ZASHIN & RICH

The More the Change, the More the Same- Managing the Law and Employees March 9,2021

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- AV Preeminent rated by Martindale Hubbell.
- Fellow in the College of Labor and Employment Lawyers.
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- Over thirty years of experience and expertise in representing public and private employers in labor and employment law.
- Negotiated over 500 labor contracts at State, County & Local levels
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- Recognized many times over as a subject-matter expert, Jonathan is designated as one of the Best Lawyers and Top 50 Central Ohio Lawyers and an Ohio "Super Lawyer" every year since 2004.

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About Zashin and Rich

- Zashin & Rich Co., L.P.A. (“Z&R”) has over 20 attorneys who specialize in labor and employment law with offices in Columbus and Cleveland, representing both private and public employers.
- Z&R represents its clients in labor negotiations, human resources matters, and civil service. Attorneys of Z&R have collectively negotiated over 1000 contracts and have represented private and public employers in arbitrations, impasse proceedings and litigation.
- Attorneys represent private employers, universities and colleges, state agencies, special districts, cities, counties, townships, housing authorities, hospitals and others. Attorneys handle matters at the National Labor Relations Board, the State Employment Relations Board, State Personnel Board of Review, and local civil service commissions.

AGENDA

>Employment Law- Discrimination
>Freedom of Speech
>Disability Discrimination
>Discipline
> Fair Labor Standards Act
>Immunity for COVID-19
>COVID-19 Cases
>FFCRA, ESL & FMLAE

Employment Law- Discrimination

columbus | cleveland

Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020)

- In each of three cases consolidated before the Court, an employer allegedly fired a long-time employee simply for being homosexual or transgender.
- The United States Court held that employers each violated Title VII of the Civil Rights Act of 1964 when they fired a long-time employee shortly after the employee revealed that he or she was homosexual or transgender because it was impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.

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- The United States Court held that employers violated Title VII of the Civil Rights Act of 1964 when they fired a long-time employee shortly after the employee revealed that he or she was homosexual or transgender
- Court found that it was impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.

- Altitude Express, Inc. v. Melissa Zarda and William Moore, as Co-Executors of the Estate of Donald Zarda (Sexual Orientation)
- R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC and Aimee Stephens (Transgender/Transitioning)
- Bostock v. Clayton County, GA, 140 S. Ct. 1731 (2020) (Sexual Orientation)

Sixth Circuit – Reasonable Accomodation

- ***Shreve v. City of Romulus,***
  No. 16-12037 (E.D. Mich. June 9, 2017) **Affirmed** 742 Fed. Appx. 97 (6th Cir. 2018)

  The Sixth Circuit affirmed the dismissal of employee's disability discrimination claims and the city's summary judgment motion on the employee's due process claim.

  The Sixth Circuit held the CBA at issue could be reasonably interpreted only one way: an employee, who had not completed the Field Officer Training Program when he was terminated from his employment with the city police department, was a probationary employee, and therefore an at-will employee, at the time of his termination. The Court additionally held with an express at-will employment relationship and without support for a legitimate expectation of just-cause employment, the employee was unable to demonstrate a protectable property interest in his continued employment. Accordingly, his due process claim failed.

  Lastly, the Court concluded because the employee was not otherwise qualified for the proposed reasonable accommodation of a light-duty position, and because the city participated in good faith in the interactive process, the employee was unable to prevail on his disability discrimination claims under the ADA and Michigan law.

Queen v. City of Bowling Green, Kentucky
Case No. 18-5840 (April 22, 2020)

Religious Adverse Action

- Plaintiff claims that from the start of his employment as a firefighter, he was subjected to regular harassment from his coworkers and supervisor for being an atheist.
- He filed suit in Kentucky state court, alleging claims under the KY laws of hostile work environment based on religion, constructive discharge, and retaliation .
- The Court held there was sufficient evidence to find the supervisor's conduct after receiving the harassment complaint amounted to an adverse action. For one, telling the plaintiff that he "should get employment elsewhere," said the court, "could be interpreted by reasonable jurors to convey the message that [he] was no longer welcome at the Fire Department, thus amounting to a constructive termination.

Horvath v. City of Leander, 2020 WL 104345 (5th Cir. 2020).

Vaccinations and Religious Accommodations

- Horvath, employed by the City of Leander Fire Department, Horvath is an ordained Baptist minister and objects to vaccinations as a tenet of his religion.
- In 2016, the City mandated that all personnel receive a TDAP vaccine. When Horvath refused the accommodation of wearing PPE or reassignment to inspector position, he was fired for insubordination. Horvath sued, claiming the Department impaired his freedom of religion.
- The Fifth Circuit upheld Horvath's termination. The Court determined an employer has an obligation to make reasonable accommodations for the religious observances of its employees.
- The Court concluded wearing PPE instead of getting a TDAP vaccine was reasonable.

Perry v. Slensby, 2020 WL 2945004 (2d. Cir. 2020).

Sexual Harassment and Hostile Work Environment

- Westchester County Corrections Officer Kevin Perry sued Captain Robert Slensby for sexual harassment. Perry alleged three separate incidents as evidence of the harassment. Trial court dismissed lawsuit. He appealed to the Court of Appeals.
- The Court upheld the dismissal of the lawsuit, finding that Slensby's conduct was not serious enough to establish a hostile work environment.
- The Court held that "to establish a hostile work environment claim, a plaintiff must show that the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.
- "Finally, it is undisputed that the workplace environment here was characterized by a degree of offensive language and sexual remarks in which Perry himself had participated and which sometimes included physical contact. In this context, Slensby's conduct and comments were not so humiliating as to take them outside the run-of-the-mill, if unpleasant, vulgarity present in this workplace."

Freedom of Speech

Moser v. Las Vegas Metropolitan Police Department, No. 19-16511 (January 12, 2021)

Social Media Posts

- Moser, a former Navy Seal joined the Las Vegas Metropolitan Police Department (Metro) becoming a SWAT member. In 2015, someone shot a Metro police officer, Moser commented on a friend's Facebook post that "it's a shame [the suspect] didn't have a few holes in him." Metro transferred him out of SWAT and put him back on patrol.
- Moser subsequently sued, alleging that his disciplinary transfer was unconstitutional retaliation for his protected speech.
- The Ninth Circuit reversed the district court's grant of summary judgment and found a factual dispute as to whether Metro provided any evidence of predicted disruption.
- The record, said the court, did not support Metro's contention that the officer's comment would have caused disruption. Not only was there no media coverage of the comment, but there was also no evidence anyone other than the anonymous tipster even saw it. Further, the court observed, most people would not have known the officer was a SWAT sniper as nothing in his Facebook profile confirmed that. And that he deleted the comment two months after it was posted made the chance the public would have seen it less likely.

