

2017 LOCAL GOVERNMENT SERVICES CONFERENCE

## Public Sector Personnel Management: Limiting Liability, Managing Leaves, & Promoting Efficiency

Brian D. Butcher, Director



Akron | Cincinnati | Dublin | Lima

[www.clemansnelson.com](http://www.clemansnelson.com)

1.800.282.0787

© 2017 Clemans, Nelson & Associates, Inc.

---

---

---

---

---

---

---

---

## PUBLIC SECTOR OVERVIEW

- Public Sector Employment is NOT Private Sector Employment
  - Public employment is different because public employees simply have more rights and more agencies before whom to seek "review."
  - In addition, for whatever reason, public employees are simply more aware of their rights under federal and state law.
- Some local governments are facing financial crisis making it that much more important that they have sound HR practices. This helps limit exposure to litigation.
- Litigiousness of our society is compounded by economic downturn.
- We need to have our Personnel Systems in place NOW.

---

---

---

---

---

---

---

---

## PUBLIC SECTOR EMPLOYMENT

### At the Federal Level:

- Age Discrimination in Employment Act
- Americans With Disabilities Act, as amended
- Brady Bill
- Civil Rights Act of 1866
- Civil Rights Act of 1871
- Civil Rights Act of 1871
- Civil Rights Act of 1871
- Civil Rights Act of 1964
- Civil Rights Act of 1964
- Civil Rights Act of 1968
- Civil Rights Remedies for Gender Motivated Violent Crime.
- Clean Air Act
- Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA)
- Consumer Credit Protection Act
- Drug Free Workplace Act of 1988
- Employee Retirement Income Security Act of 1974
- Equal Pay Act of 1963
- Fair Credit Reporting Act

---

---

---

---

---

---

---

---

## PUBLIC SECTOR EMPLOYMENT

- Fair Labor Standards Act
- Family and Medical Leave Act
- Federal Merit System Standard
- Federal Water Pollution Control Act
- Federal Wiretapping Act
- GINA
- Hatch Act
- H.I.P.P.A.
- Immigration Control Reform Act
- Jury System Improvement Act
- Occupational Safety and Health Act
- Older Workers Benefit Protection Act
- Omnibus Transportation Employee Testing Act
- Rehabilitation Act of 1973
- Veterans Reemployment
- Vietnam Era Veterans Readjustment Assistance Act
- Violence Against Women Act of 1994

---

---

---

---

---

---

---

---

---

---

## PUBLIC SECTOR EMPLOYMENT

### At the State Level:

- 3.06 Deputies and Clerks "serve at the pleasure of."
- 9.84 Witness has right to counsel.
- 102.03 Ethics in government, public employees. Complex interaction with R.C. 2921.42. Some nepotism prohibited.
- 102.03(B) Prohibition against revealing confidential information.
- 102.09(E) Appointing authorities are required to furnish each new appointee with a copy of ethics law.
- 117.01 "... Public officials are liable for all public money received or collected by them or by their subordinates under color of office."
- 117.28 Finding for recovery by state auditor.
- 121.22 Open meeting law. 24 hour notice.
- 124.01-124.57 Classified and Unclassified Employment (State, County, City, limited Township applicability)
- 149.43 Public records law, limited exceptions. Must provide copy on request.
- 153.59 All construction contracts by political subdivisions must have nondiscrimination clause and an affirmative action program.
- 505.491 Township procedure for discipline (police)
- 737.12 Municipal procedure for suspension. (police & fire)
- 1333.81 Employee cannot knowingly disclose confidential information.
- 1347 Personal Information Systems, annual report, rights of individuals.

