



ZASHIN & RICH

Current Employee Issues for Counties

FLSA Changes, FMLA/ADA Challenges, & Medical Marijuana

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Jonathan J. Downes

- More than thirty years of experience and expertise in representing public and private employers in labor and employment law and human resource management.
- Negotiated over 500 labor contracts.
- Represents employers in arbitrations, organizing campaigns, and administrative hearings.
- Defends employers in state trial and appellate courts, the Ohio Supreme Court, federal district courts and the United States Court of Appeals for the Sixth Circuit.
- AV Preeminent rated by Martindale Hubbell.
- Fellow in the College of Labor and Employment Lawyers.
- Ohio State Bar Ass'n. Certified Specialist in Labor and Employment Law
- Recognized many times over as a subject-matter expert, Jonathan was selected as one of the Top 50 Central Ohio Lawyers of 2015 and every year since 2004 has been named an Ohio "Super Lawyer".



OSBA Certified Specialist
in Labor and Employment Law



Employment and Labor Law Group

Zashin & Rich's Employment Group has extensive experience representing public sector entities, large and small businesses, and non-profit organizations. Zashin & Rich's Employment Group's expertise extends into many areas including:

- **Litigation and EPLI Defense**
- **Discrimination and Retaliation**
- **General Employment Counseling**
- **Labor Law**
- **Collective Bargaining**
- **FLSA, Wage and Hour Issues**
- **Worker's Compensation**
- **Restrictive Covenants**
- **Employee Handbooks**
- **Unemployment Compensation**
- **Civil Service Law**
- **Public Records/Sunshine Laws**

Discrimination and Retaliation Laws Representation

- **Title VII**
- **ADA**
- **ADEA**
- **FMLA**
- **PDA**
- **FLSA**
- **Section 1983**



Today's Agenda

Agenda



1. FLSA Issues and Challenges
2. ADA/FMLA Exposure
3. Medical Marijuana & CDLs



FLSA Changes: The “Final Rule”

