How to Respond to Employee Leave Requests and "Playing Nice" with Others in the Workplace

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PRESENTED TO YOU BY

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A. Family Leave

1. The Family Medical Leave Act ("FMLA") requires a "covered employer" to provide an "eligible employee" with up to 12 weeks of leave per year for eligible family and medical situations, with restoration for the employee to the same or a similar position upon return to work.

2. "Covered employer" means:

   a. All public employers, regardless of the number of employees employed are covered by the FMLA. 29 U.S.C.S. § 2611 (4)(A)(iii). *See also Frederico v. Grand Haven Charter Township*, Case No.1:96-CV-25, (W.D. Mich., Sept. 30, 1996), ruling that all public agencies, regardless of size or number of employees, fall within the meaning of the term "employer" under the FMLA.

   b. Public agencies are covered by the FMLA regardless of the number of employees; they are not subject to the coverage threshold of 50 employees; however, employees of public agencies must meet all of the requirements of eligibility, including the requirement that the employer employ 50 employees at the worksite or within 75 miles. 29 C.F.R. § 825.108(d).

      i. In an opinion letter, FMLA 2020-1-A, the Department of Labor ("DOL") determined the county health district and the county were not the same public agency, meaning that the health district does not need to include all county employees when determining whether its employees are FMLA eligible.

      ii. In reaching this decision, the DOL clarified the employment-related factors used to assess whether county agencies, like a combined county health district, must calculate all county employees when determining FMLA eligibility. These factors include:

         - Whether the two agencies have separate payroll systems;
         - Whether they have different retirement systems;
         - Whether they have separate budgets and funding authorities;
         - Whether each has the authority to sue and be sued in its own name;

- Whether they have separate hiring and other employment practices;
- Whether one employer controls the appointment of officers of the other agency; and
- How state law treats the relationship between the two agencies.

3. "Eligible employee" means that an employee must have:

   a. Worked for the employer for at least twelve (12) months. The 12 months need not be consecutive, but service prior to a break in service up to seven (7) years ago need not be counted.

   b. Worked for the employer for at least 1,250 hours in the 12-month period prior to the date on which leave is to commence. Exclude paid vacation leave, sick leave, holiday pay, and any paid FMLA leave.

      NOTE: If employer fails to maintain accurate records, presumption is in favor of the employee having worked the required hours.

   c. Been employed at a worksite where 50 or more employees are employed by the employer or the employer employs 50 or more employees within 75 miles of the worksite.

      NOTE: See previous section on employers about FMLA 2020-1-A; DOL's guidance for the county health district.

      NOTE: A county is considered to be a single public employer for purposes of counting the number of employees. The regulations provide, and case law affirms, that any question as to whether a public entity is a public agency, as distinguished from a part of another public agency, will be resolved by first examining state law and if state law fails to resolve the issue, then by referencing the U.S. Bureau of Census' "Census of Governments." *Rollins v. Wilson County Gov't*, 154 F.3d 626 (6th Cir. 1998); 29 C.F.R. §825.108(c).

B. Military Leave

1. The FMLA's standard 12 weeks of leave during a 12-month period must also be provided to eligible employees due to a "qualifying exigency" related to an immediate family member's call to active duty in the military. The FMLA also requires covered employers to provide employees with **up to 26 weeks** of FMLA leave during a 12-month period in order to care for a "covered service member" suffering from a "serious

injury or illness" received in the line of duty if the employee is an immediate family member or a "next of kin" to the service member.

C. Qualifying Reasons for Taking Leave

1. Qualifying Reasons

   a. Upon the birth of an employee's child and in order to care for the child.

   b. Upon the placement of a child with an employee for adoption or foster care.

   c. When an employee is needed to care for an immediate family member who has a serious health condition.

      i. "Immediate family member" means a spouse, child, or parent.

      ii. "Spouse," generally, for purposes of FMLA includes marriages that were validly entered into based on the law of the state where the marriage occurred and not the law of the residence of the employee and his or her spouse. This protection also extends to marriages that were entered into in a foreign country that recognizes same-sex marriage. An employer may still make a reasonable request for documentation indicating that a marriage is valid. Employers should note, however, that verification requirements, while considered on a case by case basis, should not be administered in a discriminatory manner. Under the FMLA, employers may require employees to take paid leave concurrent with FMLA leave.

