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HR Fundamentals For Nurses

OHCA – Hot Topics in Human Resources
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Jan E. Hensel

Dinsmore & Shohl LLP
191 W. Nationwide Blvd., #200
Columbus, OH 43215
Phone: (614) 227-4267
jan.hensel@dinsmore.com



LEGAL EMPLOYEE RELATIONS FROM HIRE TO TERMINATION

3 >



Employment Applications

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Key elements and statements to include:

1. **Date – for purposes of determining when a statute of limitations period might run.**
2. **Statement that any offer is contingent upon pre-employment screening and favorable references.**
 - A form for reference checking may be included on the application, but is better to keep separately with a waiver signed by the applicant which can be easily submitted to former employers.

4 >

Employment Applications

(Continued)

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Key elements and statements to include:

3. **Identification of Criminal Convictions (optional)**
 - Statement that while convictions will not necessarily disqualify applicant from employment, Ohio law prohibits employees who have been convicted of certain "disqualifying offenses" from working in direct care positions.
4. **At-will clause – Applicant should be on notice that, if hired, the employee can be terminated with or without cause or notice at any time.**

5 >

Employment Applications

(Continued)

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Key elements and statements to include:

5. **No-misrepresentations clause -- requires the applicant to affirm that all of information provided is true and complete to the best of their knowledge; also warns that any misrepresentations or omissions can result in refusal to hire or termination of employment upon discovery.**

6 >

Reference Checks

- **Not required, but a good idea**
- **Can provide defense to negligent hiring claim**
- **Complete before employee starts working**

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7 >

Criminal Records Check

General Requirement

- **An agency that is considering an applicant for a position that involves providing direct care to an older adult (60 years of age or older) must request a criminal records check from the Bureau of Criminal Identification and Investigation (BCII). If an applicant for a direct care position has been convicted of a disqualifying crime, the law prohibits a health care facility from employing that applicant unless he/she meets personal character standards.**

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8 >

Criminal Records Check

(Continued)

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Confidentiality of Records

A. The criminal records check is not a public record and may be available only to:

- Individual who is subject to the criminal records check or the individual's representative.
- The chief administrator or representative of the entity requesting the records check or related healthcare facility.
- Any court, hearing officer or other necessary individual involved in cases of dealing with the denial of employment of the applicant.

B. Personnel Record

- Facility must maintain criminal records report in a confidential manner sealed within or separate from personnel record.

9 >

Criminal Records Check

(Continued)

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Confidentiality of Records

C. Facility must maintain an applicant log separate from the personnel record which shall be accessible to surveyors and contain:

- Name of each applicant
- Application date
- Date the applicant starts work
- Date the criminal records request is submitted to BCII
- Types of records checks requested (BCII, FBI or both)
- Dates records checks are received
- Date the report is completed by BCII Whether the applicant was hired pursuant to personal character standards
- Final disposition of applicant
- Whether the applicant was terminated and why (i.e., conditional hired exceeded 30 day time limit, disqualifying offense)

10 >

Exclusion Checks

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All SNFs that receive federal funding (e.g., Waiver Program participants) must check all employees and volunteers (as well as vendors/contractors) prior to hire and annually, at a minimum, for exclusion using the following databases:

- List of Excluded Individuals and Entities (“LEIE”) – To verify the person (or entity) has not been excluded from participation in federally funded health care programs (which is updated monthly).
- State Medicaid Provider Exclusion and Suspension List – To verify whether the person (or entity) is excluded from participation in the state Medicaid program.

11 >

Exclusion Checks

(Continued)

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- System for Award Management (“SAM”) – To verify if the individual or entity is debarred by a federal agency, which could preclude payment by Federal health care programs for items or services furnished, ordered, or prescribed by the debarred party.
- Specially Designated National and Blocked Persons List – To verify whether U.S. persons are generally prohibited from dealing with the person (or entity) due to their ownership or control by targeted countries, or due to their designation as terrorists or narcotics traffickers.
- Sex Offender Search – through the Ohio Attorney General’s website

12 >

Professional Licensure and/or Certification

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Nurse Aide Registry

- For any state where the individual resided (or is believed to have resided), to confirm that the individual has not been the subject of a finding of abuse or neglect of a resident, or misappropriation of the property of a resident.

