Labor Law and Employment

Module Description

This module will address topics of the law in six sections that are experienced by municipal employees in today's society. In total, the sections will provide information on areas of the law that deal with developing a productive hiring and firing process as well as reducing exposure to litigation from legal missteps in the hiring process. To address the changes that are taking place in society, one section will include emerging legal topics as well as reviewing the challenges of balancing the use of social media at work by employees. Questions about personnel matters that may be encountered by municipal employees will also be discussed.

Module Objectives

Upon completion of this module the participant will be able to:

- Learn the correct steps, procedures, and boundaries in the hiring and firing of employees and how to avoid the common mistakes normally taken in the hiring and firing process
- Study the legal steps to reduce the risk for litigation from employees
- Adapt operating policies and procedures to respond to the changes in the law that address concealed weapons, medical marijuana, e-cigarettes and how they can be addressed in the workplace
- Familiarize yourself with common practices for drafting and enforcing a social media policy
- Understand tips in getting the personnel policy manual up to speed with correct procedures and updates in order to reduce exposure to litigation

Hiring & Firing: Reducing Litigation Expenses

Whether or not you are currently in a position to hire or fire employees, it is a good idea to be aware of how the law views the hiring and firing process. Armed with this knowledge you can protect your municipality from litigation that may come about from mishandling each.

I. AUTHORITY

The municipal corporate authorities may dictate how employees, as distinguished from officers, are hired or fired and may delegate such power to some person other than the mayor or president. The legislative body may not, however, use this power to create positions that would frustrate the executive power of the mayor to appoint officers. Some other rules apply in manager and commission forms of government.

II. AT-WILL EMPLOYMENT

Generally, unless an employee has achieved a tenure position by statute or by ordinance, or unless the employee is given employment with a fixed duration of time, the employment relationship is "at-will." At-will employment means either the employer or the employee may terminate the employment at any time, for any reason, other than an illegal reason, or for no reason at all. Illegal reasons, for purposes of this definition, are generally defined as discrimination-based employment decisions.

III. PROPERTY INTEREST IN EMPLOYMENT

Additionally, courts often find that an employee possesses a protected "property interest" in continued public employment. When this interest exists, a municipality must follow the requirements of due process for the dismissal. To determine whether a property interest in continued employment exists, a municipality needs to examine the circumstances surrounding the employment relationship, including personnel policies and handbooks, job offers, agreements with particular employees and other similar factors.

For example, language in a personnel manual may create a binding contract with property interests unless it is properly drafted. Courts often find no contractual rights to employment exist when employee manuals or company handbooks contain clear disclaimers which explain that the employment relationship is at-will. However, an employer's unilateral modification of an employee handbook to include a contract disclaimer after employment

has commenced has been found to be invalid in the absence of a reservation of the right by the employer to make unilateral changes.

IV. PERSONNEL POLICIES

Municipalities should seek expert advice when drafting personnel manuals or policy handbooks because the words used may take on more than their everyday meanings. For instance, language in a personnel code which provides that an employee may not be fired except "for cause" does not only mean that the employee must be given some reason for the firing but it also means that the employee is entitled to a full due process hearing. Sometimes, however, personnel codes contain language indicating that the statements in the code merely set goals of employee and employer behavior. Courts have permitted municipalities to change these statements of goals and, at times have not held the municipalities to the stated goals.

V. TERMINATION

Employees may not be fired for exercising their constitutional rights, including criticizing elected officials, joining labor unions or living a lifestyle which does not offend community standards or interfere with their job performance. Employees may not be subjected to discharge or any type of retaliation for "whistle blowing."

VI. PATRONAGE

Employees who hold non policy making, non-confidential positions may not be denied employment or be fired solely because they belong to another political party. In Elrod v. Burns, the United States Supreme Court held that the practice of patronage dismissals violated the First and Fourteenth Amendments of the U.S. Constitution. The Court found that patronage dismissals in low and mid-level public positions severely restricts political belief and association, which constitute the core of those activities protected by the First Amendment, and government may not force a public employee to relinquish the right to political association as the price of holding a public job. The Court stated that since unproductive employees may always be discharged and merit systems are available, it is clear that less drastic means than patronage dismissals exist to ensure the vital need for governmental efficiency and effectiveness. The United States Supreme Court extended this holding to cover independent contractors. The Supreme Court also found that, unless the government may demonstrate an overriding interest of vital importance requiring that a person's private beliefs conform to those of the hiring authority, such beliefs may not be the

sole basis for depriving him of continued public employment. Although a pre termination hearing may not be required, under some circumstances the courts may require a post-termination hearing.

Hot Topics in Employment Law

Guns, Drugs & E-Cigarettes

Concealed weapons, medical marijuana and e-cigarettes are three growing areas of concern related to safety and managing your workspace environment. These topics will probably arise when you least expect it. The following will give you a good background on what actions to take.

I. MEDICAL MARIJUANA

A. Compassionate Use of Medical Cannabis Pilot Program Act

1. 410 ILCS 130/1

2. Effective January 1, 2014

3. IDPH/IDFPR/IDOA/IDOR regulations
   a) Patient, Dispensary, Cultivation & Tax Rules

B. What's allowed?

1. 68 Ill. Admin. Code §1290.20 - Dispensary Distribution throughout State
   a) Non-Cook County within Collar Counties – 15 dispensaries (divided by County)
   b) Cook County – 24 dispensaries - 13 in Chicago, 11 outside Chicago (divided by township(s))
   c) Non-Chicago Metropolitan Area – 21 dispensaries (divided by police district)

2. 2.5 ounces every 2 weeks

3. 60 licensed dispensaries in Illinois

4. 22 cultivation sites – 1 in each state police district

5. 1% tax on patients

6. 7% tax on growers and dispensaries

C. Who can get a card?

1. 30 different conditions qualify
   a) Cancer
   b) Glaucoma
   c) HIV
   d) Aids
   e) ALS
   f) MS
   g) Fibromyalgia
   h) Lupus
   i) Residual limb pain
   j) Tourette's Syndrome
   k) Hepatitis C