      iii. A "child" must be under 18 years of age or incapable of self-care because of a mental or physical disability. Included in "child" are children related to the parent biologically, adopted, foster children, a stepchild, and a legal ward. Also included in the definition is a child of a person standing *in loco parentis.* 29 U.S.C. § 2611(12).

      iv. "Parent" means a biological parent or an individual who stands, or stood, *in loco* parentis to an employee when the employee was a child; does not include in-laws.

      v. "Loco parentis" employees who have no biological or legal relationship with a child may nonetheless stand *in loco parentis* to the child and be entitled to FMLA leave. The DOL's 2010 Interpretation of "In Loco Parentis" states that

"either day-to-day care or financial support may establish an *in loco parentis* relationship where the employee intends to assume the responsibilities of a parent with regard to a child. In all cases, whether an employee stands *in loco parentis* to a child will depend on the particular facts."

d. When an employee is unable to perform the functions of his position because of the employee's own serious health condition.

e. In order to care for a "next of kin" who is a military service member suffering from a "serious illness" received in the line of duty.

f. For a "qualifying exigency" related to an immediate family member's call to active duty in the military.

D. What is a "Serious Health Condition"

1. Any illness, injury, impairment, or physical or mental condition that also involves:

   a. Inpatient care.

   b. Any period of incapacity of more than three calendar days that **also involves**: (a) two or more treatments by a health care provider; **or,** (b) treatment by a health care provider on one occasion that results in a regimen of continuing treatment under the supervision of a health care provider.

      i. The DOL Regulations clarify that the two treatments by a health care provider must occur within 30 days of the period of initial incapacity (absent extenuating circumstances) under the first part of this definition.

      ii. The DOL regulations also state that the "continuing regimen" section of the definition requires a first visit to a health care provider within seven days of the initial incapacity.

   c. Any period of incapacity due to pregnancy or for prenatal care.

   d. A chronic serious health condition which involves all of the following: (1) periodic visits for **treatment** to a health care provider; (2) continue over an extended period of time; and, (3) may be periodic rather than a continuing incapacity.

      i. The DOL Regulations clarify that "periodic visits" means at least two visits per year.

e. Any period of incapacity which is permanent or long term and for which treatment may not be **effective** (i.e. terminal stages of a disease, Alzheimer's disease, etc.).

f. Absence for restorative surgery after an accident/injury or for a condition that would likely result in an absence of more than three days at a later date without medical **intervention** at the present time (i.e. chemotherapy for cancer, dialysis for kidney disease, etc.).

2. **Voluntary** and cosmetic treatments that are not medically necessary are ***not*** "serious health conditions" unless inpatient care is required or complications arise. Surgeries performed for mixed purposes (cosmetic and a serious health condition) may qualify under the FMLA.

3. **Colds and Flu** - The DOL has advised that a cold or the flu may be considered a serious health condition for purposes of the FMLA if the situation meets the criteria outlined for a serious health condition. However, the Code of Federal Regulations states that under normal conditions, the flu and colds normally do not constitute a serious health condition. *See Miller v. AT&T*, 250 F. 3d 820 (4th Cir. 2001).

E. Notice Requirements

1. Notice standards for Employees

a. Foreseeable need for leave – employee must give 30 days' notice to the employer; if 30 days not possible, then as soon as practical.

b. Unforeseeable need for leave – employee must notify the employer as soon as practical.

c. Employee **does not** need to mention FMLA; he/she need only state a qualifying reason for leave.

d. Notice to a supervisor is sufficient to establish that the employee notified the employer.

e. Notice may be provided by persons other than the employee on FMLA leave if the employee is incapable of doing so because of their qualifying condition.

2. Notice by Employer

a. Posting

i. All covered employers must post an approved DOL FMLA notice in a conspicuous place; if no notice is posted and the employee fails to give the required advance notice for leave,

the employer may take no adverse action against the employee.

ii. Poster: https://www.dol.gov/agencies/whd/posters/fmla

b. Employee Handbook/written policies

i. If the employer has any written guidance to employees regarding other benefit or leave rights, information concerning the FMLA and employee rights and obligations hereunder must be included. Appointing Authorities must have a well-drafted, current, and legally compliant FMLA policy.

c. Notice to specific employee requesting leave

i. Employer must designate leave as FMLA leave (if qualifying); designation may be oral or written; if oral, the employer must follow up in writing.

d. Written Notice must include:

i. Statements that leave will be counted against FMLA entitlement.

ii. Any requirements regarding required medical certification and consequences of not providing such certification.

iii. Notice of employer's requirements regarding substitution of paid leave or notice of employee's choice to substitute paid leave.

iv. Notice regarding procedure for maintenance of health benefits.

v. Any requirement of certification of fitness for duty.

vi. Notice regarding employee's status as a "key employee" and the consequences of such status.

vii. Notice regarding the right to restoration upon return from leave.

viii. Notice regarding potential liability for health insurance premiums paid by employer if employee fails to return to work.

ix. Precise number of hours, days, or weeks that will be designated FMLA.