13 >

Application/Interview Pitfalls

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Avoid questions that directly or indirectly inquire about:

1. Age/Date of birth;
2. Race, religion, ethnicity, sexual orientation or national origin; or
3. Physical traits, disabilities or handicaps.

14 >

Performance Evaluations

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1. **Determine objectives for performance evaluation**
2. **Train evaluators**
3. **Conduct evaluations periodically**
4. **Be consistent with evaluations – in form and application**
5. **Be honest in evaluations – document any serious complaints about employee**
6. **Follow-up with additional training or corrective action**

15 >

Disciplinary Documents

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1. **Maintain records of any disciplinary action – oral, written and final**
2. **Inform employee that counseling/warning will be reflected in personnel file**
3. **Reflect prior counselings/warnings in subsequent warnings**
4. **Require employee to sign acknowledgment that he/she has received copy and understands the problems and recommended solution**
5. **Have supervisor sign**

16 >

Disciplinary Documents

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These documents must be

1. Consistent;
2. Objective;
3. Detailed;
4. Timely

17 >

Pre-termination Risk Assessment

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1. Is this a high risk termination?

- Member of a protected class
- Whistleblower
- Filed complaint with EEOC, OSHA, DOL, DOH
- WC claim
- Leader in workplace for employee rights or in union
- Near vesting in benefits

18 >

Pre-termination Risk Assessment

(Continued)

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Protected Classes / Activity:

1. Race or Color
2. National Origin
3. Ethnicity
4. Gender
5. Disability
6. Religion
7. Age
8. Status as a Veteran
9. Military Service
10. Requested FMLA Leave
11. Union Activity
12. Filed a WC claim
13. Complained about wages
14. Made a complaint of patient abuse/neglect

19 >

Pre-termination Risk Assessment

(Continued)

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2. Is the evidence conclusive?

- Is termination appropriate remedy?
- Is termination for conduct explicitly or implicitly addressed in company policies/handbook?

20 >

Pre-termination Risk Assessment

(Continued)

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3. Is the evidence conclusive?

- Have policies and procedures been consistently applied?
- Similar instances tolerated or ignored?
- Progressive discipline plan followed?

21 >

Attendance Policies and Staffing Concerns

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There is no silver bullet

No fault attendance policies

- **Pros**
 - Objective
 - Legally defensible
- **Cons**
 - Risk of assessing points for protected (FMLA, ADA) absences
 - May seem unfair, if last absence is for a valid reason

22 >

Attendance Policies and Staffing Concerns

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Suggestions

- Schedule an “intervention” after a set number of absences
- Reward perfect attendance

23 >

FMLA AND ADA CONCERNS FOR NURSE MANAGERS

24 >

Family & Medical Leave Act (FMLA)

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- Generally, the FMLA provides qualifying employees with a period of unpaid leave (usually, up to 12 weeks) per year for certain qualifying reasons.
- In addition, the employee is entitled to reinstatement to his or her previous position at the conclusion of that leave.
- FMLA leave cannot be counted against an employee in any employment decision, not even in a no-fault attendance policy

25 >

Family & Medical Leave Act (FMLA)

(Continued)

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Is the employee eligible?

- The employee must have been employed for at least 12 months at the time the leave is to commence.
- The employee must have actually worked at least 1250 hours in the 12 months immediately preceding the commencement of the leave.

26 >

Family & Medical Leave Act (FMLA)

(Continued)

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Is leave being requested for a qualifying reason?

- For the birth of a son or daughter and to care for such child;
- For the placement of a child with the employee for adoption or foster care;
- To care for a spouse, son, daughter, or parent with a “serious health condition;” or
- Due to the employee’s own “serious health condition” that prevents the employee from performing the functions of his or her position.