D. What's prohibited?

1. Section 30. Limitations and Penalties
   a) CDL regulations prevail
   b) May not be used in public place
   c) Areas covered by Smoke Free Illinois Act
   d) Driving under the influence
   e) Police and firefighters
   f) May not use around persons under 18
   g) Can't share medical cannabis with friends
   h) Can't sell your medical cannabis to others

E. What can employers do?

1. Adopt reasonable rules

2. Discipline for creating risk of liability

3. Consider when an employee is impaired and unqualified to perform the job

4. Prohibit the use of medical cannabis in any "public place"

5. Prohibit the use of medical cannabis in any municipal vehicle

6. Federal law does not recognize the right to consume medical cannabis

7. Medical cannabis may not be consumed by CDL holders

8. Police officers and firefighters may not use medical cannabis

F. Other issues

1. Private businesses can restrict or prohibit the use of medical cannabis on their premises

2. Universities, colleges or other institutions of post-secondary education can restrict or prohibit the use of medical cannabis on their property

3. Cultivation centers must have security plans and 24 hour surveillance in place. Security plans must be reviewed and approved by the State Police

4. Cultivation centers cannot be within 2500 feet of the property line of any pre-existing public or private pre-school or elementary or secondary school or day care center or an area zoned for residential use

II. CONCEALED CARRY

A. Firearm Concealed Carry Act

1. 430 ILCS 66/1

2. Effective January 1, 2014

B. Concealed Carry Licenses: The Illinois State Police were given a deadline to review applications for a license to carry a concealed firearm. Deadline changes depending on form of application

C. Prohibited areas

1. Any building or portion of a building under the control of a local government

2. Playgrounds & parks, except you can't prohibit carrying on bike path or trails when only a portion of it runs through the park

D. Signage: The Illinois State Police (ISP) has enacted rules on required signage for prohibited areas

E. Local Policies

1. The Act preempts local governments (Home Rule too) from regulating or prohibiting handgun possession by licensees outside of prohibited areas

2. Check your local codes – you may have regulations on the books that conflict with the new law

F. Personnel Policies

1. Illinois' concealed carry law, like those in other states, is silent on a municipal employer's right to prohibit guns in the workplace

2. Challenges to employer policies have been unsuccessful in other states

III. E-CIGARETTES

A. What are electronic cigarettes?

1. Electronic cigarettes, also known as e-cigarettes, are battery-operated products designed to deliver nicotine, flavor and other chemicals. They turn nicotine and other chemicals into a vapor that is inhaled by the user

2. E-cigarettes can be manufactured to look like conventional cigarettes, cigars, or pipes. Some resemble everyday items such as pens and USB memory sticks

B. E-cigarettes can be characterized as either a tobacco product or a drug

1. Sottera, Inc. v. Food & Drug Admin., 627 F.3d 891 (D.C. Cir. 2010)

2. Since Sottera, the FDA has not released any definitive report regarding whether e-cigarettes represent a public health threat

3. FDA lacked authority to regulate e-cigarettes as a drug if customarily marketed without claims of therapeutic effect

4. FDA had authority to regulate e-cigarettes customarily marketed without claims of therapeutic benefit as a tobacco product (e-cigarettes are “derived from” tobacco)

5. FDA is currently preparing to exercise their regulatory authority by publishing proposed rules for the manufacture, labeling, marketing and sales of e-cigarettes

C. How are e-cigarettes treated under the Smoke Free Illinois Act?

"Smoke" or "smoking" means the carrying, smoking, burning, inhaling, or exhaling of any kind of lighted pipe, cigar, cigarette, hookah, weed, herbs, or any other lighted smoking equipment.

D. Local Regulation?

1. Chicago Sun-Times, January 13, 2014:

    a) City of Chicago agrees to ban e-cigarettes where smoking is prohibited
    b) City Council's Health and Finance Committees voted to regulate e-cigarettes as "tobacco products" subject to Chicago's smoking ban
    c) Evanston and Mount Prospect have also adopted regulations

2. Ultimately, is there a rational basis for including e-cigarettes within the scope of the Smoke Free Illinois Act or a local smoking ban?

    a) Post-Sottera, the FDA regulates e-cigarettes as tobacco products, (but only because the definition of tobacco product under applicable law includes products made or derived from tobacco, and the nicotine in the e-cig is derived from natural tobacco)
    b) Smoke Free Illinois Act was motivated by protecting the health of bystanders from the negative secondary effects from smoking
    c) SFIA does not expressly require the use of tobacco to satisfy the definition of "smoking", but adopting interpretation of KS OAG would exclude e-cigarettes

3. Will Chicago's ordinance be challenged? What will the result be?
    a) Public smoking bans are evaluated as public health and safety regulations which do not touch upon a fundamental right, so they are evaluated under a test which asks whether there is any rational basis for the regulation
    b) Under the rational basis standard, there is less demand for concrete proof of secondary health effects and there may be other policy considerations which justify the regulation (e.g. simplify enforcement, primary health effects (paternalism))

E. How are employers allowed to address e-cigarettes?

1. Places of employment are covered by the Smoke Free Illinois Act

2. Personnel policies may not be less restrictive than State law – preemption

3. What other motivations are incorporated into personnel policies?

4. What about public vehicles used in the course of employment?

Employee Compensation and Benefits

Unless you are in human resources, wage and hour issues, the Family and Medical Leave Act, the Affordable Care Act, and other topics can be complex issues to work with. Even with the changes that occur with benefits, these topics can even be confusing for human resource professionals. The following will give you an awareness of these items so that you can help employees find the right answers to their questions.

I. COMPENSATION AND BENEFITS

A. Fair Labor Standards Act ("FLSA")

A municipality is subject to the Illinois Minimum Wage Law (IMWL) and also to the Fair Labor Standards Act (FLSA), which establishes Federal regulations relating to minimum wage, overtime pay, and other matters. The general rule under the FLSA is that employers must pay their employees time-and-a-half for hours worked in excess of 40 in a seven-day week. In this regard, each workweek stands on its own; unless exempted, an employee must be paid overtime for each workweek in which he works over 40 hours, even though he may work only 80 hours in a payroll period.

