Leadership Conference #16 - 2025
Fairfield County Commissioners' Office
April 15, 2025

Leadership Conference

Commissioner Jeff Fix called the Leadership Conference meeting to order at 8:00 a.m. and the following Commissioners were Present: Steve Davis, David Levacy, and Jeff Fix. Also in attendance: L. Adams, T. Ashton, J. Bahnsen, J. Bennett, S. Bergstrom, B. Berry, B. Blevins, G. Blevins, R. Briggs, A. Brown-Thompson, S. Bryan, D. Burgei. J. Camechis, M. Carper, C. Clark, J. Collins, C. Cook, A. Cordle, A. Crist, M. Culbertson, L. Dixon, J. Donnell, B. Downhour, C. Downour, N. Drake, J. Ebel, J. Ehorn, R. Elsea, C. Enyart, W. Ervin, A. Fahner, E. Favinger, B. Fields, M. Fields. C. Finney, L. Fisher, S. Fortner, K. Frank, S. Garren, C. Gaskill, L. George, J. Gordan, M. Gray, J. Grubb, B. Hampson, A. Hannum, L. Hawk, B. Heaston, D. Henwood, R. Hoch, A. Horn, J. Horvath, K. Humphries, K. Hyme, E. Jones, M. Kaper, S. Karns, A. Kennedy, G. Knight, S. Knisley, H. Kochis, J. Kochis, A. Lape, B. Lee, C. Less, A. Lines, C. Lucht, S. Lynch, M. Maffin, E. Maple, H. Mattei, E. McCrady, L. McKenzie, R. Menningen, J. Messinger, B. Meyer, D. Miller, R. Moresea, D. Neeley, K. Nelson, G. Neville, B. Niceswanger, H. O'Keefe, L. O'Toole, J. Porter, K. Riddle, CJ Roberts, M. Roberts, E. Robinson, M. Shafer, A. Scheidegger, H. Shields, K. Shoemaker, L. Smith, A. Stedman, H. Stoneburner, J. Stout, R. Szabrak, T. Tennant, M. Thomas, B. Thompson, A. Tobin, D. Toney, T. Vandervoort, T. Vogel, A. Watson, P. Welsh, M. Wesney, K. Wilkerson, T. Wilson, K. Witt, M. Wright, and S. Wyrick.

Welcome & Announcements

Commissioner Fix opened the meeting, and along with Commissioner Levacy, welcomed everyone in attendance.

Human Resources Update

Deputy County Administrator, Jeff Porter, stated that the 2025 Employee Recognition Event would be August 29th at Smeck Park in Baltimore. He also provided information on upcoming dates for New Employee Orientations.

First Amendment Audits

David Moser of Fishel Downey Albrecht & Riepenhoff spoke about First Amendment Auditors and their interactions with public agencies. He shared a video example to illustrate how these individuals often engage with public employees. Mr. Moser explained the legal rights if First Amendment Auditors and emphasized the importance of clearly marking areas that are open to the public versus those with restricted access. He also clarified that while these individuals have the right to film in public spaces, they are not allowed to cause a disruption or interfere with staff performing their essential duties. Those referring to themselves as First Amendment Auditors often seek to test compliance with Ohio's Sunshine Laws. A PowerPoint presentation is available in the minutes documentation and includes information on public records audits.

Prevent Costly Employment Claims by Consistent Application of Workplace Policies – General Employment

Mr. Moser also provided a presentation (PowerPoint available in the minutes) on employee evaluations, employee discipline and investigations, compliance with the Americans with Disabilities Act (ADA), and the Family Medical Leave Act (FMLA). He emphasized that evaluations are a valuable tool for assessing whether employees are effectively fulfilling their roles and for helping ensure the office is meeting its overall goals. Moser noted that well-documented evaluations can also play a key role in workplace appeals, especially if an employee

files a claim. He recommended incorporating job descriptions directly into the evaluation process to create a clearer framework for assessment and he offered guidance on how to approach evaluations constructively when addressing negative performance issues.

Prevent Costly Employment Claims by Consistent Application of Workplace Policies – Frequent Claims Arising in the Workplace

David Moser concluded his presentation with a discussion on preventing workplace claims. He stressed the importance of thoroughly documenting any disciplinary action, ensuring that investigations clearly outline the violation, the actions taken, and the resulting disciplinary measures. An employer's responsibilities under the ADA and the elements a plaintiff must establish to prove an ADA claim were explained; along with FMLA qualifying reasons, intermittent leave, and leave recertification. The need and requirements for workplace drug testing were also explained.

AI in the Public Sector

Bob Bickmeier, Ph.D., of PRADCO, discussed how AI technology can be effectively leveraged in the public sector. He acknowledged that while AI has great potential, it is not without flaws. Mr. Bickmeier explained that there is both generative AI and predictive AI. Generative AI creates something from nothing and has been trained to sound like a human. It is built around the idea of generating contact to find input, like a prompt. Prompt engineering is designing a query to tell our interface to generate something for us. You should ask yourself the following questions before using AI: What problems will AI solve? How will data be collected and secured? How will fairness and accountability be ensured? What is the contingency plan for AI errors? How will AI effect employee experiences or their work? Mr. Bickmeier stated that AI generated responses are based on prompts and must be tested and verified to ensure outcomes are accurate, unbiased, and reliable. One practical use of AI is automating communication with job applicants, a feature that addresses growing concerns about transparency during the hiring process. Bickmeier emphasized the importance of data protection and urged organizations to carefully consider how they safeguard information. He highlighted transparency and accountability as key principles when implementing AI in public service. Agencies must clearly communicate how AI is being used, as the average user may not fully understand how their data is processed. When applied thoughtfully, AI can enhance efficiency, reduce costs, and support better decision-making and public safety.

Closing Remarks

Commissioner Davis emphasized the importance of productive communications and encouraged all in attendance to consider setting goals for a desired outcome in each conversation they hold.

Commissioner Levacy thanked those involved in preparing for the Leadership Conference. He also stated his appreciation for the conference content.

Commissioner Fix echoed the sentiments of Commissioner Levacy and stated how much he appreciated the information that had been shared.

Adjournment

With no further business, on the motion of David Levacy and the second of Steve Davis, the Board of Commissioners voted to adjourn at 12:09 p.m.

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Roll call vote of the motion resulted as follows:
Voting aye thereon: David Levacy, Steve Davis, and Jeff Fix

Motion by: David Levacy Seconded by: Steve Davis

that the April 15, 2025, Leadership Conference minutes were approved by the following vote:

YEAS: David Levacy, Steve Davis, and Jeff Fix NAYS: None
ABSTENTIONS:

*Approved on April 22, 2025

Jeff Fix
Commissioner

Steve Davis
Commissioner

David Levacy
Commissioner

Rochelle Menningen, Clerk

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FAIRFIELD
COUNTY · OHIO

First Amendment Audits

Understanding the Rising Trends of Public Records, Open Meetings, and First Amendment Auditors

Presented by:
David C. Moser

FD AR LLC™
Fishel Downey Albrecht & Riepenhoff LLC™
Attorneys at Law

What is an Auditor?

- An "auditor" is not a specific position, title, or job.
- Individuals who self-identify as Auditors do not have any additional powers from the general public.
- Their purpose is to test the limits of various constitutional rights or laws for monetary gain, notoriety, or both.

Different Types of Auditors

Auditors can come in a variety of forms, the most common include:

- First Amendment Auditors
- Public Records Auditors
- Open Meetings Act Auditors
- Second Amendment Auditors

What is a First Amendment Auditor?

- Activists or citizen journalists targeting a government facility, employee or event
- Likely demanding answers and attempting to explore a building or crime scene
- Encounters are recorded

- Purpose is a test of the 1st Amendment
- Encounter is broadcast to the public via social media + YouTube
- Primary goal is to provoke a reaction, even a lawsuit

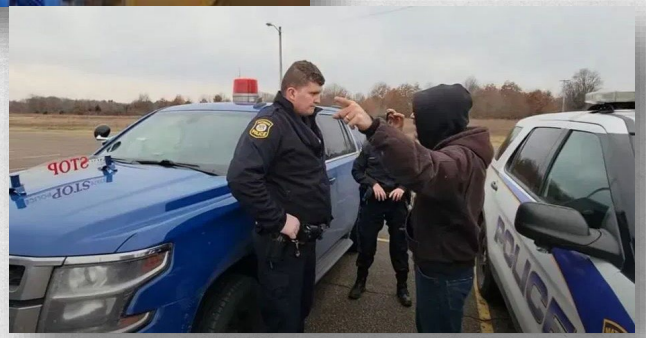
Legal Background

- What is protected by the First Amendment?
  - Visual
  - Audio

First Amendment Auditors—Do They Have the Right?

Legal Rights

- Forum – Where can this happen?
  - Traditional
    - e.g. park
- Designated
  - e.g. meeting facilities
- Limited
  - e.g. Open space for limited uses/topics
- Non-public
  - e.g. spaces not open to the public



Legal Rights

- Restrictions?
  - Time
  - Place
  - Manner
  - Viewpoint neutral
  - Reasonable

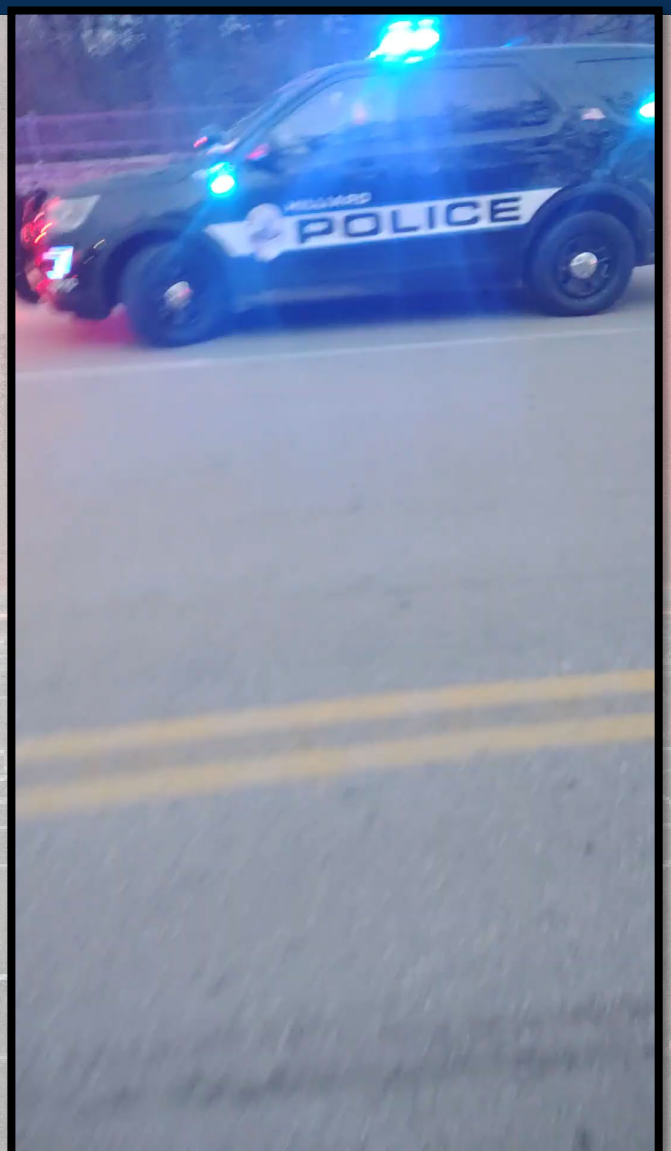
What are First Amendment Auditors Recording?

- Public buildings
- Parking lots
- Individuals on a public sidewalks
- Parks
- Public Vehicles (including confirming locked while parked)
- Personal Vehicles

First Amendment Auditors—Do They Have the Right?

First Amendment Auditors—Do They Have the Right?

First Amendment Auditor tells officer "You are dismissed."



Can Someone Lawfully Video in a Public Space?

- Generally, if in a public space, an individual has the ability to photograph/video anything in plain view.
- What about audio?
- Ohio is a one-party state, but…consent is not required where speaker does not have an ordinary expectation of privacy.

Can Someone Lawfully Video in a Public Space?

Legal Considerations

- **Freedom of the press includes the right to record video and audio.**
  - ***Am. Civil Liberties Union of IL v. Alvarez*, No. 11-1286 (7th Cir. 2012).**

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

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

    The press comprehends every sort of publication which affords a vehicle of information and opinion.

Legal Considerations

- ***Branzburg v. Hayes*, 408 U.S. 665 (1972).**
  - The First Amendment does not provide the press a right of special access to information not otherwise available to the public, generally.
- ***Glik v. Cunniffe*, No. 10-1764 (1st Cir. 2011).**
  - Recording police and other government officials in the discharge of their duties is explicitly allowed.

How to Respond?