O'Laughlin v. Palm Beach County, 2020 WL 7392456 (S.D. Fla. 2020)

Social Media Posts

- AJ O'Laughlin and Crystal Little are firefighters with the Palm Beach County Fire and Rescue Department in Florida. On February 6, 2019, O'Laughlin made Facebook posts on an invite-only Facebook page. The posts concerned alleged attempted misuse of a Union Time Pool (UTP).
- The UTP is a pool of paid-time-off hours donated by union members for union officers to use to take time off to perform union duties.
- O'Laughlin and Little were disciplined for their social media posts. O'Laughlin and Little sued, contending that the social media policy, both in the abstract and in its application to them, violated the First Amendment's guarantees of freedom of speech.
- The court found that plaintiffs failed to allege facts sufficient to demonstrate that the speech at issue addressed a matter of public concern.
  - "Here, the content of the speech addressed the potential misuse of the UTP, an internal, union-specific, paid-time-off sharing mechanism. The speech did not address misuse of public dollars or the Fire Department's budgeting priorities. Importantly, the Plaintiffs' speech did not regard union organizing, union membership, or retaliation against union members."

Marquardt v. Carlton, No. 19-4223 (6th Cir. 2020)

Social Media Posts

- Fourteen months of the shooting death of 12-year-old Tamir Rice, a post appeared on a Cleveland EMS captain's Facebook page stating that "Tamir Rice should have been shot and I am glad he is dead." The EMS captain was subsequently fired. The lower court found that the captain's posts did not address a matter of public concern noting that the incident made national news
- The Sixth Circuit disagreed with the lower court's finding, reversed and remanded a district court's order granting summary judgment against the captain's 1st Amendment retaliation claims.
- Although the posts included the author's personal opinions on the shooting, which the employer found disturbing, they referred to a subject of general interest and were posted in a widely viewable forum. Because its decision was limited to the question of whether the speech addressed a matter of public concern, the Court remanded to the court below to determine whether the speech was protected by the First Amendment.
- On remand, the district court would need to examine whether the employee's free speech interests outweigh the employer's interest in the efficient administration of its duties.
- The purpose of Facebook, and other social media, is to allow individuals to share options with a wide audience. The court also cited the Supreme Court's decision in *Packingham v. North Carolina,* in which social media is called the "modern public square."

Williams v. City of Allentown, 2020 WL 1166062 (3d Cir. 2020).

Freedom of Speech – matter of speech as a citizen

- Williams, an officer with Allentown PD, aided a co-worker run for public office while off-duty.
- After learning subsequent information, the Department reassigned Williams to work night shift. Williams responded by suing the Department, alleging that his transfer was retaliation for his engaging in speech protected by the First Amendment. *Garcetti v Ceballos* applied – matter of speech as a citizen or an employee
- The Court allowed Williams to proceed with his lawsuit because the Court found Williams was speaking as a private citizen on a matter of public concern."

Moreau v. St. Landry Parish Fire District No. 3, 2020 WL 1696124 (5th Cir. 2020).

Freedom of Speech – matter of employment concerns

- The Board voted to fire Moreau, captain with the St. Landry Fire Protection District, after discovering Moreau's Facebook remarks on a local news story when he commented on the nature of his Board as "clueless idiots"
- The 5th Circuit rejected Moreau's argument that his termination violated his free speech rights under the 1st Amendment
  - "[Moreau] made the Facebook post in the context of his private frustration with the Board's management and decision-making, and a 'personal problem' he had with its Chairman. Moreau's statement was primarily motivated by and primarily addressed his displeasure with District 3's Board and the way it operates."
  - Speech made solely in furtherance of a personal employer-employee dispute isn't public – and generally, an employee speaks in furtherance of his personal employer-employee dispute when he discusses personnel matters directly impacting his job or criticizes other employees or supervisors' job performance.

Knight First Amendment Inst. at Columbia Univ. v. Trump, 928 F.3d 226 (2nd Cir. 2019).

Private Social Media Accounts

- President Trump continued using his then-personal Twitter account, @realDonaldTrump, after his inauguration "as a channel for communicating and interacting with the public about his administration."
  - Several individuals were blocked from accessing Trump's Twitter account "after posting replies in which they criticized the President .
- The Second Circuit held that the blocking of these individuals was a violation of the First Amendment.
- The Court further concluded the First Amendment does not permit a public official to use the Twitter blocking function to exclude individuals because of their disfavored speech.

Disability Discrimination

Bey v. City of New York, 2020 WL 467507 (E.D. N.Y. 2020).

ADA Accommodations

- Bey and three of his colleagues are African-American men who were employed as firefighters .They suffer from Pseudofolliculitis Barbae (PFB), a physiological condition that causes disfigurement of the skin in hair-bearing areas PFB is exacerbated by shaving with a razor down to the skin.
- In 2018, the Chief of Safety revoked their medical accommodations and ordered the firefighters to shave their beards or be reassigned to light duty.
- The firefighters sued, claiming the revocation of the accommodation violated the ADA.
- The Court granted summary judgment in favor of the firefighters. The Court found that "ample evidence in the record indicates that the essential function of the job the firefighters were hired to do was to respond to fires and other emergencies, the assignment to light duty was an empty vessel of opportunities to carry out these tasks. Thus, placement on light duty effectively demoted the firefighters to second-rate firefighters."