The overtime requirement does not apply to employees who are exempted from the requirement by statute. The most common exemptions are the exemptions for executive, administrative, and professional employees, computer professionals, and outside salesmen. The overtime requirement also does not apply to employees of either police or fire departments that employ less than five employees. Civilian personnel and bona fide volunteers employed by such departments are not counted in determining whether this exemption applies. However, part-time police officers, firefighters and department members

who may themselves be exempt from coverage under the FLSA as executives, administrators or professionals, are counted.

Various work periods ranging from seven to 28 days can be established under the partial exemption contained in Section 207(k) of the FLSA (the "Section 7(k) exemption"). If the conditions for the application of the Section 7(k) exemption apply, the overtime requirements of the FLSA are met where, for example, firefighters are paid overtime for any hours in excess of 212 worked during a 28-day period or for any proportional number of hours worked in a lesser period, ranging down to any hours in excess of 53 in a seven-day period. For police officers, the Section 7(k) exemption can apply to require overtime to be paid only after 181 hours of work in a 28-day period, or proportionally less hours worked in lesser work periods between seven and 28 days in length. Thus, electing to use the Section 7(k) exemption for police and fire employees can reduce the department's overtime liability more than would the standard seven-day work period.

In 1985, the FLSA created a statutory exception for public employers from the requirement that overtime be paid only in cash. This exception provides that "non-exempt" public employees may be paid by compensatory time ("comp time"), meaning time off from work, in lieu of cash overtime in certain circumstances. The use of comp time must be pursuant to an agreement with the employee or union. There are no requirements that a formal written agreement must be established, but some written record should be maintained. Comp time must be awarded on a time and a half basis. That is, one and one half hours of comp time must be awarded for every hour of overtime worked, in lieu of cash overtime payment.

Employees may accumulate or "bank" comp time subject to the following limits: public safety employees, such as police and firefighters, may bank up to 480 hours of comp time, while other employees may bank only as many as 240 hours. An employee's request to use comp time must be granted within a reasonable time unless it would unduly disrupt the operation of the municipality. An employee with accrued comp time upon termination must be paid the higher of the average regular rate received by the employee during the preceding three years or the final pay rate for the unused time.

Further, once an agreement to use comp time has been reached between the employer and employees, public employers may compel their employees to schedule and use their accrued comp time. Although not required, it is suggested that all employers put comp time agreements in writing and include a sentence authorizing the employer to control the employees' use of comp time.

The damages under the FLSA available to employees are potentially extremely high. The FLSA imposes fines of up to $10,000 for willful violations of the Act. Employers may be held liable for all unpaid compensation, mandatory liquidated damages (equal to the amount of the unpaid compensation) and attorneys' fees.

In 2004, both the federal government and Illinois legislature passed laws impacting employee overtime and wages. At the federal level, new labor regulations were enacted to more clearly define those executive, administrative and professional employees who are exempt from overtime under the FLSA. At the same time, Illinois amended the Minimum Wage Law (MWL) to eliminate the governmental body overtime pay exemption from the MWL and adopt rules applying the FLSA interpretations as they existed before any federal FLSA changes were made. The new MWL also increased the minimum salary threshold level to coincide with the federal level, which is now $455 per week.

What the changes mean is that, when determining whether an employee is exempt or nonexempt, Illinois employers must now analyze the employee's wage and job classification under both the federal FLSA and Illinois' Minimum Wage Law. The primary difference between the state and federal regulations concerns the executive exemption, which is widely applied by public sector employers to staff supervisors. While both regulations require management and supervision over two or more employees, the federal rules also provide that the employee has the authority or meaningful input into hiring and firing decisions. This could potentially affect the exempt status of lower level supervisors in governmental bodies with civil service and board of fire and police commissions.

B. Family and Medical Leave Act of 1993 ("FMLA")

The Family and Medical Leave Act ("FMLA") applies to all units of local government. To be eligible for FMLA leave, an employee must have worked for his or her employer for at least 12 months and have worked at least 1,250 hours during the 12 months prior to the start of the FMLA leave. Eligible employees are entitled to an unpaid leave up to 12 work weeks during an employer's designated 12 month period to care for a newborn or newly adopted child, to care for an employee's spouse, child or parent with a serious health condition or to care for one's own serious health condition that renders the employee unable to work.

Additionally, FMLA provides for leaves of absence for eligible employees who are family members of armed service members. Covered employees are entitled to take up to 26 weeks of leave in a single 12-month period to care for the service member recovering from a serious injury or illness incurred in the line of duty while on active duty. This provision

defines family members as a “spouse, son, daughter, parent, or next of kin [the nearest blood relative]” of the injured or ill service member. Covered service members are those in the Armed Forces, including members of the National Guard and Reserves.

To qualify for this leave, the member of the Armed Forces must be undergoing medical treatment, recuperation, or therapy; is otherwise in outpatient status; or is otherwise on the temporary disability or retired list, for a serious injury or illness. A “serious injury or illness” is:

an injury or illness incurred by the member in the line of duty on active duty in the Armed Forces that may render the member medically unfit to perform the duties of the member’s office, grade, rank or rating.

The FMLA also provides for leave to an employee during a family member’s duty in the Armed Forces. Specifically, employees who have a spouse, parent, or child who is on or has been called to active duty in the Armed Forces may take up to 12 weeks of FMLA leave yearly when a “qualifying exigency” arises out of the fact that the family member is on active duty or has been notified of an impending call to active duty status.. “Qualifying exigency” is defined as:

(1) Short-notice deployment
(2) Military events and related activities
(3) Childcare and school activities
(4) Financial and legal arrangements
(5) Counseling
(6) Rest and recuperation
(7) Post-deployment activities
(8) Additional activities not encompassed in other categories, but agreed to by the employer and employee

The FMLA and its regulations govern who is entitled to leave, the maintenance of health benefits during leave, job restoration after leave, requirements for notice and certification of the need for FMLA leave and protection for employees who request or take FMLA leave. Additional details regarding the FMLA may be found in the Code of Federal Regulations at 29 C.F.R.Part 825.