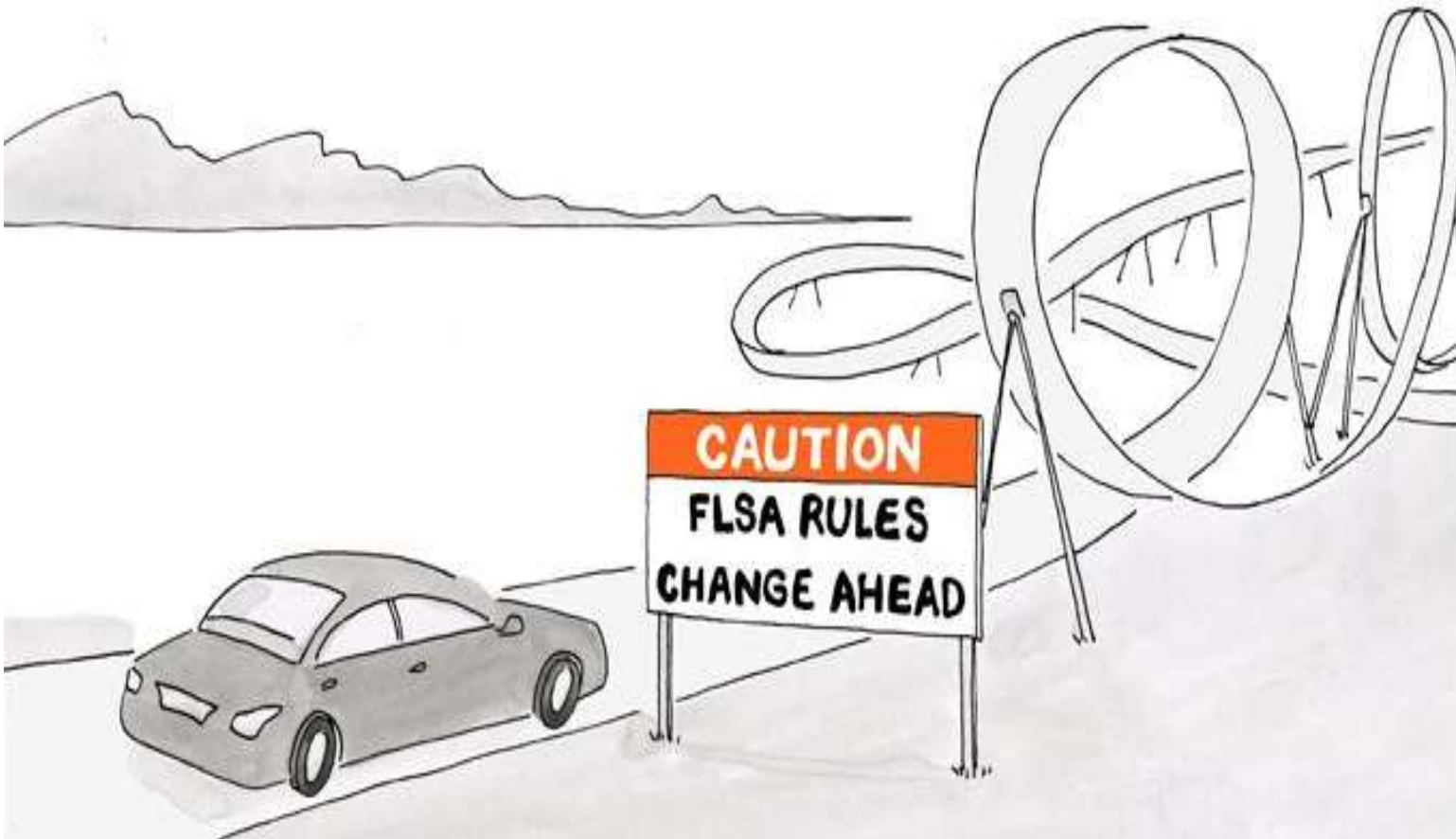


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FLSA Proposed Changes

- Substantial increase to the minimum salary levels required for “White Collar” and “Highly Compensated” workers to be exempt from the overtime requirement:
- The rule contains a mechanism to automatically update and increase the salary thresholds annually.

New Rules For Overtime Pay

	CURRENT	NEW
Exempt Full-Time Salaried Workers	> \$23,660	> \$47,476
Exempt Highly Compensated employees	> \$100,000	> \$134,004

Source: U.S. Department of Labor



FLSA Proposed Changes – BLOCKED!

- On **November 22, 2016**, a Federal District Court in Texas issued a nationwide preliminary injunction that stopped the implementation of the DOL's new rules (*State of Nevada, et al. v. U.S. Dept. of Labor*).



FLSA Proposed Changes – BLOCKED!

- What does the injunction mean for employers?
 - For the time being, the minimum salary levels for the “White Collar” exemptions remain at \$23,660 per year (\$455 per week).
 - The Court’s ruling is only a preliminary injunction, and is subject to modification, so employers should work with their legal counsel to monitor the status of the DOL’s new rules as the case proceeds forward.
 - It is unclear how President Trump’s administration will handle the DOL’s rules and the legal challenge still pending in Texas.



FLSA Proposed Changes – What now?

- What options do employers have if the new rules do go into effect?
 - Raising employee salaries to the new threshold
 - Reclassifying affected employees and absorbing the costs of overtime for those employees
 - Limiting overtime without authorization
 - Some combination of the above



Impact of Injunction on FLSA Rule

- **Roll-back pay raises**
- **Reassign duties**
- **Withhold future raises**
- **Possible reduction in pay appeals**
- **Timeclock and timesheets for exempts**
- **Position descriptions to be rewritten**
- **Amendment of OT/CT policies**



Fair Labor Standards Act

BASIC POINTS

- **HOURS “ACTUALLY” WORKED**
- **OVER 40 IN A WORK WEEK**
 - (SAFETY FORCES: 171 HOURS-POLICE, 212 HOURS-FIRE)
- **WORK PERIOD OF 7 CALENDAR DAYS**
 - (SAFETY FORCES 28 DAYS)
- **PAID, UNWORKED TIME DOES NOT COUNT TO OVERTIME**
- **COMPENSATORY TIME OPTION FOR PUBLIC EMPLOYERS**
- **POLICY FOR ACCUMULATION, USE, CONVERSION, ETC.**
- **LIABILITY COVERAGE DOES NOT COVER FLSA CLAIMS**



FLSA and Civil Service Law

“Exempt” does not equal “Unclassified”

Unclassified employees under civil service law are not necessarily “exempt” under the FLSA.