Monroe v. Florida Dept. of Corrections, 2019 WL 6048538 (11th Cir. 2019)

ADA Accommodations – Indefinite Leave

- Monroe worked as a corrections officer with the Florida Department of Corrections. Monroe was diagnosed with PTSD and requested an indefinite leave of absence. Shortly thereafter, the Department terminated his employment.
- Monroe sued, claiming he was the victim of disability discrimination.
- Monroe admitted that he could not perform his job duties at that time. Monroe's doctor did not give, and could not have given, a date when Monroe could return to work.
- The 11th Circuit Court of Appeals disagreed and dismissed Monroe's lawsuit.
- Finding: Indefinite leave is not a reasonable accommodation

Kurtzhals v. County of Dunn
No. 19-3111 (7th Cir. 2020)

Workplace Conduct – PTSD and Retaliation

- While sitting at his desk, a sergeant was aggressively approached by his deputy, who yelled at him and called him a liar. When the deputy refused to leave, the sergeant said something like "if you call me a liar again, we are going to take it outside." Because the implied threat violated the county's workplace violence policy, the sheriff placed the sergeant on paid administrative leave and ordered him to undergo a fitness-for-duty evaluation
- A sergeant, who had served in the military, had a history of PTSD. He informed his then-supervisors of his diagnosis and that he had received counseling. When asked following he administrative leave if the leave had anything to do with the Sergeant's PTSD, the Sheriff and Chief Deputy remained silent.
- Suing under the ADA, the sergeant claimed that the County discriminated against him when it placed him on paid administrative leave
- The Seventh Circuit affirmed summary judgment in favor of the County. The Court found the sheriff's and chief deputy's purported silence when asked if their decision to place the sergeant on leave was based on his PTSD fell "well short of an affirmative 'yes.'"

Gipson v. Tawas Police Authority, 2019 WL 6876619 (6th Cir. 2019).

Fitness for Duty Must be Job Related

- Gipson worked for the Tawas Police Authority when he was in a serious car accident. Gipson hurt his back so badly that he was unable to return to work for over six months.
  - Before returning the Authority insisted on a "functional capacity exam," which is the equivalent of a fitness-for-duty evaluation. Gipson passed the exam but, after one week was placed on medical leave again. Gipson contended that the lifting involved in the exam had aggravated his back injury.
- Gipson sued, alleging that the Authority had no right under the ADA to compel him to participate in the exam.
- ADA requirement - employer "shall not require a medical examination, unless it is shown to be job-related and consistent with business necessity."
- The Sixth Circuit dismissed Gibson's claims.
  - The Court found there was ample evidence that would cause a reasonable person to question whether Gipson could perform his job.

Hartwell v. Spencer, 2019 WL5957362 (11th Cir. 2019).

ADA and Essential Functions – Prompt and Predictable Attendance

- Hartwell, a firefighter/EMT for Naval Support Activity (NSA) Panama City, had trouble getting to work on time.
- Hartwell notified the Department that he was diagnosed with ADHD, dysthymic disorder (persistent depression), and generalized anxiety disorder. Hartwell claimed these conditions caused him to be chronically late.
  - He also submitted a request for reasonable accommodation asking that he be allowed to use up to an hour of sick leave on the mornings that he was late.
- The Eleventh Circuit rejected Hartwell's claims.
  - "A firefighter can't do his job if he's not at work."

Discipline

Cleveland Civil Service Commission v. Gerardo Colon

Drug Use – CBD Oil

- City of Cleveland Firefighter was terminated for testing positive for marijuana on October 23, 2019
- Arbitrator Lustig sustained the termination. He explained that although Appellant's explanation that the positive test is the result of his having used CBD oil was credible and his work history is admirable, as long as the federal government classifies marijuana a Schedule 1 drug, with no recognized medical use, there is no alternative but to conclude there is no relief for Appellant in this proceeding.

Ashwaubenon Public Safety Officers' Ass'n and Village of Ashwaubenon.

20-2 ARB ¶7633

Lining up the Drive off the Tee

- Playing in a charity golf tournament an officer, for comedic effect, took off his pants on the 18th tee, revealing a thong and teed off. After investigation, the Department issued a letter to the officer reminding him of the sexual harassment policy and the dress code and urging him to clean up his behavior.

- The arbitrator determined, the thong stunt was inappropriate. The very act of taking one's pants off in public is sexual harassment. The employer had the right to decide that it did not want the behavior repeated. Thus, the employer was within its rights, therefore, to issue the letter and the grievance was denied

Town of West Terre Haute v. Stevens, 2020 WL 2666520 (Ind. App.2020).

Discrimination – Discipline, Pre-D, Racial Slurs

- Stevens, a police officer with the Town of West Terre Haute, was arrested and charged with disorderly conduct and felony domestic battery. The Department placed Stevens on unpaid leave until there was a final resolution of his criminal charges.
- Stevens was convicted for disorderly conduct and not domestic battery. The same day Stevens received notice that he was fired as a result of his conviction. There was no pre-disciplinary meeting offered or conducted.
- Stevens challenged the decision and presented evidence that the Department was racially biased against him. Board member recorded as having made numerous racial slurs.
- The Court overturned Stevens' termination. The Court ruled that "due process in administrative hearings requires that all hearings be conducted before an impartial body. When a biased board member participates in a decision, the decision will be vacated. The Court found "Stevens has shown that he was deprived of a hearing before an impartial body and his due process rights were violated."

Pasos v. Los Angeles County Civil Service Commission
No. B291952 (July 27, 2020)

Discipline for failure to Report – Desire not to be labeled "as a rat"

- Los Angeles County Sheriff's Department, Meghan Pasos was involved in an incident in which another deputy physically assaulted an inmate.
  - She did not witness the act itself, because she was acting as a lookout.
- Pasos was charged with multiple violations and she was fired for her inaction in failing to report the use of force and failing to seek medical attention for the inmate.
- A deputy sheriff's position is held to the highest standard and appeals courts have upheld their discharge for conduct harming the public service.
- The Court concluded that the Department had not abused its discretion in discharging Pasos.
  - Her claim that she had no duty to make a report ran counter to her claim that she did not want to do so because she did not want to "rat" on her partner. The sheriff's department provided a reasoned explanation for why discharge was necessary, and this was not an "exceptional case" where reasonable minds could not differ.
  - Code of Silence not appropriate defense

Yerkes v. Ohio State Highway Patrol, Case No. 2:19-cv-2047 (April 17, 2020)

Discrimination and Constructive Discharge

- A state trooper, a 25-year veteran of OSP, alleged she was the victim of harassing comments and stereotyping by her supervisors (included pictures of naked women in her locker and questions about her sex life) about both her gender and her sexuality, which she described as gay. She was facing several discipline charges.
- She sued under Section 1983 alleging constructive discharge
- Constructive discharge" it is not the employer's overt firing of an employee but the conduct of individuals attributable to the employer that resulted in working conditions that were so difficult or unpleasant that a reasonable person would have felt compelled to resign.
- The Court concluded the trooper had alleged that the individual defendants had the authority to, and did, engage in conduct that she claimed made her working conditions so difficult that a reasonable person would have been compelled to resign.