C. Equal Pay Act ("EPA")

The Equal Pay Act ("EPA, enacted in 1963), prohibits sex-based wage discrimination between men and women. The EPA prohibits employers from paying unequal wages to employees of opposite sexes where jobs require equal skill, effort, and responsibility and are performed under similar working conditions. The EPA also prohibits sex-based discrimination in "fringe benefits." Fringe benefits include "medical, hospital, accident, life insurance and retirement benefits, profit sharing and bonus plans, and other such concepts." Damages under the EPA are the same as those under the FLSA. (See "FLSA" section in this chapter).

D. Affordable Care Act (Obamacare)

The Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010, as amended by the TRICARE Affirmation Act and Public Law 1173, otherwise known as the "Affordable Care Act" ("ACA") or "Obamacare", was signed into law by President Obama on March 23, 2010. Because of the sweeping changes effected by the law, provisions of the ACA are being phased in through 2020. The major impact on employers, including municipalities, however, will occur effective January 1, 2015.

Two of the major provisions that will affect municipalities are the employer shared responsibility requirements and the individual shared responsibility payment. The employer shared responsibility payments provide that a "large employer" that fails to offer minimum essential coverage to all full-time employees and their dependents may be subject to "assessable payments" (sometimes called a "play or pay" penalty) of $2,000 annually ($166.67 per month) times the number of full-time employees less the first thirty.

Under the ACA, a "large employer" is defined as one that employs an average of at least 50 full-time and full-time equivalent employees. For any month, a full-time employee is one who works at least 30 hours per week or 130 hours per month. All employees who meet this definition must be included in the category of full-time employees.

Determination of large employer status also requires inclusion of full-time equivalent ("fte") employees. Determination of fte employees for a calendar month requires adding up the number of hours worked by employees who are not full-time employees (up to 120 hours per month) and dividing that number by 120. Thus, for any month, if non-full-time employees worked a total of 1,200 hours, dividing that number by 120 would yield 10 fte employees. That number is then added to the number of full-time employees; if the

resulting number is 50 or more, the township is considered to be a large employer for ACA purposes.

Municipalities that are not large employers are not required to make employer "play or pay" penalty payments. Large employers may be required to make such payments to the extent that its insurance coverage does not cover all full-time employees (not including, for this purpose, part-time or fte employees) and their dependents. "Dependents" include the employee's children under the age of 26 but not the employee's spouse.

An alternative tax penalty is incurred if the employer does offer coverage but the coverage is deemed "unaffordable", that is, if the employee's coverage for employee only coverage exceeds 9.5% of the employee's taxable income for the tax year. Dependent coverage is not considered in making affordability determinations. The "play or pay" penalty for unaffordable employee-only coverage is $3,000 annually for each full-time employee who is "subsidized" under the ACA, i.e., for each full-time employee who enrolls in coverage through one of the insurance exchanges to be set up in each state and who receives a premium tax credit or cost-saving reduction as a result.

The individual shared responsibility provision affects municipalities only indirectly. This provision arises out of the ACA requirement that, effective January 1, 2015, all covered individuals must have minimum essential health care coverage. This requirement applies to individuals of all ages, including children, unless they are exempted from coverage by the statute. The maximum amount of the individual share responsibility payment is the average premium for 'bronze level" (minimum coverage) plan available through the exchanges.

Municipalities are affected by the individual shared responsibility payment only to the extent that policy decisions to reduce the scope of medical care coverage under a municipality's health care plan could result in employees having to obtain insurance from the exchanges or make "play or pay" penalty tax payments beginning in 2016 for the 2015 tax year. This, in turn, could affect an employee's decision as to whether to continue employment with the municipality or look elsewhere for employment that provides insurance coverage sufficient to enable him or her to avoid having to obtain insurance through the exchanges or make penalty tax payments.

II. EMPLOYMENT DISCRIMINATION

A. Title VII of the Civil Rights Act of 1964 ("Title VII")

Title VII applies to all employers who employ fifteen or more employees for each working day. Title VII prohibits discrimination against employees based on race, color, national origin, ancestry, and religion. Title VII also prohibits retaliation against any employee who asserts his or her rights under Title VII. Although not explicitly defined or prohibited by Title VII, the prohibition of sexual harassment has also evolved out of Title VII.

B. Illinois Human Rights Act ("IHRA")

The Illinois Human Rights Act ("IHRA") applies to governmental units without regard to the number of employees. The IHRA prohibits discrimination on the basis of race, sex, sexual orientation, age, religion, national origin, ancestry, sexual harassment, marital status, disability, unforeseeable discharge from military service, military status, arrest record or citizenship status.

C. Americans with Disabilities Act ("ADA")

The Americans with Disabilities Act ("ADA") was enacted in 1990. Since its enactment, a tremendous amount of litigation has ensued over the Act.

Title I of the ADA prohibits employers from discriminating against qualified individuals with disabilities because of the disabilities in all aspects of employment, such as job application procedures, hiring, promotions, discharge, employee compensation, employee benefits, job training and other terms and conditions and privileges of employment.

The ADA covers individuals: (1) with mental or physical disabilities that substantially limit one or more major life activities of the individual, (2) with a record of having such a mental or physical disability, or (3) who are regarded as having such a mental or physical disability.

The ADA defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position."

"Reasonable accommodation" is determined on a case-by-case basis and includes such workplace modifications as modification of work schedules, job restructuring, making

facilities accessible to and usable by disabled employees, reassignments to vacant positions, and acquiring or modifying equipment or devices. A reasonable accommodation must be provided to a disabled employee upon request unless the requested accommodation poses an "undue hardship". "Undue hardship" is defined as "excessively costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the business."