3. Timing of Written Notice by Employer

a. Written notice must be given within five days of having sufficient information to make the determination; if leave has begun, mail to the address of record.

b. The DOL also requires employers to inform intermittent employees every 30 days that their leave is designated and protected under FMLA and to advise employees as to the amount of FMLA taken during the preceding 30-day period.

c. **Note:** Appointing Authorities are wise to use Notice Forms prepared by the Department of Labor. These forms may be found at the Department of Labor's website.

F. Paid/Unpaid Leave – Substitution of Leaves

1. **FMLA** provides for either 12 or 26 weeks of unpaid leave depending upon the reason for the leave; however, pursuant to employer's policy, leave may be paid, unpaid or a combination of both. However:

a. Employees must be made aware of policy prior to implementation.

b. In certain FMLA qualifying situations, spouses working for the same employer may only be entitled to a combined total of 12 weeks of leave rather than 12 weeks each for birth, adoption or to care for a parent with a serious health condition.

c. Employers cannot delay designating qualifying leave as FMLA leave, even at the employee's request.

i. In an Opinion letter, the Department of Labor (DOL) clarified employers are prohibited from delaying designating qualifying leave as FMLA leave, even if the delay complies with the leave provisions in the parties' collective bargaining agreement (CBA) and the employee prefers that the designation be delayed.

ii. The letter clarified that once an employee has communicated a qualifying family or medical condition, neither the employee nor the employer can decline FMLA protection for the leave. If the CBA has policies providing employees with benefits during paid leave, they must also provide those benefits when they are substituting FMLA leave for paid leave.

iii. In practice, this requires employers to begin the clock of FMLA-qualifying leave as soon as an employee communicates the need for qualifying leave. The employer may not delay the leave, even at the employee's request. Therefore, if an employee requests leave to care for a sick parent, the employer must designate that leave as FMLA leave. The employee cannot request the employer delay FMLA for another qualifying condition, for example, pregnancy, which the employee expects to take later in the year.

2. Employers may not voluntarily permit employees to exhaust some or all accrued but unused vacation, personal, family, or sick leave for unpaid FMLA leave before designating the leave as FMLA-qualifying.

   a. Once the employee has provided a FMLA-qualifying condition for leave, the leave must be designated as FMLA-qualifying.

   b. An employer's policies may provide employees with greater leave than what is provided by the FMLA, but the policies must comply with the FMLA.

3. **Light Duty:** Employers are prohibited from counting an employee's time worked during a temporary light-duty assignment (typically pursuant to a worker's compensation injury) against the employee's twelve-week FMLA allotment. The DOL rules specify that time worked in a light-duty assignment does not count toward an employee's FMLA leave.

G. Intermittent/Reduced Schedule Leave

1. In medically necessary situations, the Act allows employees who take FMLA leave because of their own serious health condition or because of the serious health condition of a family member to take leave on an intermittent or reduced schedule basis (i.e., work fewer hours per day or per week).

2. FMLA leave for the birth or placement of a child may only be taken on an intermittent or reduced schedule basis with the permission of the employer.

3. Intermittent or reduced schedule leave may be taken by the employee in any size increments, and employers may only charge intermittent or reduced schedule FMLA leave against an employee's 12-week total by the smallest increment of time that the employer's payroll system will accommodate.

4. Employees taking intermittent or reduced schedule leave must attempt to schedule leave so that it does not interfere or disrupt the employer's operations.

5. Employer has the right to temporarily transfer an employee taking intermittent or reduced schedule leave to a position with equivalent pay and benefits but is not required to do so.

H. Medical Certification and Fitness for Duty Certification

1. Initial Certification

   a. Employer is entitled to certification of initial need for leave.

   b. Employee must return certification to employer within 15 days after receiving request from employer.

   c. Remember the DOL "Certification of Health Care Provider Form" available; employer can use own form but cannot request more information than is on DOL form. The DOL also has forms available for download and use relating to the military leave provisions.