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Public Records

Cleveland Fire Fighters Assn. IAFF Local 93 v. Cleveland, Dept. of Law
2020-Ohio-7045

Public Record Access and Attorney-Client Privilege

- On May 11, 2020, requester Association of Cleveland Firefighters IAFF Local 93 (Local 93) made a public records request to respondent City of Cleveland Department of Law, for "all emails, attachments, and responses for Fire Chief Angelo Calvillo sent, received, and was CC'd on for all dates between and including 1/26/2020 to 2/05/2020." Cleveland then closed its file on the request without producing any records.

- On June 11, 2020, Local 93 filed a complaint pursuant to R.C. 2743.75 alleging denial of access to public records in violation of R.C. 149.43(B).

- The Court determined Cleveland failed to prove that the withheld emails contain privileged attorney-client communication, offering no evidence as to the nature of any legal advice sought or facilitated by the communications. The Court found neither the affidavits nor the privilege log identified what particular content in any withheld document is a confidential attorney client communication, or why. Thus, Cleveland's filings do not contain any explanation as to how any communication's content is related to legal advice.

Labor Cases / Union Issues

Allen v. Ohio Civil Service Employees Association, 2020 WL 1322051 (S.D. Ohio 2020).

Janus Continues

- When their withdrawal attempts were unsuccessful, members of OCSEA filed a federal lawsuit claiming that the Supreme Court's decision in *Janus v. AFSCME* allowed them to freely withdraw from the union.
  - Alleged that *Janus* established a right to not have union dues and fees deducted from government employees' wages without their affirmative consent.
- The Court concluded at various points in their tenure, the employees' affirmatively decided to join OCSEA and to have union dues deducted from their paychecks. While the employees now try to disaggregate the decision to join the union from the decision to subsidize the union's speech, it is impossible to do so. "*Janus* does not require a different result."
- Challenges to the "exclusive representation" status continue

Jamison v. East Lake Tarpon Special Fire Control District,
46 FPER ¶ 153 (Fla. PERC Gen. Coun. 2019).

Discussing the Contract with Union Member not Direct Dealing

- Union officer filed an ULP against the District alleging that Tom McQueen, an elected commissioner of the District, engaged in improper "direct labor negotiation discussions" via Facebook Messenger with Bobby Sullivan, a member of the negotiation team for the local fire union.
- Labor Board found that "it is not an unfair labor practice for a representative of the union and a representative of management to discuss the negotiations which are occurring or even to engage in negotiations."
- SERB has several cases finding union direct dealing when union officials directly contact City officials not directly involved in negotiations such as City Council or a Board

Town of Bennington v. Knight,
2020 WL 966350 (Vt. 2020).

Reimbursement for Training Costs

- The Bennington, Vermont Police Department hired Clay Knight to work as a full-time patrol officer.
  - Town required him to sign an agreement promising to work for the Department for three years in exchange for receiving full-time training at the Vermont Training Academy.
- Knight resigned with seven months left on his three-year term. The Department sued Knight to recover $3831.15 for training pursuant to the employment agreement.
- The Vermont Supreme Court held that the training-cost agreement was unenforceable as it conflicted with the collective bargaining agreement between the Town and AFSCME, Knight's union. The Court observed that "although the Town's desire to recoup the cost of training its employees may be reasonable, it may not do so by undercutting the salary provisions of the CBA.

Fraternal Order of Police Chicago Lodge No. 7 v. City of Chicago, 2020 WL 1304630 (Ill. App. 2020).

Modification of Schedules by City

- Union filed a lawsuit seeking an injunction in aid of arbitration restraining the Department from implementing a change in start times for all patrol division officers and reducing the day-of groups for officers. Change due to a federal court consent order.
- The Court rejected the Union's argument and concluded that in order to obtain an injunction pending arbitration, a "union must demonstrate that breaches of the agreement are occurring and will continue, or have been threatened and will be committed; that the union has suffered or will suffer irreparable harm as a result; and that the union will suffer more from denial of the injunction than the company will from its issuance.
- Same result not likely if directly implemented by employer.

City of Columbus v. IAFF, Local 67, 2020 WL 994769 (Ohio App. 2020).

Modifying positions to civilian status

- When the City of Columbus notified Local 67 that it intended to civilianize 17 positions, the Union filed a grievance to contest the civilianization.
- The Arbitrator found that language in Section 7.2 of the collective bargaining agreement, wherein the City's agreement "to not civilianize any fire prevention, emergency medical services, or fire suppression services," was broader than its exact terms might suggest when read in context with the balance of the CBA.
- Option: bargain and file petition to amend at SERB

Fraternal Order of Police, Lodge 5 v. City of Philadelphia, 51 PPER ¶ 28 (Penn. LRB 2019).

Instituting New Policies – Management Right?

- Department adopted a new tattoo policy demanding all visible tattoos or body art be covered by cosmetics or clothing. Union filed a ULP complaint City, contending that the City was required to bargain over the policy.
- Pa. Labor Relations Board disagreed, concluding that the tattoo policy was a non-negotiable management right.
- Board found the City's requirement that all tattoos on the head, face, neck and scalp be covered regardless of content is specific and narrowly tailored to projecting a professional appearance of its officers to the public. Indeed, the requirement to cover tattoos located in these visible areas is not unlike the City's restrictions in its dress code ...
- "We also find that the definition of what constitutes an offensive, extremist, indecent, racist or sexist tattoo is not vague or ambiguous…"

City of Everett v. PERC, 2019 WL 5541502 (Wash. Ct. App. 2019).

When Staffing May Be A Mandatory Topic of Bargaining

- In response to the significant increase in workload and safety concerns, the Union proposed to amend the CBA to increase the minimum crew on duty for each shift. The City objected and asserted that the proposal was a permissive – not mandatory – subject of collective bargaining and filed an unfair labor practice complaint
- "Where a subject of collective bargaining relates to working conditions and a managerial prerogative, the scope of bargaining is determined on a case-by-case basis by a balancing approach"
- PERC found the Union met its burden, City appealed to the Court which upheld PERC's decision.
  - "The Union presented compelling evidence that the firefighters' interests in workload and safety outweighs the Employer's right to determine the number of firefighters assigned to each 24-hour shift"
- SERB utilizes a similar balancing standard – *Youngstown* decision.