27 >

Family & Medical Leave Act (FMLA)

(Continued)

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Serious Health Condition

- **Illness, injury, impairment or physical or mental condition involving:**
 - Pregnancy, incapacity due to pregnancy and prenatal care
 - Inpatient treatment
 - A period of incapacity of three or more consecutive full calendar days accompanied by treatment by a health-care provider
 - Chronic conditions requiring medical treatments
 - Permanent/long-term conditions requiring medical supervision

28 >

Family & Medical Leave Act (FMLA)

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Examples of Serious Health Conditions

- **Back conditions requiring therapy**
- **Pneumonia**
- **Severe Arthritis**
- **Asthma**
- **Morning sickness**
- **Anxiety/Depression**
- **Diabetes**
- **Epilepsy**
- **Migraines**

29 >

Family & Medical Leave Act (FMLA)

(Continued)

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NOT (typically) a Serious Health Condition (unless complications arise):

- Common cold
- Flu
- Ear-aches
- Upset Stomach
- Routine dental or orthodontia
problems
- Minor ulcers
- Regular head-aches

30 >

Family & Medical Leave Act (FMLA)

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Employee Notice Requirements

- If the need for leave is foreseeable, the employee must provide the employer with advance notice.
- If the need for leave is unforeseeable, the employee must only provide the employer with notice “as soon as practicable.”
- However, the employer can require that employees comply with its usual and customary call-in procedures, absent unusual circumstances.

31 >

Family & Medical Leave Act (FMLA)

(Continued)

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Employee Notice Requirements

- The first time an employee requests leave for an FMLA-qualifying reason, he/she need not specifically reference the FMLA.
- The only requirement is that the employer have enough information to determine that the FMLA may apply.
- Calling in “sick” is not sufficient.
- However, not much more is required.
- If the employee is seeking leave for a previously-certified reason, he/she must specifically reference either that reason or the FMLA

32 >

Family & Medical Leave Act (FMLA)

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Employee Notice Requirements

- **Once the employee has provided sufficient notice to the employer, the onus is on the company to obtain the necessary information to determine whether or not FMLA leave is appropriate.**
- **Refer to HR**

33 >

Family & Medical Leave Act (FMLA)

(Continued)

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Intermittent/Reduced Schedule Leave

- **Intermittent leave occurs where an employee takes several periods of leave for a single illness or injury.**
- **Reduced schedule leave consists of a reduced number of working hours.**

34 >

Family & Medical Leave Act (FMLA)

(Continued)

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When is Intermittent Leave Appropriate?

- For planned and/or unanticipated medical treatment, recovery from a treatment or to provide care or psychological comfort to an immediate family member with a serious health condition.
- For the employee's own serious health condition.
- Must be "medically necessary."

35 >

Family & Medical Leave Act (FMLA)

(Continued)

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Examples of Intermittent Leave

- Attend medical appointments for a serious health condition.
- An employee with cancer takes leaves of multiple days together, spread over a longer period of time for chemotherapy.
- An employee with migraines takes a few hours of leave per week to treat his/her condition.
- An employee takes time off as needed to care for a child with asthma.

36 >

Family & Medical Leave Act (FMLA)

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FMLA Practice Pointers

- **It's not necessary to rescind legitimate discipline because an employee, after the fact, claims that past absences should have been covered by the FMLA.**
 - Unless either the employer had knowledge that such absences were caused by a potentially qualifying reason or unusual circumstances prevented the employee from notifying the employer.
- **If an employee mentions the FMLA for the first time in a disciplinary setting, discipline may still be appropriate.**

37 >

Americans With Disabilities Act (ADA)

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- **Prohibits employers from discriminating against employees and applicants who are "qualified individuals with disabilities."**
- **Moreover, employers may not discriminate against an individual based upon his/her association with a disabled person.**
- **In addition to a non-discrimination rule, the ADA affirmatively requires that qualifying individuals with disabilities be accommodated so that they can perform their job duties.**

38 >

Americans With Disabilities Act (ADA)

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Disability

- A physical or mental impairment that substantially limits one or more of the major life activities of an individual;
- A record of such an impairment;
- Being regarded as having such an impairment.