How to Prepare

- Know how to recognize auditors
- Ensure public areas of building are clearly marked
- Educate your employees
- Establish guidelines
- Ensure police personnel are prepared for out-of-building encounters

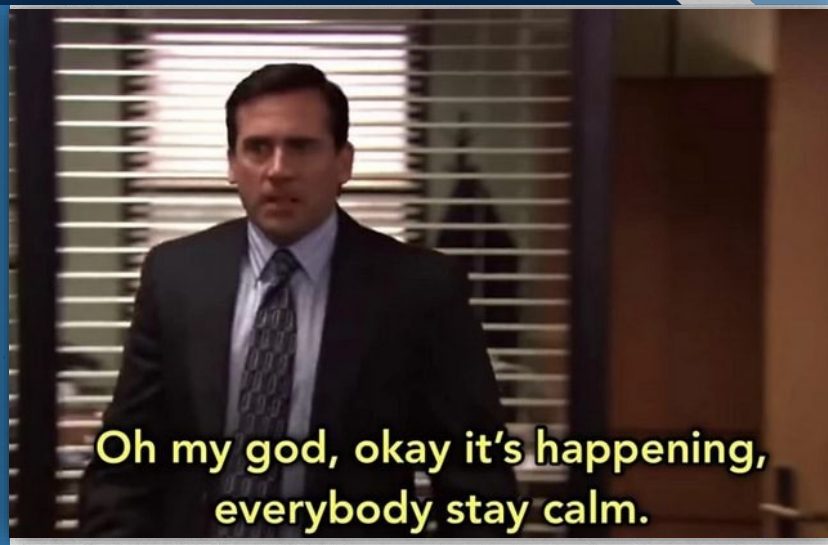
- Consult with your attorney
- Know the law and their rights
- When in doubt…contact law enforcement

Librarian Loses It

How to Respond?

How to Respond

- Don't overreact- acknowledge their right to record
- Be prepared to be provoked
  - Repeated questions
  - Not satisfied with answers
  - Profanity
- Know when you need help from a co-worker/supervisor
- Keep it short – continue business as usual
- Boring is good
- Understand anything that you do may end up on YouTube or in a 1st Amendment Lawsuit



Are There Any Limitations?

- Cannot interfere/disrupt services
- Block access
- Secure areas where video recording is prohibited
- No greater access to facility
- Establish policies
- Limit business in public areas
- Content Neutral

Are There Any Limitations?

What About Employees Recording One Another?

- Confidential Information
- Work-related
- Discipline
- Asked to Leave
- Public Records

Ohio Sunshine Laws

The Sunshine Manual is "a road map for citizens who want more information about how their government operates and how it uses their money."

- Provides rules pertaining to public records and open meetings
- The rules generally favor open government, transparency, and liberal construction in favor of the public

How Do These Auditors Operate?

This video features Brian Ames, a successful Public Records Auditor and Open Meetings Act Bounty Hunter who has initiated over a dozen lawsuits across Ohio.

Public Record Auditors

A public record auditor is a person who targets public officials or offices with numerous, large and high-volume public records requests in the hopes of catching public record violations to cash in on.

Public Record Auditors

Common issues public records auditors look for:

1. Over-denial of records;
2. Unspecific support for record denials;
3. Failure to inform requester how documents are stored or other failures to communicate with the requester;
4. Shortcomings in storing documents on personal devices;
5. Inaccurate and outdated retention schedules.

Public Record Auditors

Potential solutions for managing public records auditors:

- Charge the actual costs of producing records;
- Permit them to inspect in person;
- Be open to communicating with them before outright denying requests;
- Stick to written communications;
- Be explicit and exhaustive when denying any public records requests.

Public Record Auditors

No duty to create new records

No duty to search every record for requested information

No duty to provide in-depth explanation of office's software and data systems

Open Meetings Act Auditors

Common issues open meetings act auditors look for:

- Improperly noticing executive session
- Failing to record accurate meeting minutes

- Texting, whispering, and other secretive communications

Open Meetings Act Auditors

Potential solutions for managing open meetings act auditors:

- Retrain staff regarding accurate meeting minutes.
- Refresh yourself on proper language for moving into executive session.

Thank You!

IF YOU HAVE ANY QUESTIONS, PLEASE ASK!

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Prevent Costly Employment Claims by Consistent Application of Workplace Policies

County Risk Sharing Authority

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PH: 614-221-5627

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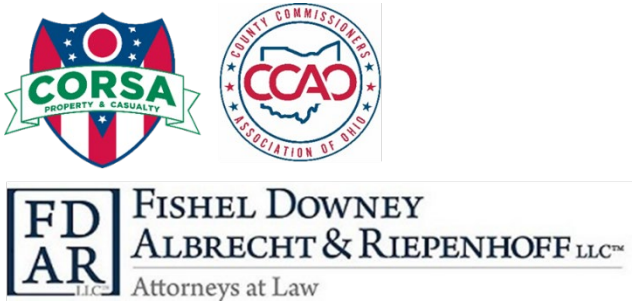


Employee Performance Evaluations

Performance Evaluations: Not Always Easy

What is a Performance Evaluation?

- A performance appraisal or evaluation has been succinctly defined as: “the process of establishing a written standard of performance criteria and both telling employees about those standards and frequently informing them how they are performing in relation to the standards.” *See* Donald W. Myers, Human Resources Management 310 (2d ed. 1992).

Why Have Performance Evaluations?

- **Today's Use of Performance Evaluations**
  - **Historically:** Post-World War II development
  - **Today's Use:** As part of an overall performance system
    - Evaluations and performance reviews can be an employer's greatest tool for improving an employee's performance and retaining employees.
      - ✓ Good evaluations communicate the employer's standards and goals in relation to the employee's performance.
      - ▪ Poor evaluations fail to address inadequate performance and do not change the behavior.

THE ROLE OF PERFORMANCE EVALUATIONS

- Measure past employee performance.
- Evaluate the workplace.
- Communicate/Reinforce standards of conduct.
- Determine departmental/individual training needs.
- Help supervisors make better hiring decisions.
- Determine raises.
- Assist in appeals.
- Can help make a winning defense!

What Should A Performance Evaluation "System" Include?

- The Job Description
- Continual Management Feedback

Job Description

Administrative Assistant

Class Title
Administrative Assistant

Class Code
Soil & Water Admin Asst

Salary ⓘ
$16.56 - $24.01 Hourly

DEFINITION BENEFITS

Objectives

To provide general administrative support and assist with day-to-day fiscal activities such accounts payable and receivable.

Job Standards

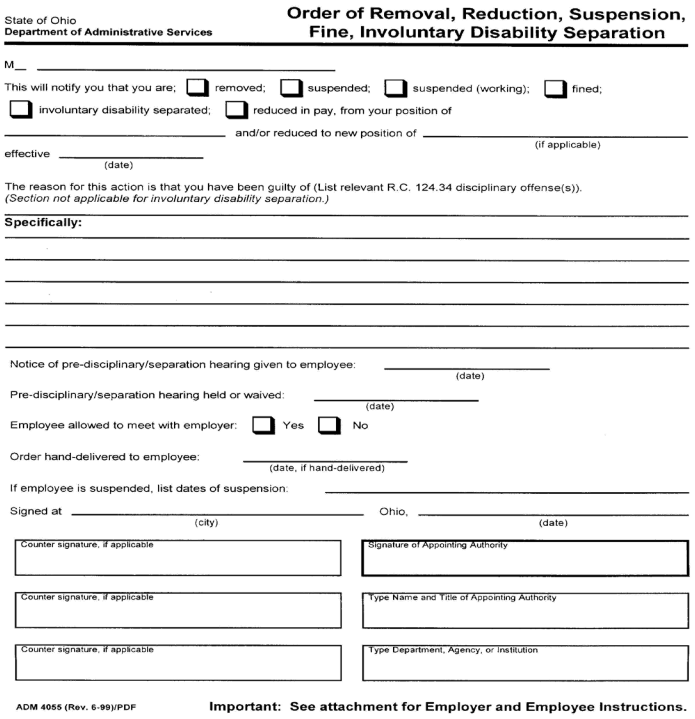
- Associates degree or high school diploma or equivalent with two or more years' experience.
- Employee must have valid Ohio driver's license and an acceptable driving record. Must meet and maintain qualifications for driving on District business at all times, including insurability.

Essential Functions

- Open the Office for incoming customers and closes the Office to ensure office security
- Serves as initial contact for visitors and telephone callers.
- Assists with intake of drainage protection review and schedules appointments.
- Assist with the preparation of financial records for multiple funds/accounts, including but not limited to vouchers, purchase orders, deposits, pay-ins, receipt book, reconciles accounts, etc.
- Assist with preparation of financial information, including accounts payable and receivable, for the monthly board meetings.
- Assists in the preparation of the annual budget request, monthly reports, and annual reports.
- Intake and scheduling of various permits and applications for technical service
- Provide customers with information for District sales, rental and outreach programs.
- Demonstrates regular and predictable attendance.
- Attends various training sessions, teleconferences, webinars and workshops.
- Performs typing, word processing, and related computer operations.
- Works additional hours outside of typical work schedule/business hours as required.
- Observes all District policies and procedures.
- Prioritizes work and practices effective time management resulting in good quality and quantity of work.
- Sets and meets deadlines, effectively manages multiple job duties and asks for assistance when needed.
- Provides accurate, timely and professional assistance to partners, landowners, and general public in a manner that heightens the District's credibility and visibility.

What Should A Performance Evaluation "System" Include?

- **Discipline**



State of Ohio
Department of Administrative Services

Order of Removal, Reduction, Suspension, Fine, Involuntary Disability Separation

M__ _____

This will notify you that you are; ☐ removed; ☐ suspended; ☐ suspended (working); ☐ fined; ☐ involuntary disability separated; ☐ reduced in pay, from your position of _____ and/or reduced to new position of _____ (if applicable)

effective _____ (date)

The reason for this action is that you have been guilty of (List relevant R.C. 124.34 disciplinary offense(s)).
(Section not applicable for involuntary disability separation.)

Specifically:

Notice of pre-disciplinary/separation hearing given to employee: _____ (date)

Pre-disciplinary/separation hearing held or waived: _____ (date)

Employee allowed to meet with employer: ☐ Yes ☐ No

Order hand-delivered to employee: _____ (date, if hand-delivered)

If employee is suspended, list dates of suspension: _____

Signed at _____ (city) Ohio, _____ (date)

Counter signature, if applicable	Signature of Appointing Authority
Counter signature, if applicable	Type Name and Title of Appointing Authority
Counter signature, if applicable	Type Department, Agency, or Institution

ADM 4055 (Rev. 6-99)/PDF

Important: See attachment for Employer and Employee Instructions.

What Should A Performance Evaluation "System" Include?

- **Written Evaluation**

Written Communication Skills

Demonstrates the ability to complete forms or other job-related reports in a clear and concise written style. Written communications and correspondence is organized, easy to follow, and appropriate.

Score	Descriptors
1—Below Expectations	Forms and reports consistently contain numerous errors and are incomplete. Reader has much difficulty understanding the contents of the report. Written communications usually require correction and clarification.
2—Somewhat Below Expectation	Forms and reports occasionally contain errors and are occasionally incomplete. Although the report may be disorganized, the reader is able to understand the content. Occasionally requires correction and clarification.
3—Meets Expectations	Forms and reports are predominantly correct, complete, and easy to understand. Rarely requires correction and clarification.
4—Somewhat Exceeds Expectations	Forms and reports are correct, complete, and easy to understand. No corrections or clarification is needed.
5—Exceeds Expectations	Forms and reports are correct, complete, and easy to understand. No corrections or clarification is needed. Provides detailed descriptions.

Quality of Work

Demonstrates ability to perform work skills accurately and completely with a minimum of errors. Complies with departmental rules, policies and standards.

Score	Descriptors
1—Below Expectations	Work is consistently late, inaccurate and incomplete. Important assignments are overlooked.
2—Somewhat Below Expectation	Work is occasionally late, inaccurate, and incomplete. Important assignments are occasionally overlooked.
3—Meets Expectations	Work is accurate, complete, and organized.
4—Somewhat Exceeds Expectations	Work is accurate, complete, and organized. Suggests alternative ways to complete assignments that are more efficient.
5—Exceeds Expectations	Work shows a high degree of thoroughness and accuracy. Reviews work results and makes revisions to improve quality. Suggests and develops alternative ways to complete tasks which save time and resources.

COMMENTS:_____

_____

THE PERFORMANCE EVALUATION

Should:

- Include Goals and Objectives of the organization
- Include a Scoring System
- Be Cost Effective
- Strive to Eliminate Rater Errors; and
- Compare Performance and Growth to defined performance objectives.

Sample Evaluation Criteria:

Quality of Work	Leadership	Communication	Planning/Organizing
Respect/Inclusiveness	Service	Safety	Any other suggestions? This may vary by department.

Performance Evaluation

Common Evaluation Errors

- Vagueness of Standards
- Late/Sporadic Appraisals
- Surprise!
- Employee buy-in… or not…

REDUCING RATER ERRORS

Best Protection = Rater Training!

Consistency is Key!

Have someone else review.

Stick with the facts.

Don't Sugarcoat the Message.

- What you say should be consistent with what's on the evaluation form.

THE IMPORTANCE OF ACCURATE AND HONEST PERFORMANCE EVALUATIONS

Employees can use "good" appraisals to prove that the employer's proffered reasons for an adverse employment action are pre-textual.

***Breyman v. RR Donnelley & Sons Co.*, 2016 U.S. Dist. LEXIS 123164 (N.D. Ohio)**

Conversely, an employee's "poor" performance documented through an effective evaluation system can help defeat a wrongful discharge claim.