The “duties test” and salary test of the FLSA must be met for the FLSA exemption



FLSA Common Errors

- **Everyone who is salaried is exempt from OT**
- **The employee “volunteered” the hours**
- **Job description indicates position as exempt**
- **All supervisors are exempt**
- **Union contract exempts the employees**
- **The job requires a college degree so it is exempt**
- **Tracking time destroys exempt status**
- **Anyone handling computers is exempt**



Overtime and Compensatory Time Policies

1. **Threshold hours for OT**
2. **Use of only hours worked or hours in paid status**
3. **Flex time or rescheduling of time**
4. **Comp time (CT) or not**
5. **Cap on CT hours accumulated (max 240/480)**
6. **Whether Employer or employee chooses CT**
7. **Discipline for unauthorized OT**
8. **Advance notice/approval for use of CT**
9. **Cash of accumulated CT: Employer and/or employee**
10. **Employer scheduling of CT**



Overtime and Compensatory Time Policies

- **Other considerations**

- Union contracts**

- Work week for OT vs. Payroll**

- Active Pay status vs. Hours Worked**

- Accrued liability**

- **FLSA requirements are a base**

- **OT does not destroy exempt status**



FLSA - Hours Worked

- **Suffered or Permitted to Work**
- **Rounding and De Minimis Rule**
- **Waiting time – Engaged to Wait**
- **On-call or Standby Time**
- **Rest Periods, Meal Periods**
- **Pre and Postliminary time (doffing/donning)**
- **Training time**
- **Unscheduled time**



FLSA Hours Worked – On-Call Status

On-Call: Factors courts consider

- Agreement to work
- Geographic restrictions
- Frequency of calls –whether unduly restrictive
- Fixed time to respond-whether unduly restrictive
- Trade of on-call duties
- Use of pagers/cell phones
- Ability to engage in personal activities



ADA: BACKGROUND

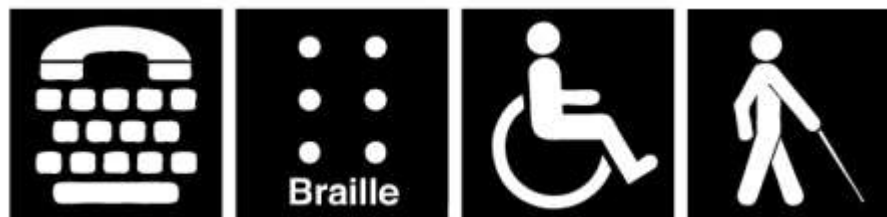
- ADA passed in 1990; Rehabilitation Act passed in 1973
- Covers most private employers & all state/local governments
- ADA protects a “qualified individual with a disability”
 - E.g. = “an ***individual with a disability*** who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.”
- 3 types of ADA claims: Discrimination, Harassment, and Retaliation
 - Discrimination includes ‘failure to accommodate’



ADA: Who is “Disabled”

1. Physical or mental impairment that substantially limits a major life activity; *OR*
2. A “record of” such impairment; *OR*
3. Being “regarded as” having such an impairment.

*** * * Only #1 is entitled to a reasonable accommodation**



ADA - WHAT ARE “REASONABLE ACCOMMODATIONS”?

- A reasonable accommodation is one that “seems reasonable on its face, *i.e.*, ordinarily or in the run of cases.”
- Courts look at the **costs** of providing the accommodation weighed against the **benefits** of the accommodation.



- An employer is not required to provide a reasonable accommodation if doing so would impose an “***undue hardship***” (significant difficulty or expense in providing the accommodation.)
- Employers must engage in an **interactive process** with employees who request reasonable accommodations for their disabilities.



ADA and Pregnancy

- The EEOC recently updated its guidelines on pregnancy, making clear that while pregnancy itself is not a disability, pregnant employees' impairments related to pregnancy affecting major life activities are covered by the ADA.
 - Complications
 - Bed rest
 - High Blood pressure



ADA and Pregnancy

- **EEOC guidelines on ADA and pregnancy:**
 - Pregnancy-related impairments do ***not*** have to be severe or fully prevent a major life activity to be covered
 - A pregnant employee may require early leave
 - Reasonable accommodations may include allowing a pregnant employee to have a water bottle at her station, take more frequent breaks, or sit while working



ADA - Pregnancy and Light Duty

- The City of Florence, KY recently settled a lawsuit brought by two female police officers who were denied light duty when they were unable to perform their duties as patrol officers due to their pregnancies.
- The officers challenged the City's discriminatory light duty policy, and the City settled the case in October 2016 for \$135,000 in compensatory damages and attorney's fees. The City also agreed to adopt new light duty policies and to retrain all of its supervisors and administrators.



ADA and PREGNANCY (Cont.)

