



ZASHIN & RICH

Dealing with Guns, Background Checks, and Marijuana in the Workplace – RISK REDUCTION THROUGH POLICIES



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- 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.
- 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, courts, the Ohio Supreme Court, federal district courts and the United States Court of Appeals for the Sixth Circuit.
- 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".



Super Lawyers



About Zashin and Rich

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

Dealing with Guns , Background Checks, and Marijuana in the Workplace

AGENDA



- ✦ **Guns –**
 - ✦ Ohio's CCW "Parking Lot" Law
- ✦ **Background Checks –**
 - ✦ Ohio "Ban the Box" and EEOC Guidelines
- ✦ **Marijuana –**
 - ✦ Ohio's Medical Marijuana Law
- ✦ **Other Policies –**
 - ✦ Workplace Accommodations
 - ✦ Lactation Breaks and Light Duty Policies
 - ✦ Leave Abuse Policy



Dealing with Guns in the Workplace After Ohio Passed the “Parking Lot” Law



- ✦ **Effective March 2017.**
- ✦ Policies cannot restrict CCW holders from transporting their firearm and ammunition in their personal vehicles.
- ✦ What is the general rule?



Dealing with Guns in the Workplace After Ohio Passed the “Parking Lot” Law



- ✦ CANT prohibit CCW holders from having guns in their private vehicle while on employer parking lots.
- ✦ Once employee leaves vehicle, the gun (and ammo) must be locked in glovebox, trunk or other enclosed and locked container in the car.
- ✦ What **can** be limited?



Dealing with Guns in the Workplace After Ohio Passed the “Parking Lot” Law

- ✦ CAN prohibit removing from personal vehicle.
- ✦ CAN prohibit carrying the guns into employer buildings.
- ✦ CAN prohibit carrying in Employer-owned vehicles.
- ✦ TRICKIER – use of personal vehicle while performing work for Employer??
 - ✦ Law says CCW holders may “transport” in their personal vehicle and also says employer cannot pass policies that “have the effect” of prohibiting such transport.
 - ✦ But what about a case worker who has to transport a child in her personal vehicle?



Dealing with Guns in the Workplace After Ohio Passed the “Parking Lot” Law

- ✦ **IMMUNITY?**: Statute says employer not liable in a civil action for harm arising out of another’s actions “involving a firearm transported or stored pursuant to” the statute unless the employer “intentionally solicited or procured the other person’s injurious actions.”
 - ✦ But this does not address potential liability for another’s actions involving a firearm that was not stored “pursuant to the statute” (e.g., in an unlocked vehicle).



Dealing with Guns in the Workplace

-Policies Impacted

- ✦ Update Weapons Policies to be in compliance
- ✦ Update Employer Property policies to the extent they prohibit CCW holders from bringing weapons onto employer property.
 - ✦ Make it clear that CCW holders may store gun and ammunition in their private vehicle while in parking lot
 - ✦ May want to include active military personnel with valid military I.D. - even without a CCW license (the law makes an exception for them)
- ✦ Use of Vehicles Policy should be updated
 - ✦ Can prohibit in employer owned vehicles
 - ✦ Risk is there for limiting “transport” in personal vehicle used for employer-purposes



Dealing with Background Checks After Ohio “Banned the Box” (H.B. 56)

- ⚡ Public Employers prohibited from inquiring about criminal convictions on the job application.



Ohio “Banned the Box” (H.B. 56)

- ✦ “**Public Employer**” includes State, County, Township, Municipal Corp., or any other body corporate and politic that is responsible for government activities in a geographic area smaller than that of the state.



Ohio “Banned the Box” (H.B. 56)

Are Public Employers prohibited from asking about criminal convictions of all job applicants now?

- ✦ No. H.B. 56 does not prohibit public employers from inquiring about felony convictions later in the hiring process. The inquiry is only “banned” from the job application itself.
- ✦ Employers should develop a policy and procedure regarding how, and when, the inquiry will be made. The developed procedure should be followed for each position without deviation (to avoid Disparate Treatment).



Ohio “Banned the Box” (H.B. 56)

When can Public Employers seek information about criminal convictions from applicants?

- ✦ This depends upon the employer and the position.
- ✦ Some may find asking about criminal convictions earlier in the process, such as during a phone interview or first in-person interview, is prudent - particularly for positions where Ohio or Federal law disqualifies a person with certain convictions
- ✦ For other positions, employers may find it is more cost-effective to make a job offer contingent upon successfully passing a criminal background check.



Ohio “Banned the Box” (H.B. 56)

Can my job application inform applicants if State or Federal Law disqualifies persons with certain convictions from employment?