Qualified Individual with a Disability

- Is able to perform the “essential functions” of his/her job, with or without a reasonable accommodation.

39 >

Americans With Disabilities Act (ADA)

(Continued)

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What are the “essential functions” of a position?

- Exactly what it sounds like.
- Evidence of the essential functions:
 - Job descriptions
 - Important to keep these updated and accurate
 - Actual experience of the employees

40 >

Americans With Disabilities Act (ADA)

(Continued)

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What is a “reasonable accommodation?”

→ **Examples:**

- Job restructuring (of non-essential functions)
- Modified work schedules
- Reassignment to a vacant position
- Acquisition or modification of equipment or devices
- Other similar accommodations

41 >

Americans With Disabilities Act (ADA)

(Continued)

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What is a “reasonable accommodation?”

→ **A period of leave can be a reasonable accommodation.**

- However, an employer is not required to provide an indefinite period of leave.
- What about repeated requests for extension?

→ **At the conclusion of such leave, the employee must be reinstated to his/her previous position.**

→ **Light duty as reasonable accommodation**

42 >

Americans With Disabilities Act (ADA)

(Continued)

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When does the employer have an obligation to provide a reasonable accommodation?

- **Technically, the employee must “request” an accommodation**
- **However, as a practical matter, this need not be a formal request.**
- **Once the employer has knowledge of a disability and a need for accommodation, the process should begin.**

43 >

Americans With Disabilities Act (ADA)

(Continued)

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When does the employer have an obligation to provide a reasonable accommodation?

- **Examples of Notice:**
 - An employee raises a medical condition during a performance evaluation, to justify a poor rating.
 - An employee, receiving discipline for attendance violation, attributes absences to a medical condition.
 - An employee mentions offhand that he/she is having difficulty performing a certain task due to a medical condition.
- **Refer to HR**

44 >

Americans With Disabilities Act (ADA)

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The Interactive Process

- Once the employer has knowledge of an employee's disability, it must engage in what is called the "interactive process" to determine whether or not the individual is a qualified individual with a disability and, if so, whether or not a reasonable accommodation exists.
- The interactive process is designed to facilitate discussion between the employee and the employer on the subject of what accommodations may be available.
- The employee's immediate supervisor or manager will likely be consulted during this process, but he/she should not be the direct contact on the issue.

45 >

UNION AVOIDANCE 101

46 >

NLRA – Employee Rights

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SEC. 7. says:

- **Employees have the right to self-organization, to join labor organizations, to bargain collectively and to engage in other concerted protected activities and shall also have the right to refrain from any and all such activities...**

47 >

What does this mean?

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- **Employees engaged in union activity are protected:**
 - Signing a Union Card
 - Saying they want a union
 - Attending a union meeting
 - Wearing union insignia (*banning some items may be OK*)
- **Actions related to safety for workforce**
- **Non-union employees engaged in a work stoppage over working conditions**

48 >

Why Employees Turn to a Union

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Poor Relationships/Poor Communications

- **Uncaring Management or Impression of Mistreatment**
- **Feeling Group Action Necessary To Achieve Goals**
- **Peer Pressure & Lack of Security**

Poor Supervision or Inconsistent Policy Administration

- **Unfairness/ Favoritism in Discipline & Job Opportunities**
- **Failure to Resolve Employee Complaints, Questions & Problems promptly**

49 >

Early Warning Signals

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- **Rumors**
- **Silent Treatment**
- **Attitude Changes**
 - Employees ceasing conversations when leadership approaches
- **Unusual Questions**
- **Upsurge in Complaints**
 - Speaking negatively about wages & benefits
 - Asking for a witness to be present

50 >

Early Warning Signals

(Continued)

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- **Unusual Employee Groupings**
- **Strangers Meeting with Employees**
- **Union Graffiti or Stickers**
- **New Leaders Emerging**
- **Open Talk About Unions**
 - Mentioning Unions or Union Websites & Commercials
- **Union Activity in the Area**
- **Union Authorization Cards**
- **Posts on Facebook**

51 >

What Is The Role Of A Supervisor Now & During an Organizing Campaign?