- **Takeaways**

- Review/revise your policies to ensure that they capture requirements for employees affected by pregnancy, childbirth, or related medical conditions.
 - Job accommodations, light duty, leave of absence, lactation breaks, discrimination/harassment, etc...
- Conduct management/supervisor training



ADA - DAMAGES OVERVIEW

DAMAGES AVAILABLE:

- Back pay/benefits minus mitigation
- Reinstatement/front pay
- Reasonable attorney fees
- Intentional? = compensatory and punitive damages
 - Job search costs
 - Out of pocket medical costs
 - Mental anguish, loss of enjoyment
 - Liquidated damages equal to back pay instead (AGE)



ADA - BUILD YOUR DEFENSE

Establish ADA Defenses:

- Legitimate Business Reason
- Undue Hardship
- Direct Threat
- Provided a “Reasonable Accommodation”
- Engaged in Good Faith in the Interactive Process
- Not a “Qualified Person with a Disability”
 - Can’t perform job even with accommodation



ADA - BUILD YOUR DEFENSES

Document:

- Accommodation/interactive process
- Your policies and UPDATE!!
- Essential Job Functions in Job Descriptions
- All similarly situated discipline/leave requests
- Interview and Selection Process
- Performance Evaluations
- Training of managers and employees
- Investigations



The Family and Medical Leave Act



The Family and Medical Leave Act



FMLA Basics

- Covers private sector employers (50+ employees) and all public sector employers
- Eligible employees entitled to up to 12 weeks of job-protected, unpaid leave for serious health conditions; up to 26 weeks for care of military service members / qualifying exigencies of a call to active service
- Leave may be continuous or intermittent, depending on the employee's condition



FMLA - EMPLOYEE OBLIGATIONS

- Reasonable notice
 - 30 days if “foreseeable”
- Provide reasons for the leave
- Certification of need
 - Use DOL forms
- Periodic reporting
 - Recertification every 30 days unless:
 - Extension requested
 - Changed circumstances



FMLA - EMPLOYER RIGHTS

- Failure to provide notice for a foreseeable leave?
- 2nd and 3rd opinions on medical certification
- Concurrent counting of paid leave
- Repayment of health care premiums if not return
- Fitness-for-duty before return to work.



FMLA - EMPLOYER OBLIGATIONS

- Posting requirements
 - May 2016 – DOL issued new FMLA poster!
- Designation requirements
 - 5 business days after employee supplies notice of need
 - Retroactive permitted if “does not cause harm or injury to the employee.”
- Handbooks and other notices
 - General notice of rights to all employees in handbook
 - Personal notices to employees requesting FMLA
- Record keeping



FMLA: Recent Developments

- “Inpatient care” has always triggered FMLA protections under the statute.
 - Courts are taking a more limited approach (the “*Bonkowski*” standard) to what is considered “inpatient care” for FMLA purposes
 - “Inpatient care” requires a **substantial period** of time from **one calendar day to the next** based on times of admission/discharge
- What does that mean for employers?
 - Possibility that an employee’s admission to a hospital, standing on its own, may not trigger FMLA protections in all situations



FMLA: Recent Developments

- What if an employer has a question and urgently needs an answer from an employee who is out on FMLA leave? Can the employer call?
- Courts have recognized that “fielding occasional calls about one’s job” during FMLA leave does interfere with FMLA rights, nor does asking the employee to participate in an investigation.
 - Krause v. Eihab Human Services, Inc. (E.D.N.Y. 2015).



FMLA: Recent Developments

- Can an employer require employees on FMLA follow the normal call-in procedures?
- **Yes.** “In general, an employer may require that employees comply with the employer’s usual and customary policies for requesting leave, unless unusual circumstances prevent the employee from doing so.”
 - DOL’s “The Employer’s Guide to the FMLA,” p. 14 (4/16)
- According to at least one court, this includes requiring employees to speak to a supervisor, rather than leave a message.
 - Chappell v. Bilco Co. (8th Cir. 2012)



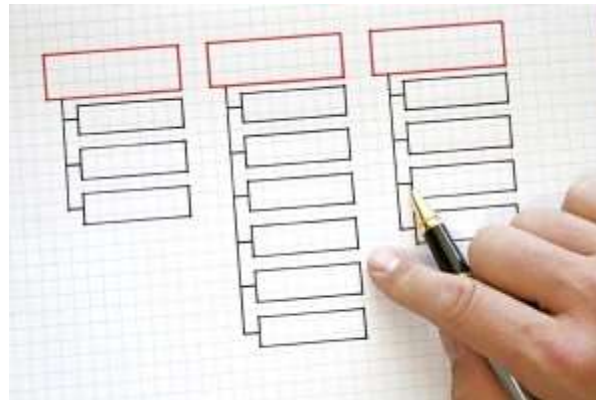
ADA/FMLA OVERLAP

- **EEOC and DOL position:**
 - “A single request for FMLA leave is enough to put the employer on notice of a potential need for an ADA job accommodation.”
 - Leave of absence may be a “reasonable accommodation” under the ADA
- **So, if I grant 12 weeks of FMLA to a person who may qualify as “disabled” under ADA – am I good?**
 - Extension of leave beyond normal limits must also be considered under ADA accommodation precedent