2. Employer's Ability to Question Certification

   a. If an employee submits a completed certification, the employer may only ask for clarification.

   b. If certification is incomplete, employer must inform employee and give employee opportunity to provide missing information.

   c. Employers are permitted to directly contact an employee's medical provider in order to obtain clarification or authentication of FMLA documentation. However, when doing so, the employer must comply with HIPAA's privacy rules. Therefore, employers will need to have employees complete a HIPAA Release prior to contacting the employee's medical provider. Further, the employee's direct manager/supervisor **cannot** be the employer representative who contacts the medical provider. As a practical matter, the HR representative should be the representative clarifying FMLA documentation.

   d. Employer may not ask for subsequent medical certification sooner than every 30 days.

      i. Certification expenses are paid for by the employee.

3. Second and/or Third Medical Opinions

   a. Employer may obtain a second medical opinion at the expense of the employer.

      i. May not use a physician regularly employed by the employer.

   b. If employee's medical certification and the second opinion/certification disagree, the employer can require a third evaluation of the employee, also done at the expense of the employer.

      i. Third examiner must be selected mutually by employer and employee.

      ii. Third opinion is final and binding.

   c. Employer must provide employee with copies of the second and/or third opinion, if requested, within two business days.

4. Failure of Employee to Provide Timely Medical Certification

   a. Foreseeable Leave – leave may be denied until certification received.

   b. Unforeseeable Leave – if employee fails to provide certification in timely manner after leave commences, continuation of leave may be denied.

   c. Certification Never Submitted – time off receives no FMLA benefits or protections.

5. Return to Work/Fitness for Duty Certification

   a. Prior to an employee's return to work, an employer may require a fitness for duty certification.

      i. Only applies to employees who take leave due to their own serious health condition.

      ii. Employee must be notified of obligation to provide fitness for duty certification.

      iii. Purpose of certification is to show employee can perform the essential functions of his or her position.

      iv. The DOL Rules permit employers to ask health care providers to address the functions set forth in a list of

essential job functions (Job descriptions are very important!) (29 CFR 825.3112(b)).

v. Where reasonable job safety concerns exist, employee may also be required to provide fitness for duty certification before returning from intermittent leaves up to once every 30 days. (29 CFR 825.312(f)).

I. Job Restoration

1. If employee took leave for his or her own serious health condition, employer may require employee to produce certification of fitness for duty prior to restoration.

2. Requirement of fitness for duty certification must be uniformly applied to all employees.

3. Employer must notify employee, in advance, that such a certificate will be required.

4. Certification of fitness for duty must relate to condition for which employee took FMLA.

5. Certification must be provided by employee's health care provider. Employer may not require a second or third fitness for duty certification.

6. Employer may require employee to report periodically during leave regarding the status and intention of the employee to return to work. However, these reports may not be more frequent than every 30 days.

7. Upon proper return to work from FMLA leave, employee must be reinstated to the same or a similar position.

   a. Similar position – equivalent status, responsibility, duties, shift, benefits, pay, etc.

   b. Employer makes the determination as to whether the positions are similar in nature.

8. There is no obligation to reinstate the employee if:

   a. Employee would not otherwise have been employed at the time of restoration (i.e., lay off, shift elimination, poor performance [established prior to leave]).

   b. Assignment that employee was hired for concludes prior to the expiration of leave.

c. Employee cannot perform the functions of his or her position.

d. Employee misconduct.

9. Establish FMLA and Attendance Policies

FMLA and attendance standards are continued in:

a. Statutes (FMLA, Sick Leave, Disability Separation, etc.);

b. Personnel Policy Manuals (Disciplinary Rules and Procedures, Code of Ethics, Canons, etc.); and

c. Collective Bargaining Agreements.

J. Practice Tips

1. Don't Make It So Easy to Call Off Sick.

With the widespread use of voicemail, it has become very easy for employees to call off before normal business hours and leave a voicemail. Make it a practice for supervisors to call the employees who call off as soon as they get the message, express concern, verify when the employee will be returning to work, what's wrong with them, will they be seeing a physician, etc., or, require the employee to call back after business hours begin and speak to their supervisor.

2. Don't Accept Just Any Old Doctor's Excuse.

Change your policies so that, to be valid, a physician's certificate or doctor's excuse must provide a diagnosis and a prognosis, especially for multiple-day absences. The FMLA gives you a good excuse to require this information.