---

---

---

---

---

---

---

---

---

---

## PUBLIC SECTOR EMPLOYMENT

- 1347.05 One person must be named to coordinate system.
- 1347.09 Disputes over information in database.
- 2313.18 A permanent employee may not be discharged for having taken time off for jury duty.
- 2317.02 Physician-patient privilege. (This is frequently an issue in ADA and FMLA-related cases.)
- 2506 Appeals to common pleas court from adjudications, quasi-judicial proceedings.
- 2711 Arbitration and appeals from arbitration.
- 2716.05 Prohibits discharge based upon a single wage garnishment within a twelve month period.
- 2744.02(C) Any order denying immunity is immediately appealable.
- 2744.03 Political subdivision tort immunity. Immunity for officials as to state court actions, causes of action.
- 2921.02 Bribery/accepting bribes by public employees prohibited.
- 2921.03 Intimidation of public servants prohibited.
- 2921.05 Retaliation against public servants prohibited.
- 2921.13 Falsification with purpose to mislead public officials prohibited.

---

---

---

---

---

---

---

---

---

---

## PUBLIC SECTOR EMPLOYMENT

- 2921.41 Theft in office by public employees prohibited. Forfeit PERS.
- 2921.42 Unlawful interest on public contract prohibited. applies to civil service employment, nepotism.
- 2921.43 Soliciting improper compensation prohibited.
- 2921.431 Soliciting political contributions from public employees prohibited.
- 2921.44 Dereliction of duty: criminal: bar to reinstatement.
- 2921.45 Public officials, employees criminally liable for deprivations of civil rights.
- 2961.01 Convicted felon cannot hold public office.
- 3517.092 Elected officials cannot solicit or accept contributions from employees
- 3599.05 Employer cannot threaten employee with termination in order to affect his vote in an election: cannot put political files in pay envelopes.
- 3599.06 Employee cannot be discharged for taking a reasonable amount of time off in order to vote.
- 3735 MHA
- 3923.38 (Mini-COBRA) Right to group coverage for six months. Not available unless employee was entitled to U.C. at time of separation.
- 4101.10 Employer duty to respond to inquiries by State Department of Industrial Relations.
- 4101.12 Prohibition against requiring, permitting, or suffering an employee to work in an unsafe place.
- 4101.17 Prohibits age discrimination: not available where employee can go to arbitration.
- 4111.03 State, city, and county employers, and employers with sales gross over \$150,000 per annum, must pay overtime: county comp time outlined.

---

---

---

---

---

---

---

---

---

---

## PUBLIC SECTOR EMPLOYMENT

- 4111.08 Duty to maintain employee records for three years.
- 4111.09 Duty to post regulations.
- 4111.13 Nonretaliation against employee who enforces overtime right.
- 4111.17 Prohibition against discrimination based upon sex, race, color, religion, or national origin in payment of wages (MINI-EQUAL PAY ACT). Merit pay exception.
- 4112.02 State level Title VII, prohibits discrimination on basis of race, color, religion, sex, national origin, handicap, age, or ancestry (OCRC).
- 4113.21 Employer must pay cost of medical examinations required of applicants for employment.
- 4113.23 Employee is entitled to a copy of any medical report from a work-related examination.
- 4113.52 General "Whistleblower" protection. County application.
- 4113.71 Limited immunity for employee reference checks.
- 4117 Public sector collective bargaining law.
- 4167.13 Unlawful to retaliate against employee who files OSHA charge: separate appeal rights to civil commission or SPBR.
- 5903.02 Unlawful to fire public employee who is called to military duty.
- 5906 State FMLA - Military Leave

---

---

---

---

---

---

---

---

---

---

## PUBLIC SECTOR EMPLOYMENT

- **Constitutional Roots Affecting Public Employment**
  - First, Fourth, Fifth, and Fourteenth Amendments to the U.S. Constitution
- **Contractual Roots Affecting Public Employment**
  - Contracts under R.C. 4117 (collective bargaining)
    - (see also R.C. 2711) (arbitration)
  - Individual contracts of employment
    - (see R.C. 737.05, R.C. 3319, R.C. 5126)
  - State and federal grant "contracts"
    - (see 28 CFR §42.301, relating to special requirements under COP grants); Hatch Act

---

---

---

---

---

---

---

---

---

---

## DEFINITIONS 101 THE TERMINOLOGY

- Exempt / Non-exempt / Non-Covered (FLSA)
- Exempt / Non-exempt (R.C. 4117)
- Classified vs. Unclassified (R.C. 124)
- "At-Will"

---

---

---

---

---

---

---

---

## THE NEED FOR HUMAN RESOURCES

- Any organization needs human resources to be successful. Proper human resources can limit liability through the promulgation of important practices and policies and increase productivity and efficiency through the proper management of people.
- What is our most expensive asset?

