years after each employee's last day of work of the employee's:
 - Name;
 - Address;
 - Occupation;
 - Pay rate;
 - Hours worked for each day worked and
 - Each amount paid an employee.

Length of Retention

- ▣ Personnel Records
 - Bare minimum:
 - ▣ Federal (FLSA):
 - Payroll records, certificates, collective bargaining agreements, contracts, plans, trusts, and sales and purchase records must be preserved for at least three (3) years.
 - Basic employment and earnings records, wage rate tables, order, shipping, and billing records, and records of additions to or deductions from wages paid must be maintained for at least two (2) years.
 - Should keep for at least three (3) years.

Length of Retention

- ▣ FMLA records
 - Must be kept no less than three (3) years

Dispose of Records on Schedule

- ▣ Records retention schedules indicate how long particular record series must be kept and when and how the office can dispose of them.
- ▣ Records kept past their retention schedule are still subject to public records requests, and can be unwieldy and expensive to store.
- ▣ As a practical matter, it is helpful to designate a records manager or records custodian to assist in crafting retention schedules, monitoring when records are due for disposal, and ensuring proper completion of disposal forms.

Questions?

THANKS FOR ATTENDING!