3. When in Doubt, Send the Employee to Your Own Physician.

For example, an employee who gets the flu, colds, stomach ailments, etc., several times a year could be suffering from a disorder of the immune system. Tell the employee that his/her stated reasons for being off have triggered a concern and send him/her to the agency's physician.

4. Define Excessive or Abusive Absenteeism.

II. WHAT TO CONSIDER WHEN EMPLOYEES ARE NOT GETTING ALONG

A. What is The Difference Between Harassment and Discrimination?

1. **Unlawful discrimination** occurs when an individual's compensation, terms, condition, or privileges of employment is negatively impacted due to that individual's membership in a protected classification.

2. **Unlawful harassment** is a subset of discrimination and occurs when abusive and harassing behavior is directed at an individual due to his membership in a protected class and adversely affects that individual's terms, conditions, or privileges of employment.

    a. Is all discrimination and harassment unlawful?

    b. Are there other forms of unlawful harassment?

III. CATEGORIES OF UNLAWFUL DISCRIMINATION AND HARASSMENT

A. What Are the Protected Classes?

1. Sex/Gender
2. Race/Color
3. National-Origin/Citizenship
4. Religion
5. Age
6. Disability
7. Genetics
8. Military Status

IV. RESPONDING/PREVENTING EMPLOYEE ISSUES

A. Set Standards/Establish Policies

1. Educate Employees
2. Investigate
3. Document
4. On-Duty v. Off-Duty Conduct

5. Prompt Remedial Action

6. No Retaliation

7. Understand the Workforce

8. Be Self-Aware

B. If it is Not Harassment or Discrimination--What About Workplace Bullying?

1. What is It?

   a. Any behavior that is repeated, systematic and directed toward an employee or group of employees that a reasonable person under the circumstances would expect to victimize, humiliate, undermine or threaten another employee and which creates a risk to health and safety.

   b. Attitude distinguished - Employers cannot discipline someone for his/her attitude, defined as "a mental position or a feeling or emotion with regard to a fact or state" (Webster's 9th New Collegiate Dictionary). However, attitude manifests itself in behaviors and employers can, and should, discipline for any behavior that does not meet the standards expected in the agency.

2. A Common Problem for Employers

   a. Common complaints falling under this category include: being excluded from work related gatherings; others being consistently late to your meetings; being given the "silent treatment"; receiving rude treatment; given little or no feedback; being yelled at or talked to in a hostile manner; being the target of rumors and/or others will not deny the falsity of those rumors, etc.

   b. While some of the aforementioned behavior seems innocuous, employees and employers should be aware of the frequency with which the behaviors occur, whether the behaviors are targeted toward a certain individual or group, and note any escalation of the behavior or incidents. It is significantly easier to address these behaviors early on rather than allow them to become part of the culture.

3. Characteristics

   a. Verbal Abuse

i. Shouting, swearing, using foul language, spreading gossip, blaming the employee, threatening job loss, unwarranted criticism, putting employee down in front of others, teasing.

b. Non-verbal Abuse

i. Ignoring employee, consistent failure to follow-up, excluding employee from meetings and social events, treating employee rudely, unreasonable work demands, rolling eyes.

4. Harassment vs. Bullying

a. Harassment or discrimination in the legal sense involves actions or inactions taken against an individual for legally impermissible reasons (race, color, sex, age, religion, national origin, disability status, military status).

b. Bullying often does not occur because of a protected status, which can make it difficult to pursue legally.

5. Personality Clashes vs. Bullying

a. Clash in perceptions, goals or values versus attempts to demean a co-worker.

b. Does anyone stand to gain out of the interaction?

C. How do I respond to Quirky Personalities?

WHAT TYPE OF DIFFICULT PERSON ARE YOU DEALING WITH?[1]

SYMPTOMS	SUGGESTED ACTION PLAN
The Complainer • Voices lots of complaints but few, if any, suggestions. • Even imagines problems. Appears blameless and innocent. • Feels he/she must get personal opinions across. • Gets worse if ignored. • Includes disillusioned youth and perfectionists.	1. Try to find the cause. 2. Listen; do not agree or disagree. 3. Avoid accusations. 4. Ask specific questions. 5. Stick to the facts. 6. If their complaints are job-related, determine whether they're unable or unwilling to perform the required duties. 7. Take appropriate action.

[1] Ken Godevenos, MBA, CCP, CHRP (HR Consultant) (2008).