City of Newark,
46 NJPER ¶ 122 (N.J. PERC ALJ 2020).

Authority to Agree/Settle Grievances

- The Union filed two grievances alleging that the City had improperly calculated the lump sum vacation payout of two retired captains. The City's Police Director granted both grievances and the City still failed to pay the captains the sums claimed by the grievances
- PERC found that the City's conduct breached the collective bargaining statutes by refusing to abide by the Police Director's decision.
  - "an employer's refusal to abide by a decision of its designated grievance representative constitutes a refusal to negotiate in good faith."
- SERB – negotiators should be cloaked with authority and if tentatively agree to an issue it is assumed the negotiator has the authority to agree

Novak v. City of Parma et al, No. 18-3373 (6th Cir. 2020)

Facebook Parody of Police

- Anthony Novak created a parody Facebook page for the Parma Police Department. When the PD discovered Anthony was behind the page, they went to his apartment and arrested him
- After being acquitted of criminal charges, Novak then sued the City for violating his 1st Amendment right to freedom of speech.
- The Sixth Circuit rejected the City's affirmative defense of qualified immunity, permitting Anthony to bring his claims against the Parma Police Department and the City.
  - In holding Novak's page was protected under the First Amendment, the Court reemphasized the standard for parody is a reasonable reader standard, not the "most gullible person on Facebook" standard.

Fair Labor Standards Act

Perkins Township v. IAFF Local 1953, 37 OPER ¶ 36 (Ohio Ct. App. 2019)

FLSA – Hours counted for Hours Worked

- The practice of the parties under the expiring CBA was to count all hours in active pay status, including paid leave, when determining eligibility for overtime.
  - The Township sought to exclude vacation time, personal days, comp time, and sick leave from the overtime eligibility calculation. It argued that its position was in accordance with Fair Labor Standards Act requirements.
  - Local 1953 proposed that hours worked for purposes of calculating overtime eligibility should include "all hours an employee is in active pay status, excluding sick leave and hours already eligible for overtime pay, including holdover, callback overtime, tone outs, or court appearance overtime, and Kelly Days."
- The Arbitrator selected IAFF's position. The FLSA provides minimum standards that may be exceeded, but cannot be waived or reduced. "The task of the Arbitrator here was to resolve the parties' impasse over the terms of the CBA by selecting one of the parties' final offers. The FLSA sets a floor – not a ceiling – for an employer's obligation to pay overtime. The Township cites nothing that would prohibit the Arbitrator from choosing a proposed final offer that places obligations upon the Township that are more stringent than those required by the FLSA. As such, the Arbitrator was free to select IAFF's final offer and did not exceed his powers in doing so."

Miller v. Travis County, Texas, 2020 WL 1471836 (5th Cir. 2020)

FLSA Exemptions

- A group of lieutenants in the Travis County Sheriff's Office in Texas brought an overtime lawsuit under the Fair Labor Standards Act. The lieutenants claimed they were wrongly treated as exempt employees. When a jury found in the lieutenants' favor, the County appealed.
  - The County's argument was that the lieutenants were exempt "executive" employees. A required element of the executive exemption is that the employee be one "who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, or promotion are given particular weight. As the lieutenants could not hire or fire, the question came down to whether their recommendations received "particular weight."
- Fifth Circuit found ample support for the jury's conclusion that the County did not give "particular weight" to the lieutenants' recommendations on hiring and firing. The Court observed that "the hiring and promotional boards did not provide the lieutenants any special influence." Thus, the lieutenants were not exempted from FLSA requirements.

Stewart v. City of Greensboro, No. 3:18-CV-129 (Mar. 31, 2020)

- Stewart, a police officer for Greensboro PD brought action for FLSA violations against the City. Stewart alleged the City failed to compensate him for overtime and terminated him in retaliation for complaining about his lack of pay.
- The City, on motion for summary judgement contended that any hours Stewart worked in excess of 171 per 28-day work period were de minimus and may therefore be disregarded. Even if the hours were not de minimus, the City argued its conduct was not willful as a matter of law, and therefore Stewart's claim should be limited to FLSA's two-year statute of limitations, not three years, and Stewart is not entitled to liquidated damages.
- The Court was unpersuaded by the City found genuine issues of material fact exist as to both the amount of overtime hours Stewart worked and the City's willfulness.

Immunity for COVID Cases

House Bill 606 – Providing (Civil) Immunity from COVID-19

- On September 14, 2020, Governor Mike DeWine signed House Bill 606 (HB 606) into law, providing civil immunity to employers and health care providers that unknowingly spread coronavirus in the workplace.
  - The bill extends protections to **all** Ohio entities, including governmental entities, schools, for-profit or nonprofit entities, religious entities, and universities.
- HB 606 is effective starting December 16, 2020. However, the provisions of HB 606 are both retroactive and temporary in nature, providing immunity from the date of the declared state of emergency in Ohio, March 9, 2020, through September 30, 2021.
- Link to text of HB 606: https://www.legislature.ohio.gov/legislation/legislation-documents?id=GA133-HB-606.

HB 606: Protections

House Bill 606 is intentionally designed to protect a wide array of entities from liability due to actions taken in response to COVID-19. The bill states:

- *Section 2. (A) No civil action for damages for injury, death, or loss to person or property shall be brought against any person if the cause of action on which the civil action is based, in whole or in part, is that the injury, death, or loss to person or property is caused by the exposure to, or the transmission or contraction of, MERS-CoV, SARS-CoV, or SARS-CoV-2, or any mutation thereof, unless it is established that the exposure to, or the transmission or contraction of, any of those viruses or mutations was by reckless conduct or intentional misconduct or willful or wanton misconduct on the part of the person against whom the action is brought.*

- The new law defines "person" broadly - the term covers **all** Ohio entities.
- Put simply, employers and other entities cannot be sued for unknowingly transmitting COVID-19 in their workplace or on their premises.

HB 606: Protections (cont.)

- Further, HB 606 specifically provides that public health orders issued by the executive branch (e.g., Governor DeWine and the Ohio Department of Health), as well as public health orders issued by federal government agencies, counties, local municipalities, and boards of health or public health agencies do not create new legal duties for purposes of tort liability. These public health orders are presumed to be irrelevant and inadmissible at trial regarding issues of the existence of a duty and the breach of a duty in tort actions.