---

---

---

---

---

---

---

---

## LIMITING LIABILITY

- Employee Handbook/Personnel Policy Manual
  - Employee Handbooks are also often called Personnel Policy and Procedures Manuals. The Handbook/Manual is a statement of the personnel policies of the Employer and how related business is to be conducted. These essential documents serve to set forth an Employer's expectations for its employees. It is important that your Handbook/Manual be clear and unambiguous as it can serve as "notice" when defending employment actions.
  - "Must Have" Policies
    - Disclosures/Disclaimers (e.g. at-will, no authority to bind, complete agreement); Discrimination/Harassment and Reporting Procedure; ADA/Reasonable Accommodation; Workplace Violence; FMLA; Discipline; BWC; Leave/Benefits; Internal Complaint; Drug Free.

---

---

---

---

---

---

---

---

## LIMITING LIABILITY

- Employee Handbook/Personnel Policy Manual
  - Policies for Consideration
    - Social Media
    - Technology/Computer Use
    - Attendance/Tardy
    - Cell Phone
    - Use of Employer Vehicles
    - Travel/Reimbursement
    - No "Self-Help"

---

---

---

---

---

---

---

---

## LIMITING LIABILITY

- Position Descriptions/Class Specifications
  - A position description (PD) is a structured document assigning work to a specific position as it is expected to be performed after customary orientation and training. The PD should accurately and completely describe the essential functions that are assigned and performed.
  - A Class Specification (Class Spec) is a general description of a job class detailing examples of duty-grouped tasks and representing a category of jobs similar enough to carry the same title, pay range, and minimum qualifications for employment.
  - Important for all types of personnel actions (e.g. layoff, compensation, performance evaluation, ADA accommodation, discipline, etc.)
  - Neither are static documents and should be revised as jobs morph.

---

---

---

---

---

---

---

---

## LIMITING LIABILITY

- Performance Evaluations
  - Performance evaluations are a critical part to the development of every organization. They should be performed at a minimum on an annual basis. Evaluations serve to hold individuals accountable for the duties they are assigned to perform.
  - A well-drafted performance evaluation should be "behaviorally anchored" in order to be legally defensible.
  - Promotion
  - Development
  - Discipline
  - Compensation (Merit Pay)

---

---

---

---

---

---

---

---

## LIMITING LIABILITY

- Compensation System
  - A well-developed compensation system is critical to an Employer's ability to recruit and retain employees. A standard system can also serve as an Employer's first line of defense against discrimination charges.
- Internal and External Pay Equity
  - Old adage – 25-year employee (in the same position) hired in at \$10.00 and has received 3% compounding each year. Does this compensation exceed the position value?
- Different Types
  - Step Plan
  - Min, Mid-point, Max
  - Merit
  - Longevity
  - Hybrid

---

---

---

---

---

---

---

---

## LIMITING LIABILITY

- Hiring and Selection
  - A proper hiring and selection process can streamline all the documentation involved which can sometimes prove to be tedious. Uniform methods can also insulate an employer from possible discrimination claims. Because choosing the "right" candidate is so important in the public sector (hard to get rid of a public employee once they complete a probationary period), it can save money and time on the back end.
- Job Posting Policies – Standard policy for asking candidates to apply for jobs.
- Structured Interviews – Consistent, job-related questions asked to each applicant set (or sub-set).
- Validated Tests and Assessment Centers