***Fewless v. Trinity Health-Michigan*, 2011 U.S. Dist. LEXIS 125296 (W.D. Mich. 2011)**

The Importance of Honesty, Consistency, and Prevention of Bias in Performance Evaluations

The Importance of Timing

RECOMMENDATIONS FOR CONDUCTING PROPER PERFORMANCE REVIEWS

- Do Not be Afraid to Give Negative Evaluations
- Stick with What Works – Use a Standard Form/Procedure
- Be Honest and Specific
- Be Prepared
- Review Performance Evaluations Before Providing them to an Employee

Performance Evaluation

Investigations & Discipline

JUST CAUSE

- Standard / rule existed
- Employee
  - knew, or should reasonably have known
  - violated the standard/rule
- Penalty imposed was appropriate

Standards for Imposing Discipline

❖ 7-Part Test

1. Notice;
2. Reasonable Rule;
3. Investigation;
4. Fair & Impartial Investigation;
5. Proof;
6. Evenhanded and Non-Discriminatory Application of Rules and Penalties; and
7. Was the Discipline Related to the Seriousness of the Offense and to the Employee's Work Record?

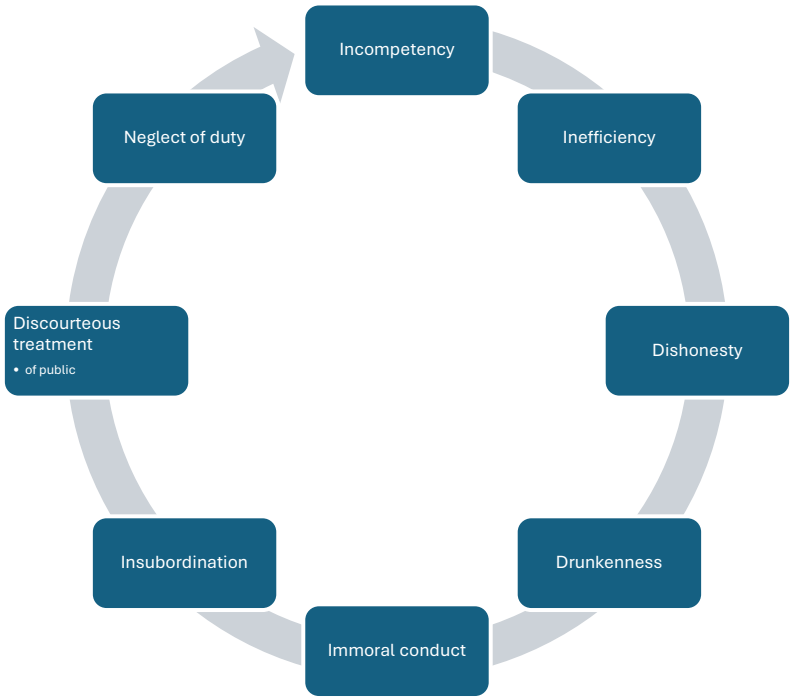
Standard of Conduct

- **Establishing a Standard of Conduct**
  - **Statutes**
  - **Personnel Policy Manuals**
  - **Collective Bargaining Agreements**
- **Conveying and Implementing the Standard**

TYPICAL FORMS

- Verbal and/or written reprimand
- Suspension (paid or unpaid)
- Reassignments
- Removal
- Reduction in pay or position
- Reduction in longevity
- Forfeiture of paid leave
- Agreed upon penalty

Basis For Disciplinary Action



- Violation of any work rule or policy of appointing authority
- Failure of good behavior
- Misfeasance
- Malfeasance
- Nonfeasance
- Conviction of a felony

Procedural Issues with Disciplining

- **Conducting the Investigation.**
  - Who is responsible for the investigation?

- **Documentation. Document all steps or stages in the investigation:**
  - Interviews.
  - Witness Statements. Written witness statements should be gathered and transcribed.
  - Personnel Files. Personnel files must be thoroughly reviewed.

Garrity Warning/Internal Affairs Investigation

- **If an employee's refusal to answer is based on their concern that such answers will incriminate them, they may not be removed for failing to answer unless and until they are told that their answers will not be used against them in any criminal proceeding. *Garrity v. New Jersey,* 385 U.S. 493 (1967).**
  - ***McKinley v. City of Mansfield***, 404 F.3d 418 (6th Cir. 2005).
  - ***Thompson v. State,*** 2010 WL 4394265 (Ga. 2010).

Piper Warnings

- **Ohio Revised Code, Section 9.84**
- In re Civil Service Charges & Specs. Against Piper (2000), 88 Ohio St.3d 308, the Ohio Supreme Court was asked to decide "whether a police officer who was the subject of an internal affairs investigation and who was compelled to appear before a superior officer for the purpose of answering questions, was entitled to legal representation pursuant to Ohio Revised Code (O.R.C.) 9.84." The Court held that the police officer was "appearing as a witness and, therefore, shall be permitted to be accompanied, represented, and advised by an attorney."

Conducting the Investigation

FLOW CHART FOR DISCIPLINE OF NON-UNION CLASSIFIED EMPLOYEES

Receive information that misconduct has occurred

↓

Conduct investigation into the truthfulness and accuracy of reports* (Garrity, Piper)

↓

Determine whether evidence exists that the misconduct actually occurred

↓

Determine the charges that apply to the employee's misconduct – Keep in mind the employee's constitutional rights (*e.g.* Speech, Religion, Association)

↓

Send notification of the charges to the employee and schedule a pre-disciplinary conference where the employee will have a meaningful opportunity to respond

↓

Conduct the pre-disciplinary conference (Loudermill, Garrity, Piper)

↓

Make a determination of whether discipline is appropriate, and, if so, the amount of discipline that is appropriate.

↓

Notify the employee of the sanction

↓

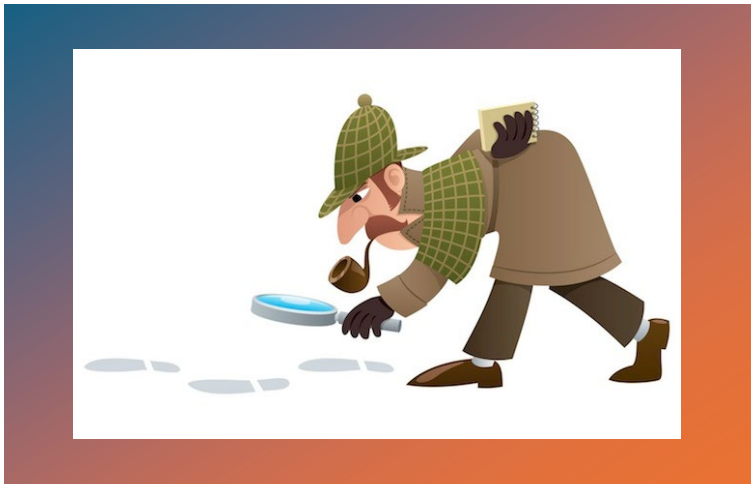
File a § 124.34 Order.

***Investigation may involve:**

- Examination of reports
- Interview of Witnesses
- Interview of the Employee
- Surveillance
- Review of the applicable standard of conduct such as a policy manual
- Other

Probationary Employees

Some of these procedures may be unnecessary for probationary employees. R.C. § 124.27



Conducting an Effective Disciplinary Investigation

- When to Investigate?
- Why Investigate?
- Pre-Investigation Process
- Who Should Lead the Investigation?
- What to do with the Accused Pending Disciplinary Investigations
- Conducting the Investigation

Concluding the Investigation

- **A thorough investigation should conclude with a report summarizing the findings of the investigation.**
- **Contents**
  - Summary of the issue/allegation of the investigation;
  - Chronology of events;
  - Analysis of the factual findings noting any discrepancies in testimony, credibility of witnesses, and any other pertinent observations;
  - **Conclusion; and**
  - **Recommendation.**

Post-Investigation

- **Pre-disciplinary Conference/Loudermill**

  Loudermill v. Cleveland Bd. of Edn., 470 U.S. 532 (1985).

  - The discharge must be preceded with a notice;
  - The employee must be afforded a pre-termination hearing;
  - The pre-termination review need not be elaborate;
  - The employee must be given notice and the opportunity to review the employer's evidence; and
  - The employee must be allowed a meaningful opportunity to respond to the grounds for discipline and to present their position either in writing or in person before any proposed action is taken.

NOTICE OF PRE-DISCIPLINARY MEETING

This notice is provided to advise you that a pre-disciplinary meeting will be held at _____ (time) at _____ (location) on _____ (date) to provide you with an opportunity to respond to the following allegations of misconduct:

_____
_____
_____
_____

You have the right to: (1) appear at the meeting to present an oral or written statement in response to the charges; (2) appear at the meeting and have your chosen representative present an oral or written statement in response to the charges; or, (3) elect, in writing, to waive your opportunity to have a pre-disciplinary meeting. If you choose to make a statement or response during this conference, your statement or response must be truthful. Untruthful statements may subject you to discipline. No pre-disciplinary meeting will be delayed more than twenty-four (24) hours to enable your representative to attend.

At the meeting, you have the opportunity to respond to the disciplinary charges. You may present written statements or documents that you believe support your position. You may be represented by any person you choose, whether such individual is an employee or not. You do not have the right to call or cross-examine witnesses.

A written report may be prepared after the meeting concluding as to whether or not the alleged conduct occurred. If prepared, a copy of this report will be provided to you.

The pre-disciplinary meeting will be conducted by _____.

If you have any questions in regard to this procedure, please contact _____ immediately.

A copy was served on _____ on this the _____ day of _____, 201__.

_____
Service by (date)

Waiver Of Pre-Disciplinary Meeting

In response to the notification of charges against me on _____(date), I hereby waive my right to a pre-disciplinary meeting.

_____
Employee Signature and Date

Post-Investigation

Procedural issues for Pre-Disciplinary Conferences

Bias of the reviewer - neutral reviewer

Full hearing not required; no guarantee to confront witnesses

Collective Bargaining Agreements

Employer Policies

Disciplinary Issues Under Collective Bargaining

- Time Limits
- Employee Rights
- In re: Davenport, SERB 95-023 (12/29/95).
- Invoking the Right to Representation
- Reassignment During Investigation

Grievance Procedure and Arbitration

- **Burden of Proof**
- **Authority of the Arbitrator**
- **Appeal of the Arbitrator's Award**

Employee Defenses

- Discrimination/Retaliation
- Disparate Treatment
- Civil Rights Violations/42 U.S.C. Section 1983

Determination of Discipline

- Evidence
- Disparate Treatment
- Progressive Discipline

Other Issues Involved with Discipline

- Settlement Agreements
- Last Chance Agreements
- Public Records

Public Records

Introduction and Current State of Public Records

- **The Standard for Public Records In Ohio.**
  - "The rule in Ohio is that public records are the people's records and that officials in whose custody they happen to be, are merely trustees for the people."

Public Records - Definition

OHIO REVISED CODE § 149.011(G):

- "Records" include any document, device or item regardless of physical form or characteristics, including an electronic record as defined in section 1306.01 of the Revised Code, created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions, which serves to document the organization, functions, policies, decision procedures, operations or other activities of the office.

Proper Request for Public Records

Request access to the public record.

Identify the records requested with sufficient clarity.

Any person, including corporations, individuals, and other governmental agencies may request public records.

- Any age, not required to be an Ohio citizen.

May designate someone else to inspect or retrieve copies.

An incarcerated person may make a public records request, but if the requested record concerns a criminal investigation or prosecution, the incarcerated person must follow very strict guidelines. R.C. 149.43(B)(8).

Invalid Reasons for Denying a Valid Public Records Request

- It will take too much time to find.
- It is not your record.
- You need to tell me why you want the document.
- You must pay me for the hours spent finding the records before I release them to you.
- You must pay me before I allow you to inspect the document.
- You did not put your request in writing.

Overly Broad, Ambiguous, and Voluminous Requests

- Burden to identify a public record with sufficient clarity is minimal.
- Organize and maintain records.
- If overly broad – you may deny the request, but shall provide requester the opportunity to revise and submit a new request.
- A public office is not required to produce a complete duplication of voluminous files.

Prompt and Reasonable Responses

- Prompt inspection of public records.
- Upon request, copies of public records within a reasonable amount of time.
- The public office bears the burden of proving that it responded quickly enough to the public records request.

Making the Record

- Redaction – obscuring or deleting information that is exempt from a record.
- Document all refusals to amend responses or accept partial responses until the request can be completely satisfied.