- The Act provides further protection for any employers and health care providers that the general immunity does not apply to by prohibiting class action lawsuits from being brought against these employers and health care workers.

HB 606: Liability Remains for Reckless Conduct

- Under HB 606, employer liability remains for intentional or reckless conduct. The Act defines “reckless conduct” as follows:
  - *"Reckless conduct" means conduct by which, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that the person's conduct is likely to cause an exposure to, or a transmission or contraction of, MERS-CoV, SARS-CoV, or SARS-CoV-2, or any mutation thereof, or is likely to be of a nature that results in an exposure to, or a transmission or contraction of, any of those viruses or mutations[.]*
- Further, employers can still be issued citations by state and federal authorities for failing to adhere to public health orders. Thus, if an employer is issued such a citation, it may be used as evidence that the employer was acting intentionally or recklessly in their contribution to COVID-19 exposure.

COVID-19 Cases

Woolslayer v. Driscoll
Case No. 20-573 (W.D. Pa 2020)

- In late March 2020, an employee discovered that another employee had been exposed to COVID-19. He determined that he should share this information with university employees and caution them to take the necessary steps to avoid infection. The employee then sent an email notifying several coworkers that "one of our colleagues is self-quarantined due to exposure to COVID-19."
- The university president subsequently fired the employee because senior leadership had lost confidence in his ability to effectively perform his assigned duties.
- The employee commenced this lawsuit, under 42 U.S.C. § 1983, against the university president alleging a claim of First Amendment retaliation and seeking reinstatement to his prior employment. In response, the president filed a motion to dismiss.

Woolslayer v. Driscoll
Case No. 20-573 (W.D. Pa 2020) (cont.)

- A federal district court in Pennsylvania first determined that as a public employee, the plaintiff spoke as a citizen, rather than an employee, when he sent the email to colleagues.

- Further, the court concluded that the speech at issue was not part of the work he was paid to perform on an ordinary basis. Moreover, both the content and the context of the employee's email suggested that he was speaking on a matter of public concern.

- Thus, the president's motion to dismiss was denied.

The International Association of Firefighters, AFL-CIO, Local 198 v. City of Atlantic City

- The Atlantic City firefighter's union filed suit alleging that the department's policy of directing firefighters to return to work after they were exposed to infected coworkers, but tested negative themselves for COVID-19, risks spreading the coronavirus among firefighters, their families and the public.
    - The union is asking the department to require exposed firefighters to self-quarantine for 14 days on paid leave regardless of the outcome of tests.
- Additionally, the union asked for an injunction to force the city to professionally disinfect each station between shifts, and to postpone the training of new hires scheduled for this week. One of the firefighters who tested positive was scheduled to be an instructor for the new hires, and was in close contact with other trainers
- Union complaint was filed 9/28/20 and still pending.

FRATERNAL ORDER OF POLICE, CAPTAIN JOHN C. POST LODGE NO. 44 v. DAYTON CITY COMMISSIONER
Case No. 2020 CV 02616

- Dayton's police and fire unions sued the city claiming it has violated agreements that suspended some sick leave requirements during the coronavirus pandemic.
- On March 31, the city entered a memorandum of understanding (MOU) with the Fraternal Order of Police Lodge No. 44 that made some temporary changes to the union's contract, The MOU removed a requirement in the police union's contract that says employees must provide a doctor's certificate for "repeated" sick leave use or absences of more than three days, with a few exceptions.
- On June 30, the city issued an emergency order that re-instituted the requirements for medical certification and doctors' notes for sick leave.
- Subsequently, the FOP and IAFF filed a joint lawsuit against Dayton's city manager, mayor and the city commission seeking a temporary restraining order and injunction to block enforcement of Emergency order.
- On 9/8/20, all parties entered into a settlement agreement that amended Emergency Order No. 2020-1 and reinstated the MOU.

Timothy Burkhard v. City of Plainfield Docket No. UNN-L-2356-20

- Timothy Burkhard, who is an Asian American firefighter, filed a discrimination lawsuit against Deputy Fire Chief Pietro Martino and the city after Martino made “racist comments about Asians” to Burkhard during the fire department’s training on COVID-19 in March.
- The complaint filed 7/23/20 alleged Martino mockingly asked Burkhard if he had been to Wuhan, China recently and “squinted his eyes so that they narrowed in a racist caricature of Asian facial features.“
    - Martino was not disciplined for the comment and did not apologize. According to the complaint, Martino has engaged in prior workplace harassment incidents which the city of Plainfield “knew or should have known,"
- Burkhard contends Martino violated New Jersey’s Law Against Discrimination and that he suffered “annoyance, inconvenience, stress, anxiety, humiliation, depression and severe emotional distress.”
- On 10/22/20, the court granted the city’s motion extending time to file an answer.

Palmer et al. v. Amazon.com Inc. et al., Case No. case number 20-cv-2468 (E.D.N.Y. 2020)

- Workers in various roles at an Amazon fulfilment center filed suit in June seeking a court order making Amazon do a better job protecting workers from COVID-19, including giving workers more time to complete their tasks and immediate access to paid time off they hadn't yet accrued.
- The court denied the workers request stating it's the place of the Occupational Safety and Health Administration (OSHA), not the courts, to decide whether Amazon is doing enough to protect workers.
  - Specifically, Judge Cogan said, "Courts are not experts in public health or workplace safety matters, and lack the training, expertise, and resources to oversee compliance with evolving industry guidance…[p]laintiffs' claims and proposed injunctive relief go to the heart of OSHA's expertise and discretion."

Leave Issues After Bringing Employees Back From Furlough (cont.)