The ADA, like most employment-related statutes, is extremely complicated and contains many federal regulations. The abundance of cases that have flooded the court system serve as evidence that careful attention must be given to the ADA. All city officials and management-level employees should be trained on the requirements of the ADA. Furthermore, the interplay between the ADA and the FMLA has become an increasingly confusing area for many municipalities as these statutes must, many times, be considered together. Legal counsel is highly recommended when dealing with any employment-related statute.

Title II of the ADA prohibits disability discrimination with respect to public services. Title II imposes various requirements on state and local government units becoming "accessible" to individuals with disabilities where public services are involved. Public services include public libraries, city council meetings, public transportation provided by public entities and any other public service.

Regulations which were enacted to assist in the implementation of Title II of the ADA may be found at 28 C.F.R. Part 35. Any public entity which employs 50 or more employees must designate at least one person to coordinate ADA compliance. Further, these public entities must adopt a grievance procedure for the prompt resolution of complaints under the ADA.

D. Age Discrimination in Employment Act ("ADEA")

In 1994, the Age Discrimination in Employment Act of 1967 ("ADEA") was amended to include units of local government. The ADEA prohibits discrimination in employment against any person between age 40 and over. However, if an employee over the age of 40 is replaced by an employee under the age of 40, but the age disparity between the employees is less than 10 years, this disparity is presumptively insubstantial.

Relevant to police officers and firefighters, pursuant to the enactment of the ADEA, in 1994 the State of Illinois dropped its under-35 restriction for new police officers. In 1996, however, Congress amended the ADEA to reinstate the exemption for state and local

governments that had age-based restrictions for firefighters or law enforcement positions as of March 3, 1983. Section 623(j)(1) states that it shall not be unlawful for a local government to refuse to hire someone as a firefighter or law enforcement officer on the basis of the applicant's age, if the applicant has exceeded the maximum age of hire that the local government had in effect as of March 1983. Therefore, the 1996 amendment offers safe harbor for all states and municipalities that had age limits in place by March of 1983.

Social Media

The impact of social media on society has been dramatic. Facebook, YouTube, Twitter, Instagram and more are all changing the way people communicate. It is tempting to use some form of social media all day long. You walk a tightrope when regulating the use and content of electric communication in your department. There are some established laws on the use of media in the workplace as well as some fuzzy areas. You will have a good understanding of how to handle social media issues at the end of this section.

I. CONSTITUTIONAL PROTECTIONS

Public employees do not surrender all of their First Amendment rights, particularly their speech rights, merely because they are employed by the government. However, the speech of public employees can be subject to certain restrictions by the government, because it has a different—and more significant—interest in regulating the speech of its employees than the general public.

The U.S. Supreme Court has outlined a two-step analysis for determining whether the speech of public employees is protected by the First Amendment. First, it must be determined whether the employee spoke as a citizen on a "matter of public concern." If the speech is a matter of public concern, then the court must engage in the Pickering balancing and decide whether the government was justified for treating the employee's speech differently from the general public.

Courts decide whether speech is a matter of public concern based on "the content, form, and context of a given statement, as revealed by the whole record." Of these three factors, the content of the statements has generally been acknowledged to be the most important, although the form and context can help make a statement one of public concern if the speech at issue occurs in an unconfined space. Matters which have been found to be of the public concern include: speech relating to public safety and policy protection; governmental wrongdoing and misconduct; or speech which seeks to expose wrongdoing by government officials.

One case deciding the issue of whether employee activities on social media are protected speech under the First Amendment involved employee political activities. That case involved employees of the local sheriff who supported the sheriff's opponent in the election. To the employees' misfortune, their supported candidate lost the election, and the sheriff terminated them. The employees sued, claiming that the sheriff retaliated against them in

violation of their First Amendment rights by terminating them for engaging in protected speech activities - in this case, clicking "like" on the candidate's Facebook page. The district court judge ruled in favor of the sheriff, finding that the mere action of clicking "like" on Facebook was not "speech." The employees appealed to the U.S. Circuit Court of Appeals, Fourth Circuit. That court issued its opinion in September of 2013 reversing the district court and finding that the employees did engage in protected speech activities in their conduct on the sheriff's opponent's Facebook page. Bland v. Roberts (U.S. Court of Appeals, 4th Cir. September 18, 2013).

The lesson from the Bland case is that employers must be cautious in taking disciplinary action against an employee for the employee's social media activities that might be protected First Amendment speech. In this particular case, the comments and "likes" on Facebook were considered protected political speech.

II. HIRING DECISIONS

Never has so much information about so many been available with the click of a mouse. Every prospective employer is interested to know everything they can about a job applicant. And every employer knows they might find something on the Internet which the applicant is reluctant to divulge in an interview. It may not be a matter of finding out "dirt" on the candidate, but just learning more about their likes, dislikes, lifestyle, thoughts and beliefs which may provide greater insight into their potential suitability as an employee. Nevertheless, the question arises as to what information from the Internet an employer can use when making hiring decisions.

Reliance on Internet information has become so common that we often forget that not all information obtained in Internet searches is completely accurate. Anyone can post information on the Internet and no assurance exists that it is all truthful. We have all heard about altered photos and intentionally planted misinformation which causes problems for an individual, to say nothing of the problems of those with common names or the same name as someone with a negative reputation. If searching for information on job candidates on the Internet, always remember that the information may not be truthful, accurate or reliable.

While it is not illegal to review public information about job candidates, it is advisable that candidates know of this possibility ahead of time. If candidates are aware that searches of social network and other Internet sites are part of the candidate review process, a decision based in whole or part on this information will not be inconsistent with their expectations.

Thus, they will be less likely to claim that an adverse decision was the product of discrimination or other illegal basis.

Prospective employers can make employment decisions on any basis that is not an illegal basis. Examples of illegal considerations are those such as race, gender, and religion. Off duty conduct can be a relevant job qualification depending on the position for which the employee applies. For example, it may be relevant to the qualifications of a police officer whether that individual posts pictures of him or herself in situations which depict illegal activity. Evidence of gang affiliation may also disqualify a candidate from employment with law enforcement. Whether information gathered from electronic sources, or any other, serves to disqualify a candidate from public employment depends largely on the position which is sought and the type of behavior which is disclosed. On the other hand, public employers must take great care to avoid decisions based on social network information related to religious affiliation, ethnic or racial information gathered only from these searches and other information which, if used, as a basis to deny employment would violate the law.