JOB RESTRUCTURING OR TRANSITIONAL DUTIES

- **ADAAA:** employer might have to modify a job to reallocate nonessential job functions.
 - May also transfer to another job as accommodation
- **FMLA:** does not apply to modified duties
 - However, transfer to another job during the FMLA leave period is permitted.



INTERPLAY OF OTHER LEAVES

Sick and Vacation

Injury Leave

Workers Compensation

Leave of Absence Policy

Short-term/long-term disability

Disability Separation

**I'VE REQUESTED
EVERY DAY OFF
FROM WORK, SO I'M
WAITING TO GET
APPROVED.**

QUOTEHD.COM

Beth Swenson



DEALING WITH LEAVE ABUSE

- Don't make it easy to call-off.
 - Entitled to have a reason for the absence
- Ask for second opinions when in doubt
- Develop effective tracking process
- Re-certification process when inconsistent use



DEALING WITH LEAVE ABUSE

- Use social media as an investigation tool
- Utilize private investigators
- Take advantage of Employment Policies
 - Employees must follow customary paid leave call-in policy of employer regardless of FMLA
 - Dishonesty
 - Investigate excessive leave and suspicious patterns
 - Leave Abuse Policy



INTERMITTENT LEAVE ISSUES

- Make sure they qualify.
 - Must be “medically necessary.”
 - Can only be taken for :
 - “serious health condition”
 - “serious injury/illness of covered service member”
 - “qualifying exigency”
 - NOT for birth, adoption, placement UNLESS employer agrees/allows under policy



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INTERMITTENT LEAVE ISSUES

- Don't take it lying down
 - If used for planned medical treatment – enforce that employee is obligated to schedule outside work hours when possible
 - Can deny if it does not fit within basis for intermittent leave
 - *Lane v. Pontiac Hospital* (2010). Employee granted intermittent FMLA to care for his mother (diabetes, arthritis). However, employee denied leave when he tried to use it for 4 days missed cleaning up flooding in his mother's basement.
 - Court upheld denial since time was not used to care for mother's illness.
 - Recertify every 30 days when no time established certification.



MEDICAL MARIJUANA IN OHIO



MEDICAL MARIJUANA IN OHIO

- Effective September 8, 2016, Ohio's medical marijuana law allows the cultivation, processing, testing, dispensing, and use of medical marijuana for patients under a physician's treatment.
- The law is designed for those suffering ailments such as suffering Alzheimer's disease, Epilepsy, Fibromyalgia, and Parkinson's disease.
 - Patients are expressly prohibited from smoking the prescribed marijuana under the law (O.R.C. 3796.06(B)(1).
 - Patients are allowed to ingest “edibles” or to use skin patches to absorb marijuana.



MEDICAL MARIJUANA IN OHIO

- Marijuana remains illegal at the federal level under the Controlled Substances Act (CSA).
- The US Department of Justice (DOJ) stated in a memo (from Deputy Attorney General James Cole) on August 29, 2013 that its general policy is **not to interfere with the medical use of marijuana pursuant to state laws** that tightly regulate and control the medical marijuana market.
- It's unclear how the US DOJ's position will change given the outcome of the 2016 General Election.



MEDICAL MARIJUANA IN OHIO

- The US Department of Transportation (DOT) Drug and Alcohol Testing Regulation – 49 CFR Part 40, at 40.151(e) – does not authorize “medical marijuana” under a state law to be a valid medical explanation for a transportation employee’s positive drug test result.
- DOT Medical Review Officers will not verify a drug test as negative simply because a physician recommended that the employee use “medical marijuana.”
- Per the DOT, it remains unacceptable for any safety-sensitive employee subject to drug testing under the Department of Transportation’s drug testing regulations to use marijuana (even state law authorized use).



ADA AND MARIJUANA?

- Most courts that have addressed this issue have held that ADA does not protect medical marijuana because it remains illegal under federal law.
- Ohio's Medical Marijuana Law allows it to be prohibited under Drug Free Workplace Policy.



THANK YOU!

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