Statutory Damages, Court Costs, and Attorney Fees

- Any aggrieved person has the ability to enforce the Public Records Act.
- Ohio Attorney General has no enforcement authority on the public's behalf.
- **Two Options:**
  - (1) Mandamus Action; OR
  - (2) Ohio Court of Claims expedited process

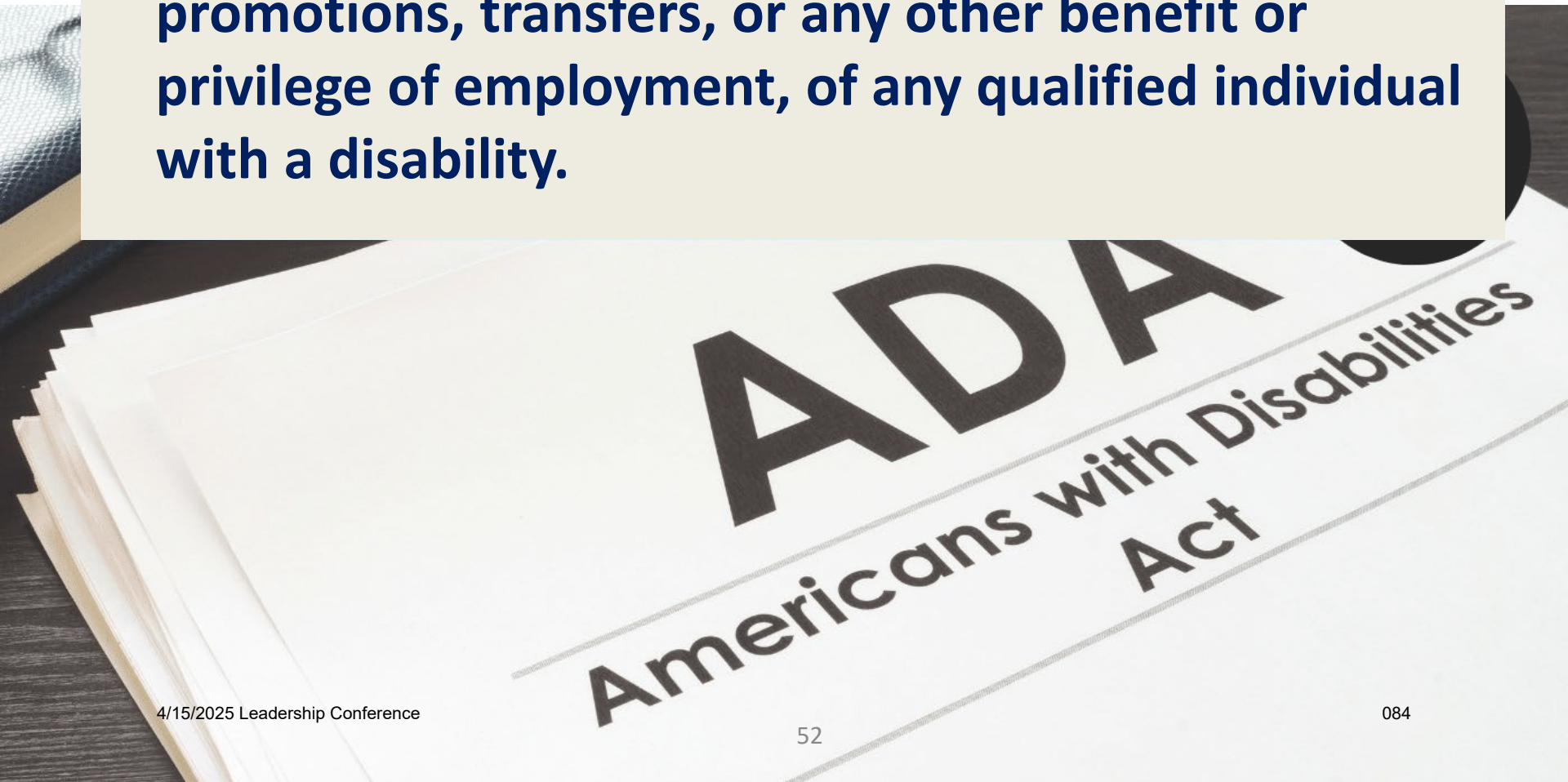
First Amendment Auditors and How NOT to Deal With Them…


ADA
AMERICANS WITH
DISABILITIES ACT

ADA

The Americans with Disabilities Act

- **The County prohibits discrimination in hiring, promotions, transfers, or any other benefit or privilege of employment, of any qualified individual with a disability.**



Elements

- **To prove a claim of discrimination under the ADA, plaintiffs must establish that:**
  - **They have a disability;**
  - **They are otherwise qualified for the position; and**
  - **Their employer discriminated against them on the basis of their disability.**

Determining if an Employee has a Disability

- **Elements. An individual is protected by the ADA if that individual:**

1. Has a physical or mental impairment that substantially limits a major life activity;
2. Has a record of a substantially limiting impairment; or
3. Is regarded as having a substantially limiting impairment.

Qualified Individual with a Disability: Who is a "Qualified Individual"?

- The individual must satisfy the requisite skills, experience, education and other job-related requirements of the position.
- Must be able to perform the essential functions with/without a reasonable accommodation.
- The ADA does not interfere with the right of an employer to hire the best-qualified applicant.

Evidence of Essential Function

- The employer's judgment as to which functions are essential;
- Written job descriptions prepared before advertising or interviewing for a job. 29 C.F.R. §1630.2(n)(3);
- The actual work experience of current and past employees in that position;

Evidence of Essential Function

- The actual time spent performing that function;
- The consequences of not requiring that employee to perform that function; and
- The terms of a collective bargaining agreement.

Reasonable Accommodation

- A reasonable accommodation is any change or adjustment to a job or work environment that permits a qualified applicant or employee with a disability to participate in the job application process, to perform the essential functions of the job, or to enjoy the benefits and privileges of employment equal to those enjoyed by employees without disabilities.
- Examples: job restricting; modified work schedule; reassignment to vacant positions; etc.
- Light Duty

Defenses to Not Making a Reasonable Accommodation

- **Undue Hardship**

  Undue hardship means that an accommodation would be unduly costly, substantial or disruptive, or would fundamentally alter the nature or operation of the business.

- Uncertain Return Dates from Leave Constitutes Undue Hardship

- *Aston v. Tapco Int'l Corp.,* 631 Fed. Appx. 292, 2015 U.S. App. LEXIS 20610 (6th Cir., Nov. 23, 2015).

Direct Threat

- **Direct threat** is a significant risk of substantial harm. 42 U.S.C. § 12111(3).
- **Substantial harm** is more than a slightly increased risk of harm and more than a speculative or remote risk.
  1. The duration of the risk;
  2. The nature and severity of the potential harm;
  3. The likelihood that the potential harm will occur; or
  4. The imminence of the potential harm.

The Interactive Process – Individualized Inquiry

- Employee suggestions of reasonable accommodation
- Entitled to reasonable accommodation
- Not the best or preferred accommodation
- Document the process
- Union involvement

Disability Separations

- If a classified employee remains unable to perform the essential functions of the position after exhausting available leaves, the employee may request a voluntary disability separation. If, after exhausting available leave, an employee refuses to request a voluntary disability separation, an Appointing Authority may place the employee on an involuntary disability separation if the Appointing Authority has substantial, credible medical evidence to indicate that the employee remains disabled and incapable of performing the essential job duties. Such involuntary disability separation may be done in accordance with Ohio Administrative Code (O.A.C.) Chapter 123:1-30.

FAMILY AND MEDICAL LEAVE ACT

Calling in sick…

FMLA: Qualifying Reasons

- Upon **birth** of an employee's child and in order to care for the child.
- Upon the placement of a child with an employee for **adoption or foster care.**
- When an employee is needed to care for an immediate family member who has a **serious health condition.**

Substitution of Paid Leave

Policy Requirements

Collective Bargaining Agreement

Permissible paid leave for FMLA absence

How Do I Handle Intermittent Leave?

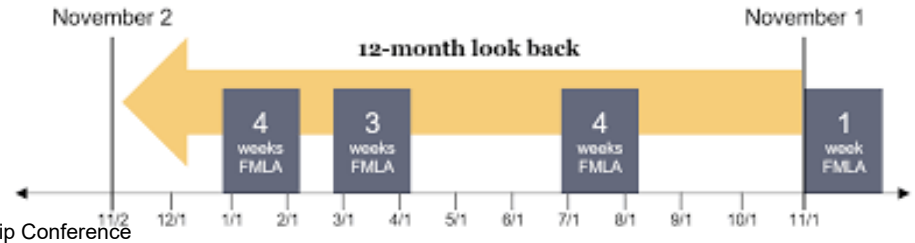
- **What qualifies for intermittent leave?**
- **Obligation to be non-disruptive**
  - Can I reassign?
- **Recertification?**
  - Duration of Certification
  - Request for an Extension
  - Change in Circumstances
  - Fraud
  - Abuse/Misuse

Certification Requirements

Employer must investigate and designate FMLA when applicable

Notice to employee

Recertification by employee



What Else Should We Be Concerned About With Respect to FMLA?

- **Policies**
  - FMLA
  - Sick Leave
  - Workers' Compensation
  - Americans with Disabilities Act
  - Discipline
  - Benefits
- **Job Descriptions**
- **Abuse/Misuse**
- **Involuntary Disability Separation**

Practice Tips

- Don’t make it easy for employees to call off sick.
- Don’t simply accept a doctor’s excuse if there are questions.
- Use the FMLA process to investigate employee absences.
- Send the employee to a physician designated by the employer.
- Define sick leave abuse and excessive absenteeism.


DRUG
TESTING

Drug Investigation

Pre-Employment Testing

- **Introduction**
  - **Public Sector Constitutional Concerns**
  - **Pre-Employment Suspicionless**
    - How to Minimize Risk
      - Consent
      - Waiver
      - Notice
  - **Applicants v. Employees**
  - **Safety Sensitive Positions**
  - **Private Sector**

Current Employees - Reasonable Suspicion

- **Reasonable Suspicion**
  - Observable Phenomena
  - Abnormal Conduct
  - Report
  - Evidence of Test Tampering
  - Information
  - Evidence of Usage, Possession, etc.
  - What to do with employee believed to be under the influence?
  - Post-Accident Testing

Safety-Sensitive Employees

- **This exception manifests for employees that operate public transportation or vehicles.**
- **Two factor focus:**
  - Whether the group of people targeted exhibited a pronounced problem.
    - If not, whether the group occupies a unique position making the pronounced drug problem unnecessary.
  - Magnitude of possible harm.

Administering Drug Tests

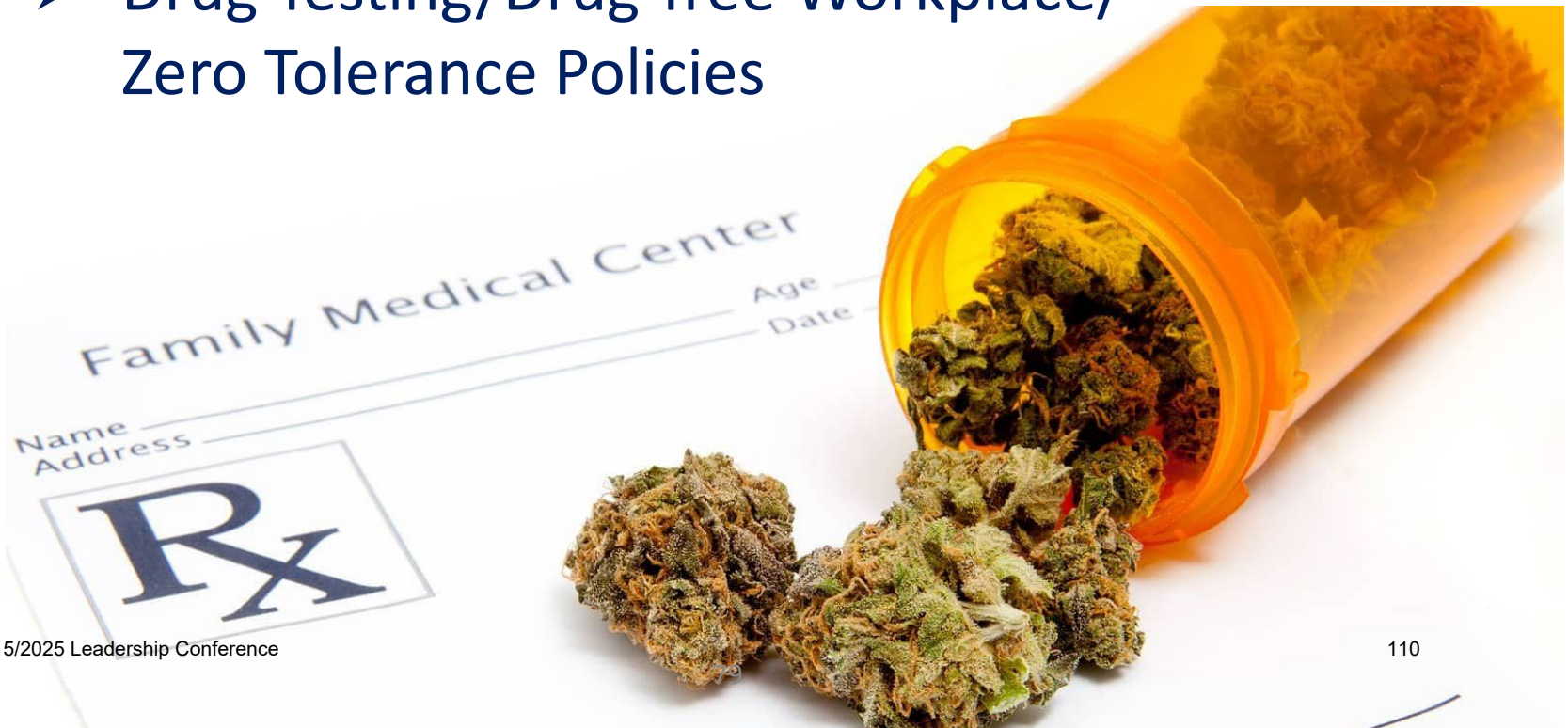
- **Need for Clear Directions**
- **Things to Consider:**
  - Transport of employee to and from testing site.
  - Returning to duty.
  - Consequences.

Medical Marijuana: No Duty to Accommodate

- Employers are not required to permit or accommodate an employee's use, possession, or distribution of medical marijuana.
- Employers are not prohibited from refusing to hire, discharging, disciplining, or otherwise taking an adverse employment action against a person with respect to hire, tenure, terms, conditions or privileges of employment because of that person's use, possession, or distribution of medical marijuana.