- ✦ Yes. H.B. 56 expressly states that a Public Employer may include in the job application a statement notifying applicants if a provision of the State or Federal law disqualifies an individual with a particular criminal history from a particular position.



Ohio “Banned the Box” (H.B. 56)

What if I hire an employee without running a criminal background check and subsequently learn the employee had a conviction that a pre-employment background check would have uncovered?

- ✦ Previously, could check to see if they checked the box on the application. If not – “dishonesty.”
- ✦ Previously, could use R.C. 124.34 –remove if “convicted of a felony” – HB 56 amended to “while employed in the civil service” . . .
- ✦ Now? Changes needed to application and policy manual



Ohio “Banned the Box” (H.B. 56)

Can I still refuse to hire persons with convictions even if there is no express State or Federal Law disqualifying persons with convictions from employment in a position?

- ✦ Be mindful of the EEOC’s 2012 Enforcement Guidelines.
- ✦ Develop management procedure as to how this will be handled
- ✦ Consider modifying/creating policy to address how criminal convictions will be handled (in compliance with EEOC)



EEOC's 2012 Enforcement Guidelines

- ⚡ Criminal record exclusions linked to unintentional race discrimination.
- ⚡ Employers must be able to show that conviction/arrest data is “job related and consistent with business necessity.”



EEOC's 2012 Enforcement Guidelines

- ✦ To show “Business Necessity” must develop a targeted screening process that considers three factors established in Green v. Missouri Pacific Railroad (1975, 8th Cir). They are:
 - ✦ The nature/gravity of the crime.
 - ✦ The time elapsed since the conviction/release from prison.
 - ✦ The nature of the job/position sought.
- ✦ The Employer must also provide an opportunity for “individualized assessment.”



EEOC's 2012 Enforcement Guidelines

- ✦ Blanket “No hire policies” for felony convictions are prohibited except in limited positions required by Federal statute.
- ✦ State laws requiring the non-selection of employees with criminal records are preempted.
- ✦ Less discriminatory alternative?



Dealing with Medical Marijuana

- **Effective September 2016**



Dealing with Medical Marijuana

- **Drug-free workplace policies are still permitted**
 - Should revise nonetheless to make it clear that marijuana still prohibited regardless of Ohio marijuana law.
- **Still permitted to remove employees for violating drug-free workplace policy (even for possession or distribution)**
 - Will still be deemed “just cause” under Ohio Unemployment Compensation Law.
- **Workers Compensation still denied if injury due to use of marijuana.**
 - Safe workplace/workplace injury policy should specify this.



ADA AND MARIJUANA

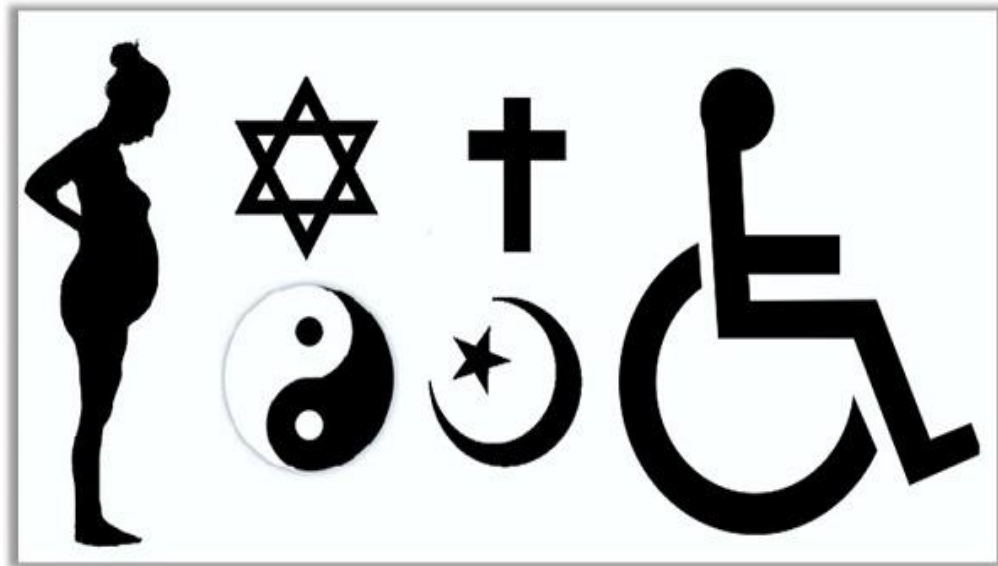
- Most courts that have addressed this issue have held that the ADA does not require an accommodation for the use of medical marijuana because it remains illegal under federal law.
- Ohio's Medical Marijuana Law specifically does not require employers to provide an accommodation.
- Ohio's law specifies that employees do not have a right to sue employers for any disciplinary action related to use of medical marijuana (whether on or off duty).