The Subversive Sniper • Often wants to "move up." • Seeks to undermine their supervisor (you) and make him (you) look foolish. • Is extremely passive-aggressive. • Puts on a friendly face but "snipes" behind your back.	1. Make it clear that you are aware of his/her ways. 2. Give specific, job-related orders. 3. Set necessary limits regarding behaviors that won't be tolerated.
The Busybody • Is a professional meddler. • Believes he/she knows everything (and is usually wrong). • Likes to drop-in anytime to gossip and relate their latest "discovery."	1. Visit him/her privately. 2. Help this person see how whispered charges hurt the whole unit. 3. Do NOT act like a prosecutor with a hostile witness. 4. Keep him/her busy, leaving little time to gossip. 5. Focus on the problem-its impact on their work and that of others-and take necessary corrective action.
The "Maybe" Person • Talks a "good game." • Usually doesn't produce. • Procrastinates, hoping a better choice will present itself.	1. Pinpoint work objectives; tie him/her down in advance; and cover "who does what for whom and by when." 2. Make your expectations clear. 3. Seek any other causes. The source isn't always shiftlessness; sometimes they might be acting out of fear, inability, confusion or boredom. 4. Determine what's applicable and take appropriate action.
The "No" Person • Is sometimes a perfectionist. • Avoids mistakes at any cost. • Loses hope and share feelings with all when things go wrong. • Extinguishes hope in others, smothering all creative sparks.	1. Employ compassion and patience, not contempt. 2. Use him/her as a resource for others. 3. Use this person as your personal character-builder. 4. Run new ideas past this person for critique before moving ahead.
The "Explosive" Employee • "Blows up" if threatened. • Needs to prove himself. • Has concrete answers for everything. • Opposes any variations in process. • Becomes irritated and impatient if plans are resisted. • Deals with all others in the above manner.	1. Don't expect change. 2. Let them run down, then regain their control after they explode. 3. Show them you take their opinion-and others'-seriously, and that there's a need to respect all equally.

The "Belligerent Aggressor" • Bullies his/her way to achieve what they want. • Embarrasses co-workers, thinking they'll gain support of others. • Throws temper tantrums. • Tries to make supervisor (you) feel you're doing poorly when you're actually doing well.	1. Use self-control and be consistent. 2. Do NOT let them pressure you into doing what you don't want to do. 3. Confront but do NOT oppose their accusations of you. 4. Anticipate challenges. 5. Practice what to say. 6. Respond with caution. 7. Set a time to deal with the situation.
The Harasser • Personally attacks co-workers. • Avoids the real issue. • Tries to set others up as "opponents" to impress their superior (you). • Cannot be objective.	1. Establish and maintain a meeting plan to discuss the concerns. 2. Do NOT allow the discussion to drift. 3. Keep discussions to the point. 4. Refocus conversations as necessary.
The "Green-Eyed Monster" • Distinguishing mark is jealousy. • Believes he/she should have something not earned. • Reacts with spiteful behavior when others get raises or promotions.	1. Keep conversations friendly and professional. 2. Avoid being dragged into an argument. 3. Always remind this person that everyone is evaluated or assessed according to their own efforts.

V. WHAT ABOUT FIRST AMENDMENT AUDITORS?

A. Case Studies

1. *Am. Civil Liberties Union of IL v. Alvarez*, No. 11-1286 (7th Cir. 2012).

In 2010, the ACLU sued the Cook County State's Attorney to enjoin prosecution under the Illinois Eavesdropping Act. The ACLU was monitoring the police in public places, including audio recording officers on-duty. Illinois had a law prohibiting recording the conversations of others. The ACLU wanted to monitor the police and record on-duty conversations of officers while they were on-duty in public places. The ACLU sued the State indicating it had a First Amendment right to gather information and disseminate it to the public.

Ultimately, the Court determined the act of *making* an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights.

2. *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

The City of Griffin, Georgia had an ordinance prohibiting the distribution by hand, or otherwise, circulars, handbooks or advertising within the limits

of the City of Griffin without first getting permission of the City Manager. Lovell knowingly distributed information regarding Jehovah's Witness in violation of the ordinance. Lovell alleged the ordinance violated her First Amendment rights. Eventually, Lovell was charged and fined $50 which she refused. Because she refused to pay her fine, she was sentenced to jail. Lovell appealed all the way to the U.S. Supreme Court.