Medical Marijuana: No Duty to Accommodate

- Employers are not prohibited from establishing and enforcing:
  - Drug Testing/Drug-free Workplace/ Zero Tolerance Policies



Recreational Marijuana: Impact on Employers

- Even though Issue 2 permitted recreational marijuana use, it did **not** permit individuals to file complaints against employers for refusing to hire, disciplining, or taking an adverse employment against an individual regarding employment as a result of marijuana use.

Recreational Marijuana: Impact on Employers

- Discharge of an employee for marijuana use is considered "just cause" ***if*** the employee's marijuana use was in violation of an employer's workplace policy.

Thank You!

County Risk Sharing Authority

209 E. State Street

Columbus, Ohio 43215

PH: 614-221-5627

FX: 614-220-0209

CORSA Risk Management Services

CORSA is a property and liability risk sharing pool established by CCAO in 1987 when commercial liability insurance was either unavailable or unaffordable. The vast majority of counties, municipalities, townships and schools in both Ohio and across the country purchase their property and liability coverage through risk sharing pools. CORSA provides members with comprehensive property and liability coverage and high-quality risk management services at a stable and competitive cost.

Available Services and Benefits

- HR Helpline
- Award-Winning Model Personnel Policy Manual
- On-Location Training Seminars
- HR Tool Kit
- On-Line Training (CORSA University)
- Broadcast Email
- Cyber Security
- Property Appraisals
- Preventive Maintenance Program (Facility Dude)
- Contract Review
- In-Person and Online Defensive Driving Classes
- Loss Control Surveys
- Flood Risk Control
- Departmental Risk Control Training

CORSA Loss Control Staff:

Frank Hatfield, Risk Control Manager
614-560-1474 | fhatfield@ccao.org

Jim Hale, Risk Control Consultant
614-246-1630 | jhale@ccao.org

Ken Hilty, Risk Control Law Enforcement
614-357-6966 | khilty@ccao.org

Steve Flory, Risk Control Law Enforcement
614-981-3414 | sflory@ccao.org

HR Helpline:

Counties located north of I-70:
Meyers, Roman, Freidberg, Lewis
Kathleen Minahan
216-831-0042 ext 223

Counties located south of I-70:
Isaac Wiles
Jeff Stankunas
614-221-2121

209 E. State Street, Columbus, Ohio 43215
Tel: 888-757-1904 or 614-221-5627 Fax: 614-220-0209
www.corsa.org

Law Enforcement & Corrections
Risk Management Services

CORSA provides members with comprehensive property and liability coverage and high quality risk management services at a stable and competitive cost.

In response to an increasing risk and liability placed upon law enforcement and corrections, CORSA created a law enforcement/ corrections help desk in 2010. This help desk provides assistance with expert advice on legal, law enforcement/ corrections matters through services from Legal Liability Risk Management Institute. (LLRMI)

Available Services and Benefits

- Best Practice Law Enforcement and Corrections Policies
- Policy Review & Revision with LLRMI
- Regional Law Enforcement and Corrections Training Seminars
- Online Training from LLRMI (Bridge)
- MILO Decision-Based Training Simulator
  - Contact Steve Flory to set up training
- Leadership Perspective Classes
- NAMI Classes
- Performance Reviews for Law Enforcement & Corrections Operations
- Law Enforcement & Corrections Help Desk
- HR Helpline for employee issues
- Online Training (CORSA University)

CORSA Loss Control Staff:

Frank Hatfield
CORSA Assistant Director
614-220-0639 (office)
614-560-1474 (cell)
fhatfield@ccao.org

Steve Flory
Risk Control Law Enforcement
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Larry Sims
Risk Control Law Enforcement
614-632-6100
lsims@ccao.org

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LLRMI/Help Desk:

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209 E. State Street, Columbus, Ohio 43215
Tel: 888-757-1904 or 614-221-5627 Fax: 614-220-0209
www.corsa.org

Prevent Costly Employment Claims by Consistent Application of Workplace Policies

2025

PRESENTED TO YOU BY

County Risk Sharing Authority
209 East State Street
Columbus, Ohio 43215-4309

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A Service Program of the County Commissioners Association of Ohio

TABLE OF CONTENTS

I. ADDRESSING EMPLOYEE PERFORMANCE

A. What is a Performance Evaluation?

A performance appraisal or evaluation has been succinctly defined as: "the process of establishing a written standard of performance criteria and both telling employees about those standards and frequently informing them how they are performing in relation to the standards." *See* Donald W. Myers, Human Resources Management 310 (2d ed. 1992).

Evaluations and performance reviews can be an employer's greatest tool for improving an employee's performance and retaining employees.

1. Good evaluations communicate the employer's standards and goals in relation to the employee's performance.

2. Poor evaluations fail to address inadequate performance and do not change the behavior.

B. The Role of Performance Evaluations. Performance appraisal systems have many benefits in the workplace. Effective performance evaluations should:

1. Measure past employee performance;

2. Evaluate the workplace;

3. Manage expectations regarding future employee performance;

4. Obtain better performance from employees/agency;

5. Determine department/individual needs, such as training, staffing, and equipment;

6. Communicate policies/standards of conduct;

7. Help supervisors make better hiring decisions and determine pay increases;

8. Assist in appeals involving employee discipline; and

9. Help make a winning defense!

C. What Should the Performance Evaluation "System" Include?

Effective employee performance evaluations have the following components in common:

1. They follow a proven process or "system."

2. The system provides employees with written standards of performance. Typically, the more objective the standard, the better. However, some degree of subjectivity is a component of all performance evaluation systems.

3. Employees are frequently informed as to whether or not they are complying with the written standards of performance.

   The performance evaluation should be construed as a part of an overall performance system. That "system" is made up of the following:

   a. **The Job Description** (provides a blueprint of the basic performance requirements). Employees should be held accountable to perform the essential functions of the position. Supervisors and employees should be permitted to participate in the position audit giving rise to new/updated Position Descriptions.

   b. **Continual Management Feedback** during the year (provides frequent notice of defective or positive performance). Employees should be advised regarding their performance during the course of the year. Regular notice regarding performance will allow employees—and employers—to recognize the variations that may impact everyday work.

   c. **Discipline** (provides immediate notice that employee has failed to correct defective performance or has failed to meet the basic performance requirements). Employers should always consider disciplining employees for poor performance or emphasizing an expected standard of conduct.

   d. **The Performance Evaluation** (provides an annual performance recap and sets future projections). Consistently apply standards and performance measures to all employees.

If performance evaluations and appraisals are conducted properly, they can accurately communicate management's opinion of a particular employee's performance. Evaluations often identify performance problems and encourage employees to improve or exceed performance standards without the imposition of the other part of the performance system - discipline.

D. What Should Be Included in a Performance Evaluation?

1. An effective performance evaluation should:

   a. Communicate the goals and objectives of the organization;

b. Include a scoring system that can easily be used for administrative results;

c. Be cost effective – both in development and use;

d. Strive to eliminate rater errors; and

e. Allow employers to evaluate the performance and growth of employees compared to defined performance objectives.

Supervisors should pay special attention to the evaluation criteria established in performance evaluations for the employees under their control. It is also critically important that performance standards be revised in response to the changing needs and demands on the department. As workplaces evolve so should the evaluations. Therefore, it is necessary to review and audit performance evaluations. The evaluations should be "living documents" designed to effectively evaluate employee performance.

2. Sample Evaluation Criteria:

a. **Quality of Work:** focus on efficiency, quality, and accuracy of work.

b. **Leadership:** focus on responsibility for work, trust, credibility, and honest and ethical behavior.

c. **Communication**: focus on relationship building, active listening, sharing of information, and demonstration of effective oral and written skills.

d. **Planning/Organizing:** focus on achieving departmental objectives/plans in a timely fashion, reflecting decision-making skills, the ability to set goals and priorities, ability to meet individual goals, and distinguish between relevant and irrelevant information.

e. **Respect/Inclusiveness:** focus on respecting co-workers and customers, promoting fairness and equity, and engaging the talents/skills of others.

f. **Service:** focus on effectiveness with customers and coworkers, promoting a service mentality, ability to turn negatives into positives when faced with a stressful situation, displaying cool under fire, and the ability to resolve stressful situations in a positive manner.

g. **Safety:** focus on reduction of injuries and risk, and continual planning for safety of customers and others.

h. **Any other suggestions?** This may vary by department.

3. Regardless of the number and types, the goals and objectives should be specific and defined in terms of measurable results. If individual goals and objectives are established, they should be linked to the organization's goals. The goals and objectives should be measured in a reasonable time period that is specified. Finally, the goals and objectives should be flexible as it may be necessary to adjust as conditions warrant.

4. In preparing the performance evaluation, it is necessary to include a section that defines and explains each score. Regardless of the scoring system used, it is imperative that supervisors provide more than simply word or number responses. Explanations should be provided explaining the decision of the evaluator.

E. How to Provide Effective Performance Evaluations?

The Supervisors conducting the evaluations are crucial to ensuring that the performance evaluation system will be effective.

1. Common Evaluator Mistakes

Supervisors can be guilty of subconscious errors in providing evaluations. Therefore, it is necessary for supervisors to evaluate how they conduct performance evaluations. The most common evaluator errors include:

a. Duties poorly communicated (vagueness of standards);

b. Appraisals are late or done sporadically;

c. Employee surprise;

d. Lack of employee buy-in;

e. Rater biases:

i. **First Impression.** Developing a positive/negative opinion of an employee early in the review period and allowing that to positively/negatively influence your perception of the employee's performance.

ii. **Recency.** Allowing the employee's most recent performance to taint/positively impact the employee's performance during the entire period.

iii. **Leniency.** Rating someone higher than they deserve. This is often "the desire to be nice," or "the desire to be liked." It is more often a desire to avoid confrontation. The antidote is a dose of preparation. It is easier to be candid when you are dealing in facts and not just subjective conclusions.

iv. **Central tendency.** Related to leniency, this is the tendency to rate a "good" or "average" employee as good or average in all categories instead of making critical distinctions. Rarely is an employee mediocre in everything, instead the employee is good at some things, not so good at others.

v. **Halo/Horns.** This is the tendency to allow one characteristic or behavior that you really like/dislike about a person to affect the ratings in all other rating areas. For example, a supervisor may really dislike tardiness and allows the employee's habit for being tardy impact all other areas of evaluation.

vi. **Clone.** Giving a better rating to someone because they possess similar traits. Statistics show that persons of all races, genders, nationalities, and backgrounds tend to engage in this behavior even subconsciously. The more you perceive someone as being like you, the more you tend to like him or her and the higher you rate him or her. This also encompasses circumstances when the employee is the supervisor's close, personal friend. Acknowledging this inherent error is the beginning to solving the error.

vii. **Spillover.** Continuing to downgrade someone for prior performance. The reviewer believes that there is no hope for improvement.

viii. **Length of Service Bias.** This is a supervisor's tendency to assume that a long-term employee is continuing to perform the way he or she always has, or worse, that an employee's performance is increasing due to length of service. Objective criteria are key.

2. **Reducing Rater Errors**

a. The best protection against rater errors is rater training!!! Therefore, it is advisable to conduct supervisory training, so that the evaluations can be consistently applied.

b. Also, it is recommended that employers use a check-and-balance system that provides a second layer of review for the proposed

evaluation prior to providing it to the employees (such as HR or another manager). They can help catch possible indications of a rater error.

c. Inadequate Documentation: If your evaluation system does not effectively rate or document the applicable employment standards, the evaluation system is plagued with error. To eliminate the errors of inadequate documentation:

i. Establish performance standards that are based on what needs to be done, not on the person who will be doing them.

ii. Evaluate consistently between and among employees.

iii. Employees should sign off on the appraisal and be given a copy.

iv. Set specific job-related future goals that form part of the next evaluation. It should be a continuum, not a series of isolated events.

v. Complete the evaluation form legibly, sign and date it.

vi. The form should state the evaluation period and all documentation should be within that period.

vii. Stick with the facts you can actually support.

viii. What's on the paper should be consistent with what you say, don't undermine the form by sugarcoating the message.

3. **The Importance of Honest and Accurate Evaluations**

a. Employees can use "good" appraisals to prove that the employer's proffered reasons for an adverse employment action are pre-textual.

***Breyman v. RR Donnelley & Sons Co.*, 2016 U.S. Dist. LEXIS 123164 (N.D. Ohio):** The Plaintiff brought suit against her former employer for gender discrimination after she was denied a promotion. The plaintiff was denied the opportunity to interview, while two male employees were given the opportunity.

The Plaintiff was able to establish a prima facie case of gender discrimination by showing she met the qualifications for the job. The Plaintiff met her burden by her experience, tenure, seniority status, and positive performance evaluations.

b. Conversely, an employee's "poor" performance documented through an effective evaluation system can help defeat a wrongful discharge claim.

***Fewless v. Trinity Health-Michigan*, 2011 U.S. Dist. LEXIS 125296 (W.D. Mich. 2011):** The Plaintiff alleged interference and retaliation under the FMLA after she was terminated upon returning from FMLA leave for the birth of her child. The Defendant (employer) moved for summary judgment, arguing that the Plaintiff's termination was due to deficiencies discovered while she was on leave. The Plaintiff was unable to produce evidence demonstrating that taking FMLA leave was a negative factor in the employer's decision to terminate her. The court granted summary judgment in favor of the employer.