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- **A supervisor is an “agent” of the Employer at all times.**
- **The supervisor is not protected by the NLRA**
 - Company allowed to expect your loyalty during election campaign
 - Supervisor required to respect employees Sec. 7 rights while using Sec. 8 (c) right of free speech
- **The supervisors will win – or lose – a Union election.**

52 >

What Can An Employer / Supervisor Do Now and During an Organizing Campaign?

(Continued)

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→ **Avoid T.I.P.S.**

- Cannot **T**hreaten or **I**nterrogate employees
- Cannot make **P**romises of a benefit to keep union out
- Cannot engage in **S**urveillance of employees & union

53 >

T.I.P.S. RULE

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- **Threats** – do not threaten employees with loss of overtime, plant closure, decreased pay, discharge, etc., if or because the Union wins the election.
- **Interrogation** – do not question employees about union activity – there is nothing wrong with listening. Just avoid any hint of “Who”, “What” or “Where”.
- **Promises** – do not promise employees anything to defeat the Union, such as a raise or better benefits.
- **Surveillance** – do not spy on union meetings, follow the organizer around or check out his motel room.

54 >

Lawful Supervisor Communications – FOE

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- **FACTS, OPINIONS & EXPERIENCES**
 - You CAN campaign against the Union
 - Avoid saying that bad things WILL happen here. Instead explain unions cannot guarantee job security; that comes from our customers seeing us as competitive & reliable
- **Dispute untrue Union statements**
- **Share true facts about Union**

55 >

Statements Employer Can Make – FOE

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- **Disadvantages of belonging to a Union**
 - Cost of Union Dues & Assessments
- **You are willing to discuss any subject**
- **You & the Company prefer to deal with the employees directly**
- **Share true information about the Company's policies & the Company's history**
 - Fairness
 - Committed to Being Safe Working Environment
 - Good Wages & Benefits
 - Committed to be the employer of choice in our community

56 >



CURRENT TRENDS

57 >



Wage & Hour Litigation

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58 >

- **Fastest growing segment of employment law**
- **Settlements and verdicts in collective actions have skyrocketed**

Overtime / Compensation issues

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- **Docking for unauthorized overtime**
- **Failing to accurately record time worked**
- **Calculating time worked over a pay period rather than a work week**
- **Not including work at second job for same employer or its affiliate**
- **Working “off the clock”**
- **Improperly docking for mandatory breaks (less than 20 minutes or not “uninterrupted”)**
- **Not including non-discretionary bonuses in the regular rate when calculating overtime**

59 >

Blurring the Line Between Work and Home

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Technology has become so pervasive that it is more difficult to distinguish between the home and workplace

60 >



LGBT ISSUES IN THE WORKPLACE

61 >

OSHA Transgender Guidelines

- **All employees should be able to use facilities that correspond with their gender identity.**
- **Employees should determine the most appropriate and safest option for themselves.**
- **Best policies include single-occupancy gender-neutral facilities; and use of multiple-occupant, gender-neutral facilities with lockable single occupant stalls.**

62 >

OSHA Transgender Guidelines

(Continued)

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- **Employees are not asked to provide medical or legal documentation of their gender identity.**
- **No employee should be required to use a segregated facility because of his or her gender identity.**
- **Employees may not be limited to using facilities that are an unreasonable distance or travel time from their worksite.**

63 >

Legal Protections for LGBT Employees

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- **June 2020 U.S. Supreme Court Decision in *Bostoc v. Clayton County* held that Title VII's prohibition against sex discrimination applies to gay, lesbian and transgender employees.**

64 >



- **Continues to shed light on sexual harassment in the workplace.**
- **Has changed how such allegations are viewed.**
- **February 2022 – Congress passed legislation banning mandatory arbitration of sexual harassment claims.**

#MeToo

(Continued)

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What can managers do?