Finally, given the potential for inaccurate information gathered from social networks or other Internet sites, it is advisable to allow a candidate to provide explanation to any information gathered from these sources to ensure that a decision is not based on false information.

III. DISCIPLINE OF CURRENT EMPLOYEES

Evidence of misconduct related to work performance that is gathered from social network sites may be an appropriate basis for action against current employees. Like pre-employment considerations, the misconduct must impact, or have a nexus, to the reputation of the employer or the employer's ability to deliver services to the citizens. So, for example, the police officer or teacher who posts obscene pictures of himself or herself on their Facebook page, or photos of obvious illegal conduct, likely serves an appropriate basis for disciplinary action.

Government employers, like other bosses, are struggling with critical social media posts by employees. Can an employer terminate or discipline a worker for complaining about his or her boss or company on Facebook? Will social media policies protect an employer? The answers to these questions are not yet clear, because there is little case law on this issue. However, the National Labor Relations Board (NLRB) has been active in this area recently. While the National Labor Relations Act does not apply to government employers, the NLRB rulings can provide government employers with some guidance.

In one case, the NLRB ruled that a nonprofit employer unlawfully discharged five employees who had posted comments on Facebook relating to allegations of poor job performance that had been previously expressed by one of their coworkers. The workers were found to be engaged in "protected concerted activity" because they were discussing terms and conditions of employment with fellow co-workers on Facebook. The NLRB cited the Meyers ruling that an activity is concerted when an employee acts "with or on the authority of other employees, and not solely by and on behalf of the employee himself." In this case, the discussion was initiated by one worker in an appeal to her coworkers on the issue of job performance, resulting in a "conversation" on Facebook among coworkers about job performance.

In another case, however, the NLRB ruled that a reporter's Twitter postings did not involve protected concerted activity. Encouraged by his employer, a reporter opened a Twitter account and began posting news stories. A week after the employee posted a tweet critical of the newspaper's copy editors, the newspaper informed the employee he was prohibited from airing his grievances or commenting about the newspaper on social media. The reporter continued to tweet, including posts about homicides in the City and a post that criticized an area television station. The newspaper terminated the reporter based on his refusal to refrain from critical comments that could damage the goodwill of the newspaper. The NLRB found that the employee's conduct was not protected and concerted because it (1) did not relate to conditions of employment and (2) did not seek to involve other employees on issues related to employment.

Two recurring themes have come out of the NLRB rulings. First, individual gripes or venting by employees is not protected and employers can discipline, and even terminate, employees for this conduct. Second, the NLRB is taking a very narrow view of social media policies and striking down a number of policies for being overbroad where the policies could be interpreted to prohibit protected conduct.

What does this mean for government employers? First, employers must be cautious in disciplining or terminating employees for critical posts on social media sites. An employer should ask itself whether the posts are "protected and concerted activity" or merely constitute "gripes" about an employer that are not protected. Second, an employer should review its social media policy to make sure it is not overbroad in prohibiting protected activities. Finally, an employer should be careful not to enforce social media policies in an arbitrary or discriminatory manner.

IV. EMPLOYER REQUESTS FOR SOCIAL MEDIA PASSWORDS

It has become common practice for public and private employers to review the publicly available Facebook, Twitter and other social networking sites of job applicants as part of the vetting of candidates in the hiring process. However, because many social media users have privacy settings that block the general public (or non-friends or followers) from viewing their complete profile, some employers are asking candidates to either turn over their passwords or log on to their social media accounts during the interview.

Until recently, there was no federal or state law expressly prohibiting this practice, although a few states have proposed or enacted legislation. However, just last year, the General Assembly passed Illinois P.A. 97-0875, prohibiting public employers from seeking job applicants' social media passwords. The legislation allows candidates to file lawsuits if they are asked for access to sites like Facebook. Employers can still ask for usernames to view public information and monitor employee usage of social media on employer devices.

With respect to viewing a current employee’s social media sites, unless there is an actual need to review an existing employee’s social media profile, it may be difficult to find a connection between social media use and the employee’s right to hold their job.

V. IMPORTANCE OF A SOCIAL MEDIA POLICY

Governments participating in social networking sites must start with the realization that what is posted on social networking sites is public information. That means that government employees and officers should not post information that neither they nor the government would want everyone to know. By realizing the public nature of the information being published, confusion, lawsuits, and other problems can be more easily avoided.

All governments that use any form of online communication should develop, implement, and enforce a website and social networking policy. That policy should include a well-defined purpose and scope for using social media, identify a moderator in charge of the site, develop standards for appropriate public interaction and posting of comments, establish guidelines for record retention and compliance with sunshine laws, and include an employee access and use policy. The government should also post express disclaimers on its websites reserving the right to delete submissions that contain vulgar language, personal attacks of any kind, or offensive comments that target or disparage any ethnic, racial, or religious group. Finally, the government should train employees regarding appropriate use of social networking and how use might impact the employer.

In crafting a social media policy, an employer should be careful not to implicate the First Amendment rights of its employees nor violate any applicable federal or state employment laws protecting employees. As discussed above, the NLRB has struck down a number of social media policies for being too broad, so employers should take care in crafting a social media policy that avoids these issues.

A government might also consider providing examples of acceptable or unacceptable conduct in both employee and public usage of social media to illustrate the type of conduct that is regulated and why a particular regulation is in place. In addition, all employees should be required to sign a written acknowledgement that they have received, read, understand, and agree to comply with the social media policy.

VI. CHECKLIST FOR DRAFTING A SOCIAL MEDIA POLICY

A government considering establishing a social networking site should first adopt a social media policy to govern the administration and monitoring of site content, set ground rules for public input and comments, and adopt policies for employee usage of social media.