4. **Additional Supervisor Tips for Effective Performance Evaluations:**

a. **Honesty and Consistency.** These two interwoven concepts are integral in performance evaluations. Supervisors solely control both concepts. While it may be difficult and/or uncomfortable to discuss performance issues with employees, honesty in the process will help in the defense of any subsequent employment litigation as the performance-related issue will be clearly set-forth through previous evaluations and disciplines. It is equally important that supervisors are consistent in their evaluation of performance between and among employees. All employees who have the same/similar shortfall should be treated/counseled in the same manner to avoid disparate treatment allegations.

b. **Determine the Appropriate Evaluation Period.** Timing is the most important link in rebutting discrimination claims on the part of a former employee. Documentation is most effective as a defense weapon when prepared as part of an on-going review process over a long period of time. Thus, adopting and carefully administering a long-term, on-going performance review system can effectively avoid litigation.

c. **Do not be Afraid to Give Negative Evaluations.** Supervisors must be aware that many potential problems can arise from inconsistent or inaccurate employee evaluations. Positive evaluations given when the employee's work performance was substantially less than glowing can cause a substantial negative impact when employment-related litigation arises. Therefore, be sure to discuss inappropriate performance (including inappropriate behavior). However, don't be lulled into providing "opinions or conclusions" as to why you believe an employee is behaving a certain way. Simply focus on the defective performance, not the person.

d. **Stick with what Works.** Use a Standard Form/Procedure. The form should be flexible enough so that comments or narratives which are appropriate to the position can be explained or made. A supervisor must also be able to explain the purpose for each rating and category listed on the form.

The evaluation procedure should always be linked to a well-drafted and current job description and should always review and discuss any previous discipline provided throughout the review period and what is being done to ensure compliance in the future.

e. **Be Prepared.** Use a personal outline of the structure of the evaluation interview, highlighting the points/topics you want to cover and ALWAYS end on a positive note. Ending on a positive note and reformatting the "action plan" (e.g. what the employee's goals are for the new review period) is crucial. It is important to follow-up with employees to see how the action plan is proceeding within the timelines established.

Some basic rules are: (1) don't postpone or cancel the review so that the employee knows it is important; (2) schedule adequate time and don't allow interruptions; (3) allow plenty of time for two-way communication; and (4) remember to LISTEN when the employee disagrees - you may learn something useful!!

F. CORSA BPPM Language

"The County may complete annual performance evaluations. Evaluations, if conducted, will be based upon defined and specific criteria and will generally be reviewed and signed by the employee's direct supervisor, and those superiors in the direct chain-of-command. The results will be discussed with the employee and the employee will be asked to sign the evaluation. An employee's signature will reflect their receipt of the evaluation, not their agreement with its contents. Should the employee refuse to sign, a notation will be made reflecting the date and time of the review along with the employee's refusal to sign. Employees may offer a written response to their performance evaluation. Such response, if given, will be maintained with the evaluation."

II. INVESTIGATIONS AND DISCIPLINE

A. Standards for Imposing Discipline

By virtue of being in the classified civil service or in a bargaining unit, public employees in Ohio enjoy property rights in continued employment and are protected from summary termination. Public employees are assured "due process" in conjunction with disciplinary actions, and they have the protection of the "just

cause" principle contained in R.C. § 124.34 and/or collective bargaining agreements.

Just Cause - A determination of just cause involves a consideration of whether the offense was in fact committed and whether the penalty is warranted. *In re Crown Cork & Seal Company, Inc.*, 111 LA 141, Arbitrator Mitchell B. Goldberg (1998). The decision of the employer in issuing the discipline will be upheld unless arbitrary, capricious, discriminatory, or entirely unreasonable under the facts and circumstances.

7-Part Test - Several arbitrators, courts, and civil service boards use a 7-part test for determining just cause:

1. Notice;

2. Reasonable Rule;

3. Investigation;

4. Fair & Impartial Investigation;

5. Proof;

6. Evenhanded and Non-Discriminatory Application of Rules and Penalties; and

7. Was the Discipline Related to the Seriousness of the Offense and to the Employee's Work Record?

In re Grief Bros. Copperage Corp., 42 L.A. 555 (1964).

B. Establishing a Standard of Conduct

Standards of conduct should be established through:

1. Statutes (Criminal Statutes, Ethical Standards, Codes of Ethics, Professional Code of Conduct, etc.);

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

3. Collective Bargaining Agreements.

Ohio Revised Code Section 124.34(A)

(A) . . . No officer or employee shall be reduced in pay or position, fined, suspended, or removed, or have the officer's or employee's longevity reduced or eliminated,

except as provided in section 124.32 of the Revised Code, and for incompetency, inefficiency, unsatisfactory performance, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of any policy or work rule of the officer's or employee's appointing authority, violation of this chapter or the rules of the director of administrative services or the commission, any other failure of good behavior, any other acts of misfeasance, malfeasance, or nonfeasance in office, or conviction of a felony while employed in the civil service.

C. Forms of Discipline. An employee may be disciplined in a variety of ways depending upon the employee's past record and the severity of the offense. These different forms of discipline include:

1. Reprimand (Verbal or Written);

2. Suspension;

3. Removal;

4. Reduction in pay or position;

5. Reduction in longevity;

6. Forfeiture of paid leave;

7. Variations;

    a. Vacation leave;

    b. Work days off;

    c. Compensatory time;

    d. Probationary period.

D. Conveying and Implementing the Standard

1. Constitutional Requirements. The following Constitutional Rights of Employees should be taken into consideration when determining whether to discipline public employees and when implementing a standard of conduct, generally:

    a. Right to Privacy.

    b. Freedom of Speech and Association.

c. Vagueness of Policies and Orders.

d. Procedural Due Process.

2. A charge stated without specificity and clarity, and not stated with any degree of certainty, cannot be considered by this Arbitrator. *Lawrence County Sheriff's Office and Fraternal Order of Police, Ohio Labor Council, Inc.*, FMCS No. 01-14594-6, Arbitrator Marvin J. Feldman (March 19, 2002).

3. Unwritten Rules. "It is not necessary to spell out every possible duty in a job description." *Shahan v. Ohio Dept. of Mental Health and Mental Retardation* (September 18, 1980), Franklin County App. No. 80 AP-244. Discipline can be upheld even without written standards of conduct as long as the employer can meet the test for just cause.

4. Procedural. Periodically the justifications set forth in R.C. § 124.34 are challenged as overly broad amounting to an unconstitutional taking of property interests thereby violating the Fifth and Fourteenth Amendments to the U.S. Constitution. Courts have regularly held the provisions of R.C. § 124.34 constitutional. See *In re: Chase* (1976), 50 Ohio App. 2d 393.

The test for overbreadth is whether a statute forbids or requires conduct "in terms so vague that persons of common intelligence must necessarily guess as to its meaning and differ as to its interpretation." *Connally v. General Construction Co.*, (1926), 269 U.S. 385, 291. See also, *Dennis v. Carroll County Dept. of Human Services*, Seventh Dist. App. No. 442 (Jan. 28, 1993) (finding without merit of the assignment of error that the term "failure of good behavior" was vague and unconstitutional).

E. Procedural Issues with Discipline - Conducting the Investigation

1. Who is responsible for the investigation?

2. Documentation. Document all steps or stages in the investigation:

a. Interviews.

b. Witness Statements. Written witness statements should be gathered and transcribed.

c. Personnel Files. Personnel files must be thoroughly reviewed for documentation and/or indication of:

i. Prior performance record in performance appraisals and evaluations;

ii. Prior conduct, which could indicate that the employee had notice of the relevant standard of conduct or that he/she has prior discipline which can serve as a basis for issuing more severe discipline here;

iii. Had the employee received proper or adequate training; and

iv. Anything which might be relevant to the investigation.

3. **Garrity Warning/Internal Affairs Investigation**. If an employee's refusal to answer is based on his or her concern that such answers will incriminate him or her, he or she may not be removed for failing to answer unless and until he or she is told that his or her answers will not be used against him or her in any criminal proceeding. *Garrity v. New Jersey*, 385 U.S. 493 (1967).

4. **Piper.** *In re Civil Service Charges & Specs. Against Piper* (2000), 88 Ohio St.3d 308, the Ohio Supreme Court was asked to decide "whether a police officer who was the subject of an internal affairs investigation and who was compelled to appear before a superior officer for the purpose of answering questions, was entitled to legal representation pursuant to Ohio Revised Code (O.R.C.) 9.84." The Court held that the police officer was "appearing as a witness and, therefore, shall be permitted to be accompanied, represented, and advised by an attorney."

5. **Pre-disciplinary Conference/Loudermill.** In 1985, the U.S. Supreme Court decided the case of *Loudermill v. Cleveland Bd. of Edn.*, 470 U.S. 532 (1985). The Court held that under the Constitution, a civil servant has reasonable expectation of continued employment, and thus, retains a property right in his job. Therefore, the Court held that in a removal case the employee is entitled to due process rights and that there must be "a determination of whether there are reasonable grounds to believe that the charges against an employee are true and support the proposed action." The Court also prescribed a "minimal due process" test to ensure that these due process rights are observed, and though *Loudermill* involved a removal decision, the test must be followed for any deprivation of employment or employment status. The *Loudermill* test requires that:

a. The discharge must be preceded with a notice;

b. The employee must be afforded a pre-termination hearing;

c. The pre-termination review need not be elaborate;

d. The employee must be given notice and the opportunity to review the employer's evidence; and

e. The employee must be allowed a meaningful opportunity to respond to the grounds for discipline and to present his position either in writing or in person before any proposed action is taken.

F. Disciplinary Issues Under Collective Bargaining

1. **Time Limits** - Generally, time limits to conduct the investigation are not specified in the collective bargaining agreement. Nonetheless, the employer should conduct the investigation within a reasonable time after learning of the potential infraction. (Reasonable/CBA limits)

2. **Employee rights** – In addition to *Garrity* and *Piper* rights, the union employee has a right to union representation during investigative interviews where the employee reasonably contemplates that discipline will result. *In re: Davenport*, SERB 95-023 (12/29/95) – An employee's right to representation includes investigation meetings which **the employee reasonably believes could lead to the imposition of discipline** and meetings where grievances are presented if the employee chooses to have a representative present. See also *NLRB v. Weingarten*, 420 U.S. 251 (1975).

3. **Invoking the Right to Representation.** An employee's question concerning representation during an investigatory interview is adequate to put the employer on notice that representation is desired. An employee is obligated to make the employer aware of his desire to have a union representative present during a meeting even if he believes the request is futile. The employee's right to representation arises when a significant purpose of the interview is to obtain facts to support disciplinary action that is probable or is being seriously considered along with the employee's knowledge of that purpose. *In re: City of Cleveland*, SERB 97-011 (6/30/97).

   The union representative's role does not include advising the employee not to respond to questions. *In re: City of Cleveland*, SERB 97-011 (6/30/97).

G. Employee Defenses

1. **Discrimination/Retaliation.** Can include cases where there was no discrimination but the employer acted in response to protected activity.

2. **Disparate Treatment**. Employees may allege disparate treatment by the employer if they were issued harsher discipline for the same offense than

another employee. This concept is applicable in both arbitrations and civil service. See OAC § 124-9-11.

3. **Civil Rights Violations/42 U.S.C. Section 1983.**

a. **Freedom of speech.** The First Amendment protects public employees' speech which involves matters of public concern. Whether an employee's speech addresses a matter of public concern must be determined by the content, form and context of a given statement, as revealed by the whole record. Even if statements are related to matters of public concern, they will not be protected if they substantially disrupt the efficient operation of the employer. *Pickering v. Board of Education*, 391 U.S. 563 (1968). Where the matter in which the government employee is disciplined is based on a First Amendment right (such as speech), and of public concern, a court will use a balancing test to determine if the discipline was proper:

Test: "[B]alance the interest of the employee, in commenting on matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

b. **Public Concern:** If it is of interest to the community, whether for social, political, or other reasons. *Arndt v. Koby*, 309 F. 3d 1247 (10th Cir. 2002).

c. **Employer's Defense:** Discipline will be upheld if the governmental employer "reasonably believed that the speech would potentially interfere with or disrupt the government's activities and can persuade the court that the potential disruptiveness was sufficient to outweigh the First Amendment value of the speech." *Heil v. Santoro*, 147 F. 3d 103 (2nd Cir. 1998).

d. **Private Concern:** Speech of purely personal interest or involving internal personnel dispute. *Arndt v. Koby*, 309 F. 3d 1247 (10th Cir. 2002). Government employers have greater latitude to discipline an employee over employee speech expressing private concerns.

e. **Freedom of Association.** For the same reasons discussed when dealing with Freedom of Speech above, an employee's right to association is not absolute. Courts have upheld policies that prohibit association with those who could pose a potential threat to the agency's reputation and effectiveness, or could compromise the officer's position (such as known felons). Such policies serve as an

effective tool to restrict the possible appearance of impropriety of officers associating with those whom society fears.

f. **Union Association** - A public employee has the First Amendment right to join and the union has the right to advocate for the employee and petition government on his or her behalf. Therefore, the employee's First Amendment right of association is violated if the action by the public employer is meant to intimidate employees from joining the union or from taking an active part in the union, or if it is meant to retaliate against an employee for lawfully engaging in union activity. *Hitt v. Connell*, 301 F.3d 240 (5th Cir. 2002).

g. **Privacy/disciplinary searches.** A search must be for a reasonable purpose, reasonable in its scope and less intrusive methods must be unavailable or ineffective. The Fourth Amendment protects the "workplace," which is defined as including those areas and items that relate to work and are generally within the employer's control. For example, the premises of the employer are considered workplace, as is an employer provided vehicle, however, an employee's handbag or briefcase is not. *O'Connor v. Ortega*, 480 U.S. 709 (1987).

h. ***O'Connor v. Ortega*, 480 U.S. 709 (1987).** The U.S. Supreme Court held that the employee had a reasonable expectation of privacy in his office because he did not share his desk or filing cabinets with other employees and for seventeen years had kept personal materials in his office and desk.