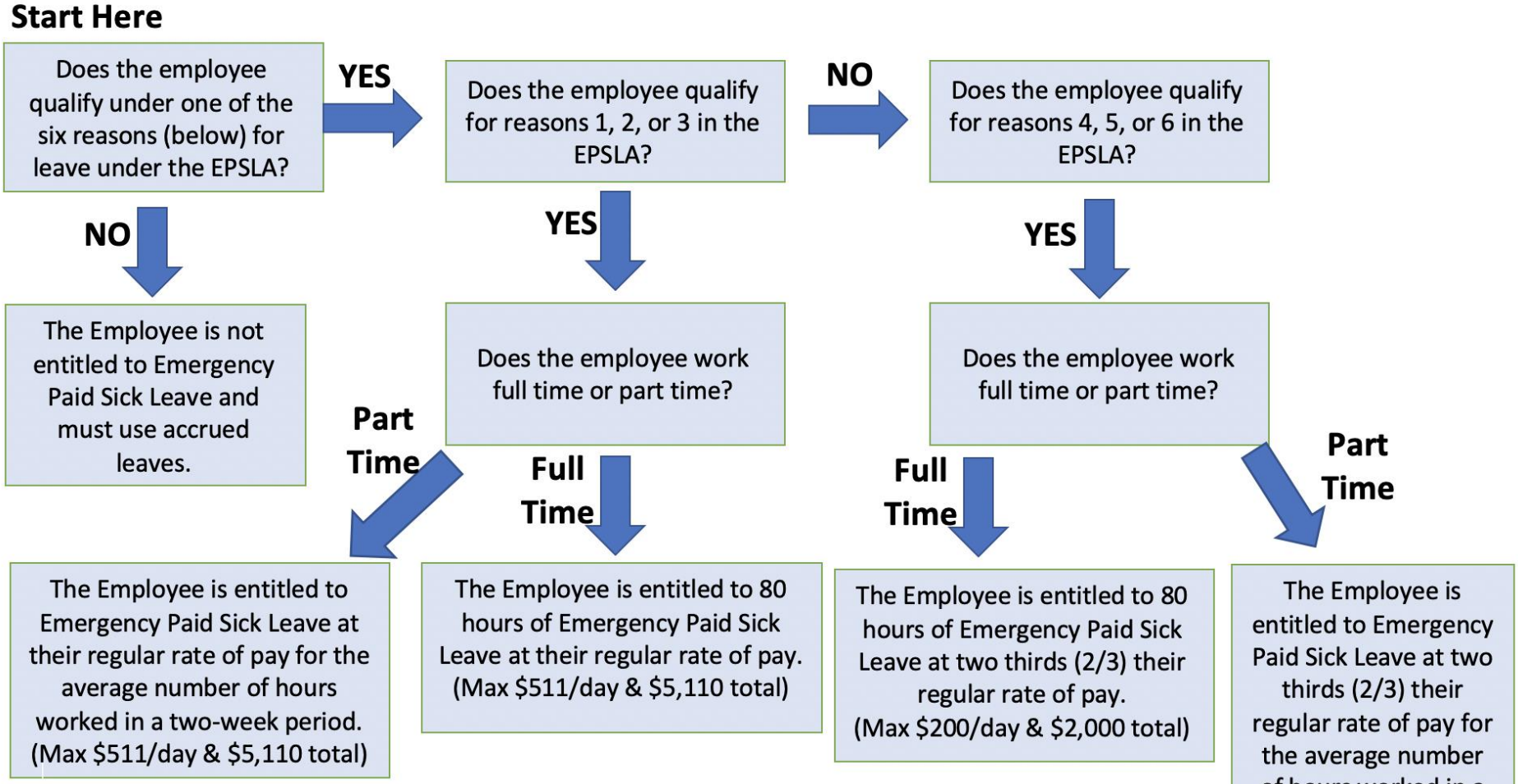
- S**econd.** Where an employer is returning employees to work after a local quarantine order forced a mass furlough. If a specific worker would require FFCRA leave to care for their child upon being called back for work, the Labor Department warned employers that you cannot extend the furlough for that employee to avoid FFCRA obligations. That would be considered discrimination or retaliation against an employee for exercising or attempting to exercise their right to take leave under the FFCRA. DOL has stated:

  "If your employee's need to care for his child qualifies for FFCRA leave, whether paid sick leave or expanded family and medical leave, he has a right to take that leave until he has used all of it. You may not use his request for leave (or your assumption that he would make such a request) as a negative factor in an employment decision, such as a decision as to which employees to recall from furlough."

FFCRA, PSL and EFMLA

Qualifying Reasons for: **Emergency Paid Sick Leave (EPSL)**	**Weeks 1 and 2** **(80 hours)**		**Weeks 3 through 12** **(additional 10 weeks)**
1. subject to a Federal, State, or local quarantine or isolation order related to COVID-19	Paid EPSL at regular rate	No EFML	No EFML
2. has been advised by a health care provider to self-quarantine related to COVID-19	Paid EPSL at regular rate	No EFML	No EFML
3. is experiencing COVID-19 symptoms and is seeking a medical diagnosis	Paid EPSL at regular rate	No EFML	No EFML
4. is caring for an individual subject to an order described in (1) or self-quarantine as described in (2)	Paid EPSL at 2/3 regular rate	No EFML	No EFML
5. is caring for his or her child whose school or place of care is closed (or child care provider is unavailable) due to COVID-19 related reasons **This is Also the Only Qualifying Reason for Emergency Family Medical Leave (EFML)**	Paid EPSL at 2/3 regular rate	Unpaid EFML	PAID EFML at 2/3 regular rate
6. is experiencing any other substantially-similar condition specified by the U.S. Department of Health and Human Services	Paid EPSL at 2/3 regular rate	No EFML	No EFML