Dealing with Accommodations in the Workplace

- ✦ **Reasonable Accommodation Policy.**
- ✦ **What does it include?**

- ✦ **Disability?**
- ✦ **Pregnancy?**
- ✦ **Religion?**



Dealing with Accommodations in the Workplace

✦ What Process is Identified in the Policy?

- ✦ Must be “Reasonable”
- ✦ Employer decides what is reasonable
- ✦ Undue Burden and Direct Threat Exceptions
- ✦ Employee Required to Cooperate – including medical information when necessary.
- ✦ Who to make the request?
- ✦ Interactive Process Identified?
- ✦ Employer discretion to provide alternative.



Reasonable Accommodations in the Workplace

Main ADA Inquiry

Can the employee perform the essential functions of this job, with or without reasonable accommodation?



ESSENTIAL FUNCTIONS

- **Consider the following when considering whether a job duty is an “essential function”**
 - Written position description
 - Amount of time spent performing the duty
 - Employer’s judgment
 - Terms of collective bargaining agreement
 - Work experience of others who performed/are performing the job
 - **“Regular and predictable attendance”?**



REASONABLE ACCOMMODATIONS

A reasonable accommodation is one that “seems reasonable on its face, *i.e.*, ordinarily or in the run of cases.”

- Job restructuring
- Part-time or modified work schedules
- Reassignment to a vacant position
- Acquiring or modifying equipment
- Changing exams, training materials, or policies
- Providing qualified readers or interpreters
- Costs and benefits are considered



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



Pregnancy and Light Duty Policies

An employee, who delivers light packages for UPS, becomes pregnant. Her doctor orders her to lift no more than 20 lbs. Even though her work rarely, if ever, requires her to lift heavy packages, UPS includes lifting up to 70 lbs as an essential job function.

- Employer policy accommodates lifting restrictions with temporary assignments only when: (1) the employee suffered an on-the-job injury; (2) the employee had a disability under the ADA; or (3) a driver lost their DOT certification.

UPS requires the employee to take unpaid leave (she used all of her FMLA leave), and was reinstated after giving birth.



Pregnancy and Light Duty Policies

The Supreme Court decided that UPS's rule that employees could be assigned to light duty only for on-the-job injuries discriminates against pregnant women.

The EEOC's 2014 guidelines also specify that employers must accommodate pregnant employees with light duty if the same is done for employees ***similar in their ability or inability to work.***

Young v. UPS, 135 S. Ct. 1338 (2015)



DO YOU HAVE A LEAVE FRAUD POLICY?



SEEGER v. CINCINNATI BELL (6th Cir. 2012)

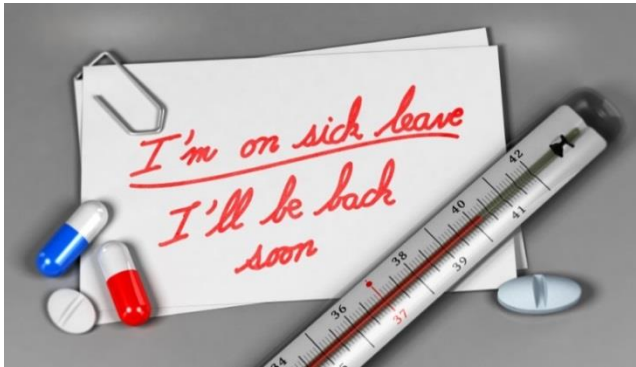
- Employee suffered herniated disc. Granted FMLA and paid short term disability.
 - Offered light duty but employee declined “too disabled to work.”
- Several days later, he was seen at Oktoberfest.
 - Upon questioning – he admitted to walking over 10 blocks and drinking beer.
 - Employer had “leave fraud” policy = fired him.
- Result?
 - “Reasonable belief” in FMLA abuse enough?
 - “Legitimate business reason” established?



DEALING WITH LEAVE ABUSE

LINEBERRY v. RICHARDS (E.D. Mich, 2013)

- An RN at Medical Center was approved for FMLA due to lower back and leg injury.
 - Dr. certified substantial lifting and mobility restrictions.



- Result?
 - “Reasonable belief” in FMLA abuse enough?
 - “Legitimate business reason” established?



BEST PRACTICES FOR LEAVE ABUSE

- **Don't make it easy to call-off.**
 - Entitled to have a reason for the absence supplied to you.
 - Make it clear in your policy manual
- **Take advantage of Employment Policies**
 - Employees must follow customary paid leave call-in policy of employer - regardless of FMLA
 - Dishonesty in leave request/use
 - Specify excessive leave and suspicious patterns have consequences
 - Stand alone Leave Abuse/Fraud Policy



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QUESTIONS

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