---

---

---

---

---

---

---

---

## LIMITING LIABILITY

- Training
  - Perhaps the most important and over-looked aspect of a Sound HR System is training.
- Why Train?
  - Educate
  - Increase Efficiency
  - Career Development
  - Mandated (e.g., Discriminatory Harassment, Safety Training, Certifications, Ethics)
  - Legal Defense

---

---

---

---

---

---

---

---

## LIMITING LIABILITY

- Practice Point: This begins BEFORE an employee is ever hired!
- "Exception" Log: Allen v. City of Chicago (pending)
- On the front end.
  - Thurman v. Daimler-Chrysler, 397 F.3d 332 (6th Cir.)
  - Oswald v. BAE Industries, (2012).
- Going out the door.
  - Cole v. Temple Israel, et al., 2007-Ohio-245 (9th App. Dist.)
- Intentional Tort Immunity for Public Entities No Longer Exists.
  - Sampson v. Cuyahoga MHA, 131 Ohio St. 3d 418 (2012)
  - George v. Village of Newburgh Heights, (8<sup>th</sup> App. Dist.)

---

---

---

---

---

---

---

---

## MANAGING LEAVES

Know what leave we are required to offer:

- State law
  - What type of public employer are we?
  - Should we require employees to use leave or actually request permission to carry over leave?
- Federal Law (e.g. FMLA, Unpaid Leave as an Accommodation)
- Vicious cycle of compensatory time
- Other time off by CBA or by policy

---

---

---

---

---

---

---

---

## MANAGING LEAVES

### FMLA

- Are your Employee's event eligible for Leave?
- Managing FMLA Generally
  - Concurrent Leave Usage Policies
  - Calendar Year Calculations (Calendar; Look Back; Look Forward)
- Managing the use of intermittent leave
- The "migraine"
- Can we require recertification?

---

---

---

---

---

---

---

---

## MANAGING LEAVES

- Proper "call-in" procedure in place
- How do we require someone to request off?
- Do we have a leave form in place?
- Is the use of unpaid leave on a regular basis okay?
- Private Sector model of PTO

---

---

---

---

---

---

---

---

## PROMOTING EFFICIENCY

- Social Media and/or Technology In the Workplace
- Facebook, MySpace, Twitter, LinkedIn, Google+, Blogs
- Regulating On/Off-Duty Conduct
- Understanding our Rights and Restrictions as Public Employees
- Personal Use of Cell Phones

---

---

---

---

---

---

---

---

## MEDICAL MARIJUANA

- Under Federal Law, it is still a Schedule I Controlled Substance.
- Under State Law, it is a Schedule II Controlled Substance.
- ...cultivated, processed, dispensed, tested, possessed, or used for a medical purpose. (ORC 3796.01).
- Prescription is required (there are limitations).
- A few municipalities passed local legislation decriminalizing possessing small amounts of marijuana. (Some municipalities will prosecute under state law).

---

---

---

---

---

---

---

---

## WHAT DOES THIS MEAN FOR EMPLOYERS?

- Employers are not required to permit or accommodate an employee's use, possession, or distribution of medical marijuana.
- Employers are not required to allow employees to be under the influence at work (this is akin to alcohol).
- Employers are not prohibited from establishing and enforcing drug testing, drug-free, zero tolerance policies.
- Employers are not prohibited from refusing to hire, discharge, discipline, or take an adverse employment action against a person because of that person's use, possession, or distribution of medical marijuana. (HB 523 does not permit a cause of action).
- Workers' Compensation and UC Benefits impact.
- Not covered by ADA and/or FMLA.

---

---

---

---

---

---

---

---

## PROMOTING EFFICIENCY

- Dual Jobs
  - Do we have FLSA Issues?
- Use of Independent Contractors
  - Checklist
  - Pension Systems are checking on you!
- Regionalization/Contracting for Services
  - Authority to contract
  - More pension issues

---

---

---

---

---

---

---

---

## QUESTIONS?



1.800.282.0787  
[www.clemansnelson.com](http://www.clemansnelson.com)  
Akron | Cincinnati | Dublin | Lima

---

---

---

---

---

---

---

---