The Court determined the City's ordinance violated the Freedom of the Press protected by the First Amendment. The Court noted the term "press" comprehends every sort of publication which affords a vehicle of information and opinion. Because the City prohibited the distribution of all materials, not just obscene, the ordinance was unlawful.

3. ***Branzburg v. Hayes*, 408 U.S. 665 (1972).**

Although a case regarding privilege for members of the press, the U.S. Supreme Court noted the First Amendment, generally, provides the same access to information as the general public.

4. ***Glik v. Cuniffe*, 65 F.3d 78 (1st Cir. 2011).**

Court concluded that a private citizen has the right to record video and audio of police carrying out their official duties in a public place.

The dispute arose when Glik filmed police officers making an arrest in a public park. When officers observed Glik recording them, Glik was arrested. Glik was alleged to have engaged in wiretapping, disturbing the peace and aiding in the escape of a prisoner. Glik sued the City of Boston.

The Court determined Glik's rights were violated and they were not entitled to qualified immunity. The court reiterated the right to film in a public location is "clearly established."

As such, recording police and other government officials in the discharge of their duties is explicitly allowed.

5. ***Vanessa Enoch v. Hamilton Cty. Sheriff's Office*, 728 Fed. Appx. 448 (6th Cir. 2018).**

On April 19, a federal magistrate ruled that Hamilton County sheriff's deputies violated the First Amendment when they ordered two people to stop taking photos in the halls of the courthouse.

Vanessa Enoch and Avery Corbin, both African American, were reporting and researching the Tracie Hunter case in the Hamilton County, Ohio Court of Common Pleas. Both Plaintiffs attended the pretrial hearing on June 25, 2014 and were arrested for disorderly conduct for taking photos and

recording in the hallway of the courthouse. Other individuals that were also taking photos and recording were not arrested. No evidence existed of the judge giving an order barring recording in the hallway. The charges against Enoch and Corbin were eventually dismissed.

Corbin and Enoch sued the Sheriff's Office, claiming their arrest and search and seizure of their iPads were a violation of their right to free speech because they occurred without a warrant or probable cause and in a racially discriminatory manner.

The Court applied a three-part test to determine if the Plaintiff' First Amendment free speech rights have been violated:

a. Whether the speech or actions are protected by the First Amendment.

b. The nature of the forum in which the speech occurs.

c. Whether the government's exclusion is justified under the requisite standard.

While government entities may regulate the use of its public facilities, they cannot enforce rules that implicate First Amendment rights in a racially discriminatory manner. Limited public forums are limited to certain groups or dedicated solely to the discussion of certain subjects. Government regulation of free speech in this context must be reasonable and viewpoint neutral.

In this case, the court found that the speech was protected under the First Amendment because it protects the rights of both the media and the public to attend and share information about the conduct of trials and the hallways of the courthouse are a limited public forum. While the public has access to the hallways, they are not as open as a sidewalk or park, and judges can limit expressive activities. The court looked at whether any restrictions that were imposed were reasonable and applied in a non-discriminatory manner.

The magistrate concluded Defendants had no probable cause to arrest Plaintiffs or confiscate their iPads and cellphones. Therefore, there was no evidence that the suppression of plaintiffs' speech was reasonably related to enforcing the laws prohibiting disorderly conduct. Also, other individuals were present in the Courthouse hallways and were using recording devices and cellphones in the same manner but were not prohibited from doing so.

The court concluded Defendants violated Plaintiffs' First Amendment rights by detaining them and seizing their iPads.

VI. MONITORING A PUBLIC AGENCIES SOCIAL MEDIA PAGE

A. Best Practices.

1. Keep personal and employer accounts as separate as possible. This includes using separate devices when possible. Avoid linking all accounts through the same platform.

    a. For instance, Instagram allows you to add numerous accounts in their app to switch easily between accounts. However, employees should not keep themselves logged in to their personal accounts and the employer's account in the same app at the same time to avoid inadvertent posts.

2. Seek prior employer approval of pages. Before starting a page, ensure you have employer approval over the type of account, background information, profile pictures, and other account and branding information.

3. Ensure content is proper. Social media posts and content should adhere to all copyright and other applicable laws.

4. Maintain account security. Employer-sponsored accounts must be regularly monitored for security concerns. This includes checking which devices have logged into the account, using a strong password, using two-factor authentication for logging in, and regularly updating passwords. Never share the password with other unauthorized individuals, inside or outside of the organization.