A. Purpose

The policy should contain a statement that the use of social media by the government entity is for the purpose of obtaining or conveying information that is useful to, or will further the goals of, the government.

B. Approval and Administration

The policy should provide for an administrator to oversee and supervise the social media networking sites of the government. The administrator should be trained regarding the terms of the policy and his other responsibilities to review content to ensure that it complies with the policy and furthers the government's goals.

C. Comment Policy

The policy should identify the type of content that is not permitted on a social media site and that is subject to removal. This might include comments that are not relevant to the original topic; profane, obscene, or violent content; discriminatory content; threats; solicitation of business; content that violates a copyright or trademark; and any content in violation of federal, state, or local law. The policy should also contain a disclaimer that any comment posted by the public is not the opinion of the government. Finally, the policy should include

language that reserves the right of the administrator to remove content that violates the policy or any applicable law.

D. Compliance with Laws

The policy should include language regarding compliance with applicable federal, state, and local laws, regulations, and policies. It should be made clear that content posted on a government site is subject to freedom of information and record retention laws. In addition, content posted on social media sites may be subject to e-discovery laws. Finally, information that is protected by copyright or trademark should not be posted or maintained on a social media site unless the owner of the intellectual property has granted permission.

E. Employee Usage Policy

A social media policy should clearly establish guidelines and boundaries to enable employees to anticipate and understand company expectations and restrictions regarding social media usage. Although each employer should create a social media policy tailored to the particular employer's workplace, the following are some suggested employee usage provisions:

1. The policy should clearly communicate to employees whether social media use in the workplace will be prohibited, monitored, or allowed within reasonable time limits. The policy should be careful not to excessively restrict the content of employee social media postings to the extent that "protected concerted activity" among the company's employees would be prohibited. For example, a social media policy should not ban "inappropriate discussions" about the company, management, working conditions, or coworkers that would be considered protected speech in another form or forum.

2. The policy should also caution employees that they have no expectation of privacy while using the Internet on employer equipment. If employees will be monitored, the policy should inform employees of such monitoring.

3. The policy might also require employees who identify themselves as employees of a particular government or company to post a disclaimer that any postings or blogs are solely the opinion of the employee and not the employer.

4. Employees should be advised that they should not use the government or company logo, seal, trademark, or other symbol without written consent of the administrator.

5. The policy should also address the protection of confidential and sensitive government information, as well as personal information relating to government officials and employees, customers, or residents.

6. Finally, all employees should be required to sign a written acknowledgment that they have received, have read, understand, and agree to comply with the social media policy.

Personnel Policies

I. THE PURPOSE OF A PERSONNEL POLICY MANUAL

Many times you reach for a personnel policy manual when you need to know about some issue that has come up. Policy manuals are a great resource to use and you should refer to it when you can. Remember that a personnel policy is a guideline, not a contract, and it is designed to identify areas of importance to the municipality.

II. PERSONNEL MANUALS (OR EMPLOYEE HANDBOOKS) IN ILLINOIS

A. Do employees read them?

B. Do more important provisions get lost?

C. How do you make sure they are current to reflect new laws, administrative interpretations, and court cases?

III. REQUIRED PROVISIONS

A. Disclaimer: All manuals should contain language that a manual is not a contract and it can be changed at any time, with or without notice to the employee.

Caveat: Be careful about saying that the Manual is not a contract, then including contract-like provisions in the Manual. For example, if your manual contains a quid pro quo, such as conditioning a benefit on accomplishing a certain objective, then the employee upon attaining the objective may have a claim to the benefit notwithstanding the disclaimer language.

B. At-Will Acknowledgment.

C. Equal Employment Opportunity Policy: This is required by state law to be included in public contracts.

D. Sexual Harassment Policy: This is also required by law to be published or posted by all parties to a government contract. This must contain information as to how individual with complaint can file charge with IDHR. Most employers extend sexual harassment prohibition to all types of harassment.

Caveat: Be careful about expanding the scope of legal protections

Example: The Manual prohibits discrimination against persons with disabilities and perceived disabilities. This goes beyond protections of law, arguably by creating a new protected class.

E. Classifications of Employees

1. All employees, except those with written contracts and those covered by collective bargaining agreements, are at will employees, as acknowledged by employees in at-will acknowledgment.

2. Employees during Introductory ("Probationary") Period

3. FLSA Classifications: Must define exempt employees properly, referencing executive, administrative, and professional exemptions and salary basis requirement. Just because an employee is salaried does not necessarily make him exempt. All hourly employees are by definition non-exempt.

4. Full-time and part-time employees: This is used as criterion for benefit eligibility, and is a critical distinction under ACA.
   a) Under ACA, employees who work an average of 30 hours per week (or 130 hours per month) are full-time for insurance purposes
   b) But large employers not liable for employer shared responsibility payments (taxes in lieu of coverage of all full-time employees) until January 1, 2015.
   c) Does the District want to change the definition now or wait for 2015?

F. Personnel Files: These files must be kept separate from medical files, are subject to review by employees under Illinois Personnel Records Review Act, and are subject to disclosure except for "private information" under Freedom of Information Act.

G. Alcohol and Drug Abuse Policy

1. Application to pre-hire and to current employees

   a) Reasonable suspicion

b) Random?

c) Specified situation, such as post-accident or upon job change

2. If general policy is less stringent, must have or reference USDOT policy for those with CDL. USDOT policy pre-empts local policy to the extent of less stringent variance.

3. Need reference to medical marijuana – can be treated as legal drug.

a) Must notify employer if using

b) May prevent employee from possessing on government property

c) May be relieved of duty if impaired

d) Employee not relieved of consequences if there is accident or behavior subjecting employee to discipline

H. Payroll Policies: The policy should have a separate section to deal with this, including specification of payroll periods, policies regarding deductions, and work schedules, meal periods, and breaks. Recording of hours for non-exempt employees should be mandatory.

I. Family and Medical Leave and VESSA: Employees need to know procedures for applying for and taking FMLA.

1. Some provisions of FMLA can be elected by employer, and employees must have notice of such election. Example: Paid time off as concurrent with FMLA.