- Model appropriate behavior.
- Report any allegations.
- Training is very important!

67 >

MARIJUANA IN THE WORKPLACE

68 >

Medical Marijuana

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Medical marijuana became legal in Ohio, effective September 8, 2016. This law legalizes marijuana for certain medical conditions, including pain that is either chronic and severe or intractable, PTSD, and traumatic brain surgeries.

69 >

Medical Marijuana

(Continued)

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So what does this mean for Ohio employers?

- **Nothing in the law requires an employer to permit or accommodate an employee's use, possession or distribution of medical marijuana.**
- **Nothing in the law prohibits an employer from taking any action that it may take under current law because of a person's use, possession or distribution. Specifically, an employer may refuse to hire, discharge or take adverse employment action due to an individual's personal use of marijuana.**
- **Employers may continue to have, and consistently enforce, zero-tolerance policies or other drug-free workplace policies.**

70 >

Medical Marijuana

(Continued)

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So what does this mean for Ohio employers?

- **The Bureau of Workers' Compensation rebuttable presumption, which allows an employer to deny a claim if the employee tested positive for marijuana, and being under the influence was the proximate cause of the accident, remains in place. The employee can rebut this presumption at hearing, and the employer must have complied with all posting requirements for the rebuttable presumption test to apply.**
- **Employers may take disciplinary action against medical marijuana users who test positive in the same manner as they would against others who test positive on drug tests.**

71 >

Medical Marijuana

(Continued)

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So what does this mean for Ohio employers?

- **A medical marijuana user who is discharged for having tested positive will be considered discharged "for cause" for unemployment purposes if the employer had a written policy addressing the use of drugs.**
- **This law does not permit a person to sue an employer for taking an adverse employment action related to medical marijuana.**

72 >

Issue 2 – Legalization of Recreational Marijuana

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- Much like with medical marijuana, Ohio employers retain all of the following rights:
 - An employer does not have to permit or accommodate an employee's use, possession, or distribution of adult use cannabis at the workplace, or tolerate an employee's impairment from the drug, even if caused by lawful off-duty use of cannabis;

73 >

Issue 2 – Legalization of Recreational Marijuana

(Continued)

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- Much like with medical marijuana, Ohio employers retain all of the following rights:
 - An employer is permitted to refuse to hire, discharge, discipline or otherwise taken an adverse employment action against an individual because of that individual's use, possession, or distribution of cannabis in the workplace;

74 >

Issue 2 – Legalization of Recreational Marijuana

(Continued)

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- Much like with medical marijuana, Ohio employers retain all of the following rights:
 - An employer is permitted to establish and enforce a drug testing policy, drug-free workplace policy, and/or zero tolerance drug policy; and

75 >

Issue 2 – Legalization of Recreational Marijuana

(Continued)

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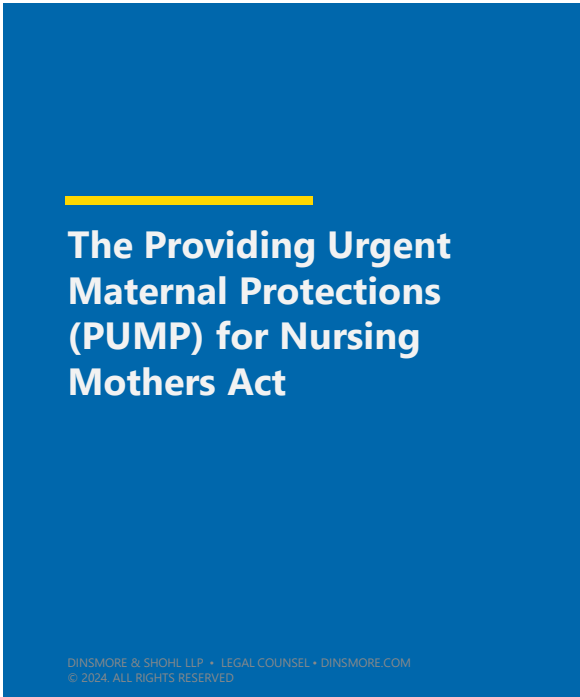
- Much like with medical marijuana, Ohio employers retain all of the following rights:
 - If an employer discharges an employee from employment due to cannabis use in violation of company policy, the employee will be considered to have been discharged for just cause.