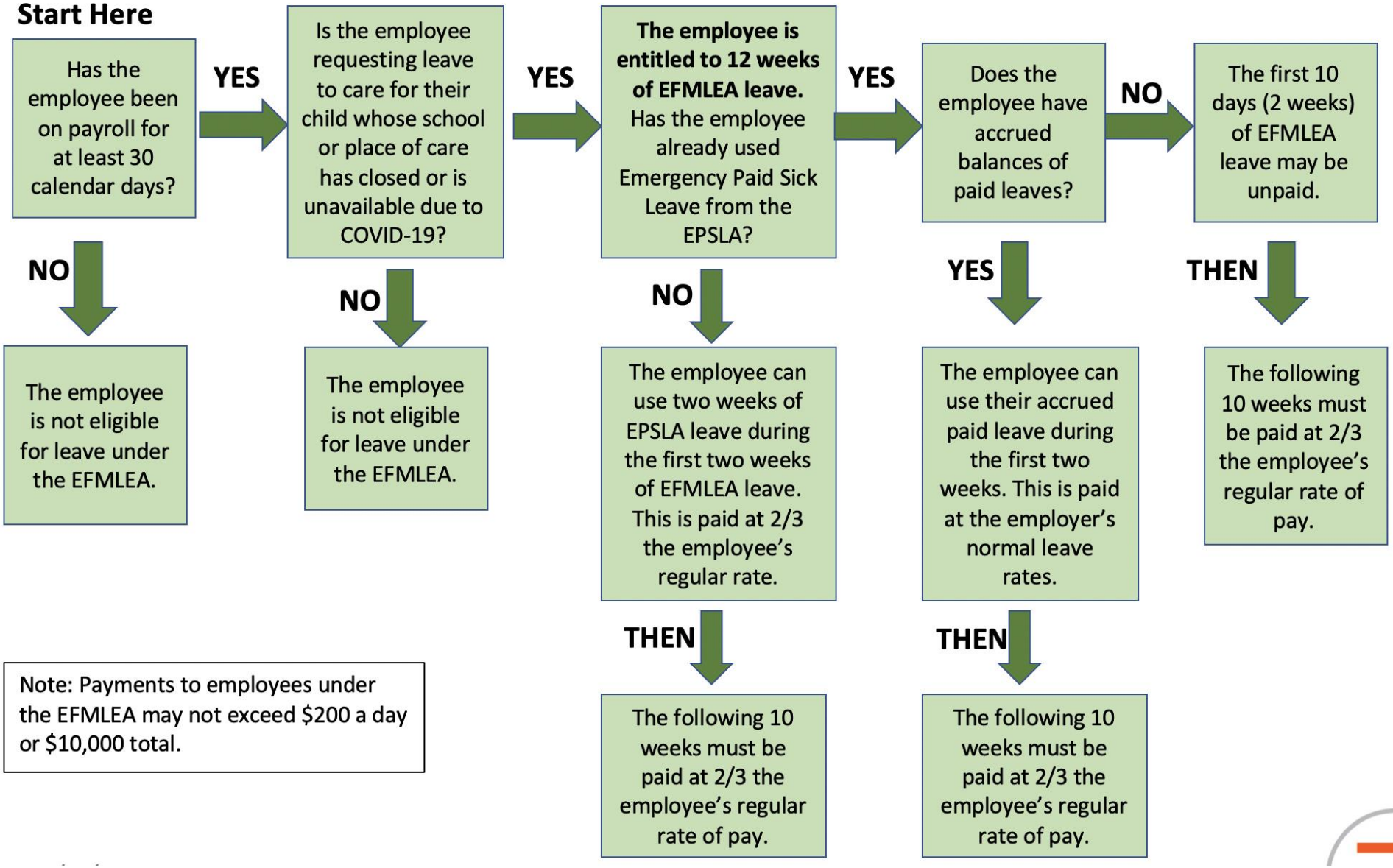
Determining an Employee's Pay Under the Emergency Paid Sick Leave Act (EPSLA)



Qualifying reasons to take Emergency Paid Sick Leave (all relating to COVID-19):

(1) The employee is subject to a Federal, State, or local quarantine or isolation order.
(2) The employee has been advised by a health care provider to self-quarantine.
(3) The employee is experiencing symptoms of COVID–19 and seeking a medical diagnosis.
(4) The employee is caring for an individual who is subject to such an order in (1) or such advice in (2).
(5) The employee is caring for their child whose school or place of care has closed or is unavailable.
(6) The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

Determining an Employee's Pay Under the Emergency Family and Medical Leave Expansion Act (EFMLEA)



Note: Payments to employees under the EFMLEA may not exceed $200 a day or $10,000 total.

DOL Wage and Hour Guidance

- You can require exempt employees to temporarily perform nonexempt duties during the COVID-19 public health emergency and continue treat them as exempt (so long as you continue to pay them a salary basis of least $684 per week).
- “Hazard pay” is not required under the FLSA for employees working during the COVID-19 pandemic.
- You can provide exempt employees with paid sick leave or expanded family and medical leave under the FFCRA without affecting their exempt status.
- You can also reduce an exempt employee’s salary because of the COVID-19 pandemic and subsequent economic slowdown.

When to Consider Paid Leaves or Extension of Leaves

- **Employee presents COVID, is exposed, and isolated**
- **Employee self-concern absence**
- **Childcare - Parental care**
- **“Compromised health condition” self or family**
- **When may employees access paid leaves and what time limits on the use**
- ***Check applicable union contracts Policies***

Considerations for Paid Leaves or Extension of Leaves

- **Authority to grant additional paid leave**
- **Requirement to use accumulated leave first**
- **Leave without pay**
- **Reduction in pay / layoff (private WARN act)**
- **Discipline considerations – Public RC 124.24**
- **Unilateral grant of benefit (pos. ULP if unions)**

FFCRA on Remote Work Policies

- The DOL said that employers may temporarily require an employee returning from FFCRA leave to work remotely or reinstate them to an equivalent position requiring less interaction with coworkers, in certain situations.
- While employees returning from FFCRA leave have a right to be restored to the same or an equivalent position, employees who have potentially been exposed to COVID-19 – for example, those who took leave to care for a family member who was advised by a health care provider to self-quarantine because of COVID-19 symptoms – can be treated differently.
- Specifically, the DOL said that you may require any employee who knows they have interacted with an infected person to telework or take leave until they have personally tested negative for COVID-19 infection. “However,” the agency said, “you may not require the employee to telework or be tested for COVID-19 simply because the employee took leave under the FFCRA.”

Wage and Hour Guidance on Remote Work

- An employer is required to pay its employees for all hours worked, including work not requested but suffered or permitted, including work performed at home.
  - 29 C.F.R. § 785.11-12.
- If the employer knows or has reason to believe that work is being performed, the time must be counted as hours worked.
- One way an employer may exercise such diligence is by providing a reasonable reporting procedure for nonscheduled time and then compensating employees for all reported hours of work, even hours not requested by the employer.

Leave Issues After Bringing Employees Back From Furlough

- The Department of Labor offered **two** specific examples to illustrate the leave obligations an employer may have to offer workers brought back from furlough.
- **First:** The FFCRA obligates employer to provide up to 12 weeks of expanded family and medical leave to employees once they return from any furlough absence, and that their time off on furlough does not count as FFCRA time.
  - If an employee used four weeks of leave before furlough, for example, and then was off work for several months, they are still eligible for eight additional weeks of leave for any qualifying reason. The reason for any such leave may have changed during the furlough, so employers should treat a post-furlough request for expanded family and medical leave as a new leave request and have the employee provide the appropriate documentation related to the current reason for leave.

QUESTIONS

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