2. Recent changes in law regarding qualified exigency leave for military personnel must be referenced

J. Military Leave: Some personnel manuals reference only federal law – USERRA. But, there are three state laws that govern military leave, some of which have more liberal allowances and benefits than USERRA. In such cases, state law governs.

K. Identity Protection Policy – required by Illinois Identity Protection Act

L. State Officials and Employees Ethics Act

IV. STRONGLY RECOMMENDED POLICIES

A. Hiring Procedures, Including Disqualification of Applicants

1. Illinois Employer Code, at 70 ILCS 1205/8-23(c), contains a list of automatic disqualifications from employment, mainly convictions of felonies, drug offenses, and offenses relating to sexual or physical abuse of a minor.

2. EEOC recently has taken the position, in a guidance memorandum that blanket disqualification of persons with conviction records is potentially discriminatory and that hiring decisions for those with conviction records should be done on a case-by-case basis, pursuant to investigation, and that disqualification should take place only for reasons that are job-related and consistent with business necessity.

3. EEOC also takes the position that this guidance is an authoritative interpretation of federal law that pre-empts conflicting state law.

4. This presents a compliance challenge for Employers.

5. Our advice: The Employer Code constitutes a legislative determination that disqualification of applicants because of any conviction listed in 70 ILCS 1205/8-23(c) is job-related and consistent with business necessity.
   a) Employers should be able to rely on the Illinois Legislature's determination that applicants with those specific convictions on their records should not be working in employers.
   b) This is especially true given the youth-oriented recreational and educational functions performed by employers.

B. Dual Jobs Policy

1. Some employers use employees for more than one job

2. Most of the time, hours worked must be aggregated for FLSA purposes

a) Unintended overtime consequences
b) Possible FLSA liability if employee not paid overtime for hours worked in excess of 40 in a week, aggregated

3. Recommend no dual jobs unless approved by Executive Director

C. Grievance Procedure

1. Method of allowing employee complaints to be handled in-house

2. Can end with Executive Director or Park Board

3. Helps avoid litigation

D. Disciplinary Action and Procedure

1. Spell out illustrative kinds of behavior that can lead to discipline

2. Provide method of challenge (usually grievance procedure)

3. Helps avoid litigation, especially in light of new legislation

E. Weapons Policy

1. Needed especially in light of new concealed carry legislation

2. Despite concealed carry, employer can ban weapons by employees (other than licensed police officers) anywhere on district property, including in cars in employee parking lot, during working time.

3. Outside of working time, employees must be allowed same weapons privileges as allowed general public
   a) Trails and pathways exception for employers
   b) Bikeways and trails and public hunting areas exception for conservation districts

F. Internet and Electronic Communications, Cell Phone, and Voice Mail Policies

1. Regulate use of internet by employees using employer equipment

2. Emphasize no right of privacy when district equipment being used

    a) All e-mail messages sent or received using district equipment are accessible by government

    b) All voice mail messages are accessible to district

    c) District equipment cannot be used for any unlawful purpose, including threats, harassment, downloading of child pornography, etc.

    d) For district cell phones, district has right to access all communications, including text messages

G. Social Media Policy: Social media policy should be carefully drafted to allow reasonable regulation, without violating employees' rights of free speech or protected concerted activities.

H. Romantic or Sexual Relationships Policy

I. Political Activity Policy

J. Policy on Solicitation and Distribution

1. Needed in event of union organization

2. Must be administered non-discriminatorily

V. ELECTIVE POLICIES (MANY OF WHICH ARE STANDARD)

A. Policies Relating To Statutory Benefits or Regulations

1. Social Security and Medicare

2. Pension benefits (IMRF)

3. Unemployment Compensation

4. Workers' Compensation
5. Child labor laws
6. One day rest in seven law

B. Paid and Unpaid Time Off

1. Holidays, vacations, personal days
2. Sick leave
3. Funeral leave
4. Jury duty
5. Personal leave

C. Employee Benefits

1. Insurance
2. Tuition reimbursement
3. Employee assistance
4. Employee awards and recognition
5. Flexible spending accounts
6. Health savings or reimbursement accounts
7. Deferred compensation programs

D. Health and Safety

1. Safety policies
2. Safety committee

3. Policy on communicable diseases

4. Policy on blood-borne pathogens

The Attorney is in. Ask Away.

This session will be an interactive session, presented in a quiz-show format. The speakers will pose common and not-so-common questions about personnel matters or present a scenario a municipality might encounter in a personnel situation, and discuss the appropriate answer or response with the attendees.

Resources

Social Media & Local Governments: Navigating the New Public Square (ABA Press, 2013), a book co-authored by Julie Tappendorf, Ancel Glink, and Dean Patricia Salkin, Touro Law School: http://ambar.org/socialmediagov

Ancel Glink website: http://ancelglink.com

Municipal Minute blog, for daily updates on legal topics of interest to municipal officials and employees, authored by Julie Tappendorf, Ancel Glink: http://municipalminute.ancelglink.com

Strategically Social blog, where you can find updates on social media legal and ethic issues, authored by Julie Tappendorf, Ancel Glink: http://strategicallysocial.blogspot.com

Illinois Municipal League website: http://iml.org

Illinois Labor Relations Board website: http://www.state.il.us/ilrb/. The Illinois Labor Relations Board is the State agency which administers the Illinois Public Labor Relations Act, the primary law governing relations between unions and public employers.

Illinois Department of Labor website: http://www.illinois.gov/idol/. The Department addresses issues about health or safety issues in the workplace.

United States Department of Labor website: http://www.dol.gov/. The Department deals with questions concerning wages, (such as minimum wage, prevailing wage, overtime or unpaid wage collection) or the Fair Labor Standards Act.

Illinois Department of Human Rights website: http://www2.illinois.gov/dhr/. The Department deals with issues of discrimination based on age, sex, race, political affiliation, religion, national origin or physical or mental disability.

Illinois Department of Employment Security website: http://www.ides.illinois.gov/. The Department deals with unemployment claims.

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