76 >



THE PROVIDING URGENT MATERNAL PROTECTIONS (PUMP) FOR NURSING MOTHERS ACT

77 >



The Providing Urgent Maternal Protections (PUMP) for Nursing Mothers Act

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History – the FLSA

- 2010: As part of the Affordable Care Act, the Fair Labor Standards Act is amended to include the “Breaktime for Nursing Mothers Act.” For one year after the birth of a child, covered employers were then required to provide covered employees with:
 - *reasonable break time “each time such employee has need to express the milk.”*
 - *a private space, other than a bathroom, that is shielded from view and free from intrusion, to express breast milk*
- Employers cannot deny covered employees a needed break.

78 >

The Providing Urgent Maternal Protections (PUMP) for Nursing Mothers Act

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History – the PUMP Act

- On December 29, 2022, President Biden signed the Consolidated Appropriations Act, 2023 into law. The law included the PUMP Act.
- The Act expands the legal right to receive pumping breaks and private space to nearly 9 million more workers, including teachers, registered nurses, farmworkers, and many others.

79 >

The Providing Urgent Maternal Protections (PUMP) for Nursing Mothers Act

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Specifically

- Clarifies that pumping time counts as time worked when calculating minimum wage and overtime if an employee is not completely relieved from their work duties during the pumping break
- If an employer has violated the break time requirement or has indicated that they have no intention of providing private space to pump, employees are able to file a lawsuit immediately. The same is true if an employee has been fired for requesting break time or space to pump.
- If an employer has not provided adequate space to pump, employees must notify their employer, and the employer then has 10 days to comply.
- The provisions of the Breaktime for Nursing Mothers Act still apply (including a 50 or fewer employee limitation where employer would be exempt from the break time and space requirement if compliance would impose an undue hardship).

80 >

The Providing Urgent Maternal Protections (PUMP) for Nursing Mothers Act

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Time

- It varies
- BE FLEXIBLE
- Employers cannot require nursing employees to make up the time they spent on pump breaks because adding work time to their normal schedule could be considered an adverse action made in retaliation for exercising their lactation rights.

81 >

The Providing Urgent Maternal Protections (PUMP) for Nursing Mothers Act

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Remedies

- Expanded under PUMP and now include:
 - Employment
 - Reinstatement
 - Promotion
 - Lost wages
 - Liquidated damages
 - Punitive damages

82 >

The Providing Urgent Maternal Protections (PUMP) for Nursing Mothers Act

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Wage and Hour Considerations

- Non-exempt: the break can be unpaid, unless the employee is not completely relieved of her duties
- Exempt: must be paid full salary even if taking a pump break

83 >

PREGNANT WORKERS FAIRNESS ACT (PWFA)

84 >

Pregnant Workers Fairness Act (PWFA)

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Generally

- Requires employers to provide reasonable accommodations for pregnant employees, as well as those who have recently given birth.
- Went into effect **June 27, 2023**.
- Final regulations issued April 15, 2024, effective June 18, 2024.

85 >

Pregnant Workers Fairness Act (PWFA)

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What's "reasonable"?

- Closer parking
- Ability to work from home
- Ability to sit down, take breaks to rest/snack/use restroom
- Flexible hours to accommodate doctor visits
- Appropriately sized work attire, uniforms, safety gear
- Explicitly excluding pregnant workers from physically strenuous activities, tasks that may involve hazardous exposures, etc.
- ****the proposed regulation says these accommodations are reasonable and do not create undue hardship in "virtually all cases."**

86 >

Pregnant Workers Fairness Act (PWFA)

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Undue hardship

- Must be shown by employer if the accommodation is not going to be provided.