H. Determination **of Discipline**

1. **Evidence.** What evidence can and should be considered in making determination of whether to issue discipline and of what level discipline is warranted:

a. All available documentation should be considered;

b. Prior performance appraisals;

c. Existing work rules established standards of conduct expected of employees. Must be presented through rules or testimony of appointing authority. *Habe v. South Euclid Civil Service Commission*, Case No. 61786 (8th Dist. Ct. App., Cuyahoga, 2-4-93);

d. Witness statements;

e. Internal affairs investigation report/investigation;

f. Employee response and report following pre-disciplinary conference; and

g. Other sources.

2. **Disparate Treatment.** The severity of discipline imposed must be commensurate with the acts committed and with the employee's prior record and must be comparable to prior discipline of other employees by the Employer.

3. **Progressive Discipline.** Prior discipline, in any form, can and should be used to establish a *de facto* standard of conduct for employees. That is, progressive discipline provides notice to employees of both what conduct is unacceptable and what the likely results will be for engaging in such conduct.

I. Other Issues Involved with Discipline

1. Settlement Agreements

From time to time, settlement discussions may lead to a decision to afford the employee the opportunity of resigning as opposed to being terminated from employment.

a. **Breach of Settlement Agreement.** *Love v. Univ. of Cincinnati Hosp.*, (1997), 90 Ohio Misc.2d 4. A former employee brought action against his former employer for breach of settlement agreement and defamation. The Court of Claims held that the former employer's agent breached the parties' settlement agreement when he gave negative employment reference about the former employee to a prospective employer, but the truthful statements made by the agent could not support the defamation claim.

2. **Last Chance Agreements.** From time to time settlement discussions may also lead to a decision to afford the employee one "last chance" to retain his or her employment.

Last chance agreements:

a. Should be used with great caution. (they should only be considered for employees that have shown past positive contributions who present a good prospect for resuming and continuing good performance.);

b. Should only be entered into voluntarily by the employee, as part of a settlement agreement of the dispute, and should never be imposed unilaterally;

c. Should include a forfeiture of the right of appeal from the disciplinary action that gave rise to termination;

d. Should define the types of misconduct which, if repeated, will give rise to termination;

e. Should allow a review only of whether the employee committed any of the types of conduct prohibited by the agreement, and not of whether they were committed;

f. Should include language wherein the employee agrees that in the event of a subsequent incident of misconduct, the employee agrees that termination for a subsequent offense is appropriate and that the only question to be determined is whether the offense was committed; and

g. Should be fair and appropriate.

J. CORSA BBPM Language.

The County has the right to investigate all alleged disciplinary violations. Employees are required to cooperate fully during investigations. Employees who are the subject of a formal investigation have the right to be accompanied, represented, and advised by an attorney. For all employees, the failure to respond, to respond truthfully, or to otherwise cooperate in an investigation, shall be considered insubordination and may result in termination. Employees involved in an investigation shall not discuss the facts of the investigation during the pendency of the investigation. Investigations shall be conducted upon receipt of an allegation of potential misconduct. Investigations shall be conducted promptly and in a reasonable and efficient manner to determine whether the alleged misconduct occurred.

Classified employees may be placed on a paid "administrative" leave of absence pending an investigation. Classified employees placed on paid "administrative" leave are expected to remain available to their employer, including coming to their designated workplace, if requested, during their designated working hours while placed on paid "administrative" leave. A classified employee who has been charged with a violation of law that is punishable as a felony may be placed on unpaid "administrative" leave, for a period not to exceed two months, pending an investigation. However, a classified employee who is placed on unpaid leave and

is later exonerated of a felony must be reimbursed for lost pay, plus interest, and lost benefits. Unclassified employees may be placed on paid or unpaid leave pending an investigation.

Employees who have completed their probationary period and who are in the classified civil services may only be disciplined for just cause. Disciplinary action will be commensurate with the offense. Discipline for minor infractions will normally be imposed in a progressive manner with consideration given to the nature of the offense, prior disciplinary action, length of service, the employee's position, the employee's record of performance and conduct along with all other relevant considerations. Nothing in the policy shall be construed to limit the County's discretion to impose a higher level of discipline under appropriate circumstances.

The following forms of misconduct constitute grounds for disciplinary action: incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, policy or work rule violations, conviction of a crime, failure of good behavior including a violation of ethics of public employment, failure to maintain licensing requirements, and any other acts of misfeasance, malfeasance, nonfeasance or any other reason set forth in O.R.C. § 124.34.

The property and image of the County is to be respected at all times; as such, an employee's off duty conduct that has a nexus to the workplace or could reasonably negatively impact the County may form the basis for discipline. Any comments or questions concerning the standard of conduct expected should be directed toward the employee's immediate supervisor.

Employees have an obligation to immediately inform the County of any on-duty or off-duty arrests or convictions. An arrest or conviction may, or may not, result in discipline depending on the nature of the incident, the job performed, and other relevant considerations. Employees will not be granted vacation leave in order to serve jail time.

The filing or prosecution of criminal charges or other civil administrative investigations against an employee for alleged misconduct or criminal activity shall not be determinative as to appropriate disciplinary action, if any, under this policy. The County may investigate the employee's alleged misconduct or activities and determine the appropriate discipline, if any, without regard to pending administrative or criminal charges. The disposition of such administrative or charge is independent of a disciplinary investigation. Although the County may utilize information obtained during other investigations, the County's decision to take appropriate disciplinary action may or may not correspond with the filing, or non-filing, of criminal charges or civil actions. A felony conviction while employed with the County is just cause for termination.

Staff is responsible for reporting any incident or conduct they believe is inappropriate and/or in violation of County Policies and Procedures whether the conduct occurs on-duty or off-duty. This duty includes incidents actually observed, reported by residents, reported by staff, or suspected due to other facts.

When the County believes that discipline of a classified employee in the form of a paid or unpaid suspension, reduction or elimination of longevity pay, demotion or termination, or loss of pay or benefits is possible, a Pre-Disciplinary Conference shall be scheduled. Prior to the Pre-Disciplinary meeting, the employee will be provided with written notice of the charges against him. At the Pre-Disciplinary Conference, the employee may respond to the charges, verbally or in writing, or have his/her chosen representative respond. The employee may also waive the Pre-Disciplinary Conference. Failure to attend the Pre-Disciplinary Conference shall be deemed a waiver of the conference.

Unclassified employees and probationary employees are not eligible for a Pre-Disciplinary Conference.

FLOW CHART FOR DISCIPLINE OF NON-UNION CLASSIFIED EMPLOYEES

Receive information that misconduct has occurred

↓

Conduct investigation into the truthfulness and accuracy of reports* (Garrity, Piper)

↓

Determine whether evidence exists that the misconduct actually occurred

↓

Determine the charges that apply to the employee's misconduct – Keep in mind the employee's constitutional rights (*e.g.* Speech, Religion, Association)

↓

Send notification of the charges to the employee and schedule a pre-disciplinary conference, where the employee will have a meaningful opportunity to respond

↓

Conduct the pre-disciplinary conference (Loudermill, Garrity, Piper)

↓

Make a determination of whether discipline is appropriate, and, if so, the amount of discipline that is appropriate.

↓

Notify the employee of the sanction

↓

File a § 124.34 Order.

<u>*Investigation may involve</u>:

- Examination of reports
- Interview of Witnesses
- Interview of the Employee
- Surveillance
- Review of the applicable standard of conduct such as a policy manual
- Other

<u>Probationary Employees</u>

Some of these procedures may be unnecessary for probationary employees. R.C. § 124.27

III. PUBLIC RECORDS IMPLICATIONS FOR PUBLIC EMPLOYERS & EMPLOYEES

A. Background

Ohio's Public Records Act defines the scope of what constitutes a public record, what information may be redacted, and what information is exempt from records requests. The Act explains public records belong to the public, and thus generally favors the disclosure of public records.

B. What is a Public Record?

1. Definition

A public record is a record kept by a public office that:

a. Contains information stored on a fixed medium (such as paper, computer, film, etc.);

b. Is created, received, or sent under the jurisdiction of a public office; and

c. Documents the organization, functions, policies, decisions, procedures, operations or other activities of the office. O.R.C. § 149.011(G), O.R.C. § 149.43(A).

2. Not Public Records

a. Records kept by a public office are not considered public records when they are explicitly exempted in the Ohio Public Records Act (e.g. Medical Records, Confidential Law Enforcement Investigative Records), or if they are implicitly exempted by its "catchall exemption" which incorporates all other State or Federal laws prohibiting disclosure of records. O.R.C. §149.43(A)(1).

3. What if it's Hard to Tell?

The general rule for public records requests is to *liberally* construe the Act toward disclosure, while *narrowly* construing the exceptions.

To the extent any doubt or ambiguity exists as to the duty of the public office, the public records law will be liberally interpreted in favor of disclosure. *State ex rel. Toledo Blade Co. v. Seneca County Bd. of Comm'rs*, 120 Ohio St.3d 372, 2008-Ohio-6253 (2008).

C. Why Do We Care?

1. Duties

a. A public office has the responsibility to disclose public records upon request.

i. A public office can only properly deny a request if the office no longer keeps the records pursuant to their records retention schedules, if the request is for documents that are not records of the office, or if the requester does not revise an ambiguous or overly broad request.

b. A failure to properly or timely disclose public records, or a failure to properly maintain public records, may result in litigation, adverse inferences, fines, or other negative consequences to the public office.

2. Spoliation

a. The spoliation of evidence germane to proof of an issue at trial, even if not intentional, can support an inference that the evidence would have been unfavorable to the party responsible for its destruction. The court may instruct the jury that it can infer from the fact that the party destroyed certain evidence and that the evidence, if available, would have been favorable to the adverse party and harmful to the party whom lost the evidence. In practice, an adverse inference instruction often ends litigation because it is too difficult a hurdle for the spoliator to overcome. Sometimes the court will end the case itself: in *Organik Kimya*, the Federal Circuit Court upheld the ALJ's entry of default judgment as a sanction for spoliation of evidence.

b. Elements: A party seeking an adverse inference instruction or other sanctions based on the spoliation of evidence must demonstrate (1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a "culpable state of mind" and (3) that the destroyed evidence was "relevant" to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense.

c. Monetary Sanctions: The court may issue sanctions against the party and require them to pay the other party's costs and attorney fees.

3. **Litigation**

a. A person aggrieved by the alleged failure of a public office to comply with an obligation of the Public Records Act may choose to either (1) file a complaint against the public office in the Court of Claims or (2) file a mandamus lawsuit against the public office.

D. Common Examples

1. **Body Camera Footage**

a. Video Recordings are considered "public records" and subject to disclosure. Police departments that implement body cameras must understand that the actions of its officers captured on camera are a matter of public record.

2. **Text Messages & Emails**

a. Text messages sent by public officials regarding official business are public records and can be requested under Ohio's Open Records Law.

b. Text messages sent on a work device OR a personal device can be subject to the law.

c. Texts and other documents on a personal cell phone that discuss official business should be maintained.

d. The texts and documents need to be addressed in the records retention schedule and retained accordingly.

e. Example: The "Gang of Five" Case.

i. This dispute arose in 2018 after five Cincinnati City Council Members, also known as the "gang of five," were accused of conducting illegal meetings via text messages in violation of Ohio's Open Meeting Act. The five City Council members admitted to breaking the law by having private text conversations regarding city business and then destroying records. This type of interaction by a majority of a city council or other legislative body could also violate the open meetings law. The city settled a lawsuit brought by a private citizen for $101,000.

3. **Social Media**

a. Certain social media content is considered to be a public record when it was both (1) created or received by and (2) documents the office's business activities, the posted information may well be a record.

b. If the agency evaluates the particular social media content and determines that it is a record, the agency must then decide whether that record is the agency's official record or a secondary copy.

c. Common issues with social media as a public record:

i. Social media content is held on third-party platforms which the public office cannot control. Accordingly, it is best practice to have a method for storing and retaining social media records.

ii. Citizen conduct on a public office's social media may constitute a public record. Consider limiting or removing the comment function to mitigate issues where commentors leave harmful or offensive comments.

iii. Do not make social media comments or posts which are expected to be deleted or revised.

iv. Issues with blocking members of the public.

E. Public Records Requests

Duty to Disclose Public Records

1. Upon request, copies of public records within a reasonable amount of time.

a. Reasonable is also determined by the facts and circumstances in each individual case which contemplates time for legal review. *State ex rel. Warren Newspapers, Inc. v. Hutson* (1994), 70 Ohio St.3d 619; State ex rel. Taxpayers Coalition v. City of Lakewood (1999), 86 Ohio St.3d 385.

b. Prompt is not necessarily immediate. It means without delay and with reasonable speed, but this standard must be judged within the context of the circumstances in each individual case. *State ex rel. Consumer News Services, Inc. v. Worthington Board of Education* (2002), 97 Ohio St.3d 58.