5. Do not delete third-party posts simply for being critical. Third-party posts and comments should not be deleted or removed solely because they are perceived as negative or critical. However, posts may be removed or hidden from view for other proper purposes, including posts that:

    a. Are off subject or out of context;

    b. Are obscene or prurient in nature;

    c. Contain personal identification or sensitive personal information;

    d. Include offensive terms targeting protected classes;

    e. Are intimidating, threatening, harassing or discriminatory;

    f. Incite or promote violence or illegal activities;

    g. Compromise individual or public safety;

h. Advertise or promote a product or service, either commercial, individual or entity;

i. Promote or endorse political campaigns or candidates; or

j. Constitute a copyright or trademark infringement.

B. Stay Tuned... The U.S. Supreme Court is Involved...

1. ***Lindke v. Freed*, 37 F.4th 1199 (6th Cir. 2022).**

Freed, the City Manager for Port Huron, Michigan, had a Facebook page. Freed's Facebook page listed him as "father, husband and city manager of Port Huron, Michigan." Not only did Freed post about his children, but also during COVID-19, he posted regarding the policies he implemented for the City of Port Huron. Lindke, a concerned citizen, reviewed Freed's posts. Lindke was critical of Freed's actions and noted his displeasure on Freed's Facebook page. Ultimately, Freed deleted Lindke's posts and blocked him. Consequently, Lindke sued alleging Freed violated his First Amendment rights.

The issue is whether Freed engaged in state action on his personal Facebook page. The court determined that it was not state action. The court noted no law required the social media page to be maintained. Additionally, the court noted no state resources were used to maintain the page. Ultimately, the court concluded it was Freed's personal page as it was created years in advance before becoming City Manager. Additionally, no city employees were used to maintain the page. Freed did not operate the Facebook page to perform any actual or apparent duty of his office. Similarly, he did not use his government authority to maintain it.

As a result, Freed did not act improperly when he deleted Lindke's post and blocked him.

But see...

2. ***Garnier v. O-Connor-Ratcliff*, 41 F.4th 1158 (9th Cir. 2022).**

O'Connor-Ratcliff and a fellow school board member used Facebook and Twitter to communicate with the public. Both school board members blocked two parents, Christopher and Kimberly Garnier, who criticized them on their social media pages. The Garniers sued alleging a violation of their First Amendment rights. The courts determined the blocking of the Garniers constituted state action and a violation of their First Amendment rights. The court determined that the manner in which the school board members used their social media pages constituted a public forum. Because the Garniers comments did not use profanity or threaten physical harm, or

engage in other comments that could be deleted, the school board members erred.

It is important to note, the school board members identified themselves as government officials and included their school district email addresses. One school board member referred to the social media page as his official page. The social media pages lacked disclaimers and actively solicited comments from constituents. Finally, the school board members regularly shared information with their constituents regarding the school district.

The school board members noted the pages started as campaign tools. However, the court noted that once elected the social media sites became official information sharing mechanisms. Consequently, the social media sites constituted state action.

VII. FINAL REMINDER ABOUT DISCIPLINE

A. Goal of Discipline and Standards of Conduct:

When discussing discipline, it is always important to start out by remembering the goal of discipline. Discipline should always be viewed as a tool to improve employee performance and not as a mechanism to simply punish, harass or target specific employees. Think of it as another arm of your performance evaluation program.

B. Collective Bargaining Agreements and Civil Service Employees:

Depending upon the employee's position, discipline may be covered by a collective bargaining agreement, civil service law, or the employee may be in the unclassified service. It is, therefore, important that supervisors understand the different standards that may apply when imposing discipline.

C. Civil Rights, Discrimination, Retaliation, Unemployment:

Discipline is important in all employment settings and should be consistently administered. Various areas for exposure to liability exist and standards of conduct and discipline will assist employers in responding to claims from employees arising out of their employment.

D. "JUST CAUSE"

Pursuant to the basic tenet of "just cause" the employer cannot implement discipline unless it meets its burden of proving that it has complied with the fundamental elements of "just cause" used by arbitrators, courts and the State Personnel Board of Review.

Generally:

1. Whether a standard/rule existed;

2. Whether the employee knew, or should reasonably have known, of the standard;

3. Whether the employee violated the standard/rule; and

4. Whether the penalty imposed was appropriate.

E. Disciplinary Charges

O.R.C. § 124.34 or Collective Bargaining Agreement