87 >

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Additional protections

- Employer cannot retaliate against employee for requesting an accommodation
- Cannot require an employee to take leave if there is a reasonable accommodation that would allow them to keep working
- Accommodations cannot be “forced” upon employees without discussion

88 >

Pregnant Workers Fairness Act (PWFA)

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Sound Familiar?

- **Americans with Disabilities Act (“ADA”)** – employers must provide reasonable accommodations to employees so long as they can perform the essential functions of their job with or without the accommodation. The accommodation cannot cause an undue hardship upon the employer
 - “undue hardship” focuses on significant difficulty/expense in both contexts

89 >

Pregnant Workers Fairness Act (PWFA)

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Similarities

- **”Covered” employers = 15 or more employees**
- **Terminology**
- **Interactive Process (with some limitations)**

90 >

Differences Between ADA and PWFA

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Differences

- **ADA** – employee must be legally “disabled,” meaning they are significantly limited in a major life activity. This includes individuals with a record of such a disability even if it does not currently ail them, and those who are “regarded as” having a disability even if they do not have one.
 - Pregnancy is not a “disability” under the ADA, but workers can have impairments caused by pregnancy that would qualify.
- **PWFA** – employee does not have to show that a limitation reaches a certain level of severity or duration.
 - Obviously, pregnancy qualifies.

91 >

Differences Between ADA and PWFA

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Differences

- **ADA** – if employee cannot perform the “essential functions” of the job with or without a reasonable accommodation, they are not “qualified” and, thus, not protected by the ADA.
- **PWFA** – employee does not need to be capable of performing the essential job functions to be a “qualified” individual. An employee may be qualified if:
 1. the inability to perform an essential job function is for a *temporary* period;
 2. the essential job function(s) could be performed in the *near future*; and
 3. the inability to perform the essential function(s) can be *reasonably accommodated*.

92 >

Pregnant Workers Fairness Act (PWFA)

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Differences

- **PWFA:** The regulations provide that employers may only ask for reasonable documentation when it is reasonable under the circumstances to determine whether to grant the accommodation. An employer is not permitted to require documentation when the limitation and need for reasonable accommodation are obvious.
- **ADA:** Employer can require documentation as a matter of course

93 >

Pregnant Workers Fairness Act (PWFA)

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What should employers be doing?

1. Review the regulations and examples to better understand how the EEOC interprets the PWFA.
2. Analyze their current policies and procedures to determine if they are in compliance with the PWFA.
3. Prepare to implement any changes that need to be made to policies, forms or practices to comply with the PWFA.
4. **Post the required PWFA notices.**
5. Consider preparing training for Human Resources employees, supervisors and managers regarding the PWFA and how to identify and respond to requests for accommodations.

94 >

Pregnant Workers Fairness Act (PWFA)

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Other laws that cover pregnancy – Civil Rights Act

- Federally, pregnancy discrimination is prohibited by Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978, which applies to all employers with 15 or more employees (same as PWFA)
 - Expanded the definition of “on the basis of sex” to include “because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes...”
- The Act prohibits employers from treating workers differently on the basis of pregnancy, childbirth, or related medical conditions. An employer can't take pregnancy into account when making decisions on hiring, promotions, raises, and other employment actions. Employers also cannot allow employees to be harassed on the basis of pregnancy.
- However, this law applies to discrimination and harassment; it doesn't explicitly require reasonable accommodations.
-

95 >

Pregnant Workers Fairness Act (PWFA)

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Other laws that cover pregnancy – R.C. 4112.01(B)

- “Women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.....
- This also dovetails into gender discrimination.
- ****Ohio civil rights law applies to any business with four or more employees. This is significant because the federal PDA applies to employers with 15 or more employees, and the FMLA requires 50 or more.****
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96 >