2. Production of Documents

   a. The requester can choose to have the record copied: (1) on paper, (2) in the same medium as the public office keeps them, or (3) on any medium upon which the public office or person responsible for the public records determines the record reasonably can be duplicated as an integral part of the normal operations of the public office.

3. Factors to consider when responding to a request:

   a. Identification of responsive records

   b. Location and retrieval

   c. Review, analysis, and redaction

   d. Preparation

   e. Delivery

4. Denying a Request

   a. There are numerous permissible reasons for denying a public records request:

      i. The requested record does not exist

      ii. The requested record is not a public record

      iii. The requested record is subject to an exception

      iv. The request is overly broad or ambiguous

   b. Duty to clarify: If a requester makes an ambiguous or overly broad request or has difficulty in making a request for copies or inspection of public records such that the public office cannot reasonable identify what public records are being requested, the public office may deny the request, but shall provide the requester the opportunity to revise the request by informing the requester of the manner in which records are maintained and accessed in the ordinary course of the public office's or person's duties.

   c. Respond in writing, notifying the requester that his/her request is ambiguous and lacks the sufficient clarity for the public office to respond.

d. Identify how the request is ambiguous. Remember the public office must prove to the court that the request is ambiguous if the matter proceeds to litigation.

e. In extreme cases, provide the requester with a copy of the public office's schedule of records retention (RC-2) which identifies all the records the public office maintains.

5. The request is overly voluminous

a. Voluminous requests cannot be outright denied, but the public office also need not expend excessive resources fulfilling a voluminous request.

b. A requester does not have the right to the complete duplication of voluminous files of a public office. But the office will still have the obligation to permit inspection or other reasonable methods for the requestor to receive the records.

c. The public office may charge the requester the actual cost of copies made and may require payment of copying costs in advance.

F. Redactions

1. Background

Courts will permit the redaction of information that is privileged and otherwise protected by state law from disclosure. Such privileges include the attorney-client privilege and the trial preparation privilege.

2. What may be redacted:

a. Attorney-Client Privilege

b. Trial-Preparation Records

c. Materials Meeting a Specific Exception

IV. WHAT IS THE ADA?

A. Purpose. The ADA was enacted to ensure that individuals with disabilities are given the same consideration for employment that individuals without disabilities are given.

B. **Protection.** The Americans with Disabilities Act of 1990 ("ADA") makes it unlawful for an employer to discriminate against an employee on the basis of a disability. 42 U.S.C. 12112(a) (1994); 42 U.S.C. 12112 (b)(4) (1994).

To be covered by the ADA, the employer must have had at least 15 employees for each working day in each of at least 20 weeks in the preceding year. 29 C.F.R. §1630.2(e).

1. Who is an employee? The mere fact that a person has a particular title in the organization (e.g. partner, director, vice president) does not necessarily mean that the person is an "employee" under the ADA. Nor does the mere existence of an employment agreement or contract automatically mean that the person is an employee. Instead, whether a person is an employee depends on the incidents of the relationship between the company and the organization. Courts will apply the "right to control" test to determine if the individual is an employee, analyzing the following six factors:

    a. Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work;

    b. Whether and, if so, to what extent the organization supervises the individual's work;

    c. Whether the individual reports to someone higher in the organization;

    d. Whether and, if so, to what extent the individual is able to influence the organization;

    e. Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts; and

    f. Whether the individual shares in the profits, losses, and liabilities of the organization.

C. **Additional Protection.** The ADA also makes it unlawful to discriminate against individuals with disabilities in state and local government services, public accommodations, transportation and telecommunications.

D. **CORSA BPPM Policy Language.**

"The County prohibits discrimination in hiring, promotions, transfers, or any other benefit or privilege of employment, of any qualified individual with a disability."

V. WHO IS A QUALIFIED INDIVIDUAL WITH A DISABILITY?

A. Who is a "Qualified Individual"?

1. **Introduction.**

   a. The battle ground in ADA litigation generally surrounds the question of whether the employee is a "qualified individual" with a disability.

   b. An individual with a disability must be qualified to perform the essential functions of the position with or without reasonable accommodation.

      i. An employer is not required to cut an essential job function to accommodate an employee with a disability.

   c. The individual must satisfy educational, experience, skill, license, and any other job qualification standards.

   d. The ADA does not interfere with the right of an employer to hire the best-qualified applicant. There are no affirmative action requirements; meaning that the employer does not have to choose a disabled employee over a more qualified applicant. The ADA simply prohibits employers from discriminating against qualified applicants or employees because of a disability.

2. **Two-Step Process.** The determination of whether an individual is a "qualified individual" is a two-step process:

   a. First, the employer must determine if the individual is "otherwise qualified."

      i. One is otherwise qualified if he/she satisfies the prerequisites for the position, such as possessing the appropriate educational background, employment experience, skills, licenses, etc.

         - e.g. An employer must determine whether an accountant who is paraplegic is qualified for a certified public accountant's position by first finding out whether the applicant is a licensed accountant with a CPA.

b. Second, the employer must determine if the individual can perform the "essential functions" of the position with or without "reasonable accommodation."

B. "*With*" a Disability?

1. An individual is protected by the ADA if that individual:

a. Has a physical or mental impairment that substantially limits a major life activity;

b. Has a record of a substantially limiting impairment; or

c. Is regarded as having a substantially limiting impairment.

VI. WHAT IS A PHYSICAL OR MENTAL IMPAIRMENT?

A. Physical or Mental Impairment. A physical or mental impairment is any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of several body systems, or any mental or psychological disorder. 29 C.F.R. § 1630.2(h).

1. Physical impairments. Physical impairments under the ADA include, but are not limited to:

a. Hearing loss;

b. Osteoporosis; or

c. Arthritis.

2. What is not a physical impairment:

a. Eye/hair color;

b. Left-handedness;

c. Predisposition to illness or disease;

d. Being overweight; or

e. Height, weight or muscle tone that is "normal."

3. Mental impairments. A mental impairment under the ADA refers to any mental or psychological disorder, including, but not limited to the following:

a. Intellectual disabilities;

b. Organic brain syndrome, e.g. brain injury;

c. Emotional or mental illness;

i. Thought disorders, e.g. schizophrenia;

ii. Mood disorders e.g. manic-depression;

iii. Anxiety disorders, e.g. neuroses, phobias;

iv. Personality disorders;

d. Specific learning disabilities;

e. Certain Sleep Disorders

4. Conditions that are not mental impairments, include:

a. Transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

b. Compulsive gambling, kleptomania and pyromania;

c. Psychoactive substance use disorders resulting from current illegal drug use; and

d. An inability to get along with others, irritability, chronic lateness and poor judgment.

B. "Regarded as" substantially limited in a major life activity. Courts will often look to whether or not the employer regards the individual as having a disability by looking at the employer's conduct towards the employee. Employers often have concerns that may result in excluding individuals with disabilities. Such concerns include:

1. Productivity;
2. Safety;
3. Insurance;
4. Liability;
5. Attendance;
6. Cost of accommodation and accessibility;
7. Workers' compensation costs; and
8. Acceptance by coworkers and customers.

C. **CORSA BPPM Policy Language.**

"To be considered a qualified individual, the employee must satisfy the requisite skills, experience, education and other job-related requirements of the position held or desired and must be able to perform the essential functions of his/her position, with or without a reasonable accommodation."

VII. MEDICATIONS AND DISABILITY

A. **Medication.** For purposes of determining whether a worker suffers from a disability as defined by the ADA, it makes no difference whether the major life function is affected directly by a disability, or indirectly by the side effect of medication taken for a medical or physical condition.

B. **When Medication is not a Disability.** The following are examples of temporary, non-chronic impairments of short duration, with little or no permanent impact, that are usually not disabilities:

1. Broken limbs;
2. Sprained joints;
3. Concussions;
4. Appendicitis;
5. Influenza

C. **Mitigating Measures.** With the sole exceptions of eyeglasses/contacts, an employee may be "disabled" under the ADA regardless of mitigating measures if their impairment would render them "substantially limited in a major life activity" absent the mitigating measure.

1. Further, the Amendments specify that "episodic or in remission" impairments such as cancer or migraines are per se disabilities if they would substantially limit a major life activity when active.

VIII. REASONABLE ACCOMMODATIONS AND UNDUE HARDSHIP

A. **What is a "Reasonable Accommodation"?** A reasonable accommodation is any change or adjustment to a job or work environment that permits a qualified applicant or employee with a disability to participate in the job application process, to perform the essential functions of the job, or to enjoy the benefits and privileges of employment equal to those enjoyed by employees without disabilities.

B. **The ADA requires** that the employer make reasonable accommodations for known physical or mental limitations of an otherwise qualified employee or applicant with a disability. 42 U.S.C. § 12112(b)(5)(A) (1994).

C. **However,** the employer need not make the requested accommodation if it would result in further harm to the employee or applicant. *Chevron, U.S.A., Inc. v. Echazabal*, 122 S. Ct. 2045 (2002).

D. **Identifying Accommodations.** The challenging employee initially bears the burden of identifying an accommodation, the costs of which facially do not exceed its benefits. If the employee satisfies the burden, the employer then has the burden to demonstrate that the proposed accommodation creates an "undue hardship."

1. **Examples**.

   a. The acquisition or modification of equipment or devices;

   b. Job restructuring;

   c. Part-time or modified work schedules;

   d. Reassignment to a vacant position;

   e. Adjusting or modifying examinations, training materials or policies;

   f. Providing readers and interpreters; and

   g. Making the workplace readily accessible to and usable by people with disabilities.

E. **Employee Refusal.**

1. If an applicant or employee refuses to accept a reasonable accommodation, then the individual may be considered non-qualified. *Hankins v. The Gap*, 84 F.3d 797 (6th Cir. 1996).

F. **Undue Hardship.** An employer violates the ADA when they fail to provide a reasonable accommodation for a known physical or mental limitation of a qualified individual with a disability. However, an employer does not violate the ADA when providing an accommodation would place an undue hardship on the employer's business.

1. Undue hardship means that an accommodation would be unduly costly, substantial or disruptive, or would fundamentally alter the nature or operation of the business.

2. Some factors to consider in determining if an accommodation is an undue hardship include: 29 C.F.R. §1630.2 (p)(1)

   a. The nature and the cost of the required accommodation, taking into account the availability of tax credits and deductions and/or outside funding;

   b. The overall financial resources of the facility(s) involved;

   c. The number of employees at such facility;

   d. The impact on expenses and resources and the impact upon other aspects of the operation of the facility;

   e. The overall financial resources of the covered entity;

   f. The number of employees and number, type and location of its facilities;

   g. The type of operation(s) of the covered entity, including its composition, structure, and work force functions; and

   h. The geographic separateness, administrative or physical relationship of the facility (or facilities) in question to the covered entity.

3. If an accommodation is an undue hardship, the employer must make efforts to identify another accommodation that will not pose an undue hardship.

IX. INTERACTIVE PROCESS

A. As previously noted, the employee seeking an accommodation has the burden of identifying an accommodation. Often, when a qualified individual with a disability requests a reasonable accommodation, the appropriate accommodation is obvious.

B. When the appropriate accommodation is not obvious, then the employer must make a reasonable effort to identify a reasonable accommodation by engaging in an interactive process with the employee. The best method is to ask the employee or applicant about potential accommodations that would allow them to perform the essential functions of the job or participate in the application process.

C. Accommodations must be made on a case-by-case basis, depending on the nature and extent of the disability and the requirements of the job.

D. The principal test is effectiveness, e.g. does the reasonable accommodation allow the individual to perform the essential functions of the job?

E. The accommodation does not need to be the best accommodation or the accommodation that the individual would prefer, although primary consideration should be given to the individual involved. An accommodation is reasonable so long as it is effective.

F. CORSA BPPM Policy Language.

"The County will provide reasonable accommodation to a qualified applicant or employee with a disability unless the accommodation would pose an undue hardship on or direct threat to the facility. Decisions as to whether an accommodation is necessary and/or reasonable shall be made on a case-by-case basis. An employee who wishes to request an accommodation shall direct such request to [At Least Two, No More Than Four Designees, Title, Phone Number], each of whom shall have the authority and responsibility to work directly with [someone outside the office] to investigate and take appropriate action concerning the request. Requests for accommodation should be in writing to avoid confusion; however, verbal requests will be considered. The employer and employee will meet and discuss whether an accommodation is appropriate and, if applicable, the type of accommodation to be given."

X. EMPLOYEE MISCONDUCT

A. The requirement of reasonable accommodation does not necessarily include a duty to tolerate misconduct by the employee. This area has proven especially problematic for the courts and administrative agencies because it is often difficult to separate the employee's behavior from the disorder itself.

1. Medical and Psychological Fitness for Duty Testing

   a. A fitness for duty exam must be job related and consistent with business necessity. Job descriptions can help employers determine whether an employee is "fit for duty" and defend against any subsequent discrimination claim.

      i. Generally, an examination of an employee may be job-related and consistent with business necessity when the employer has a reasonable belief based on objective evidence that (1) the employee's ability to perform essential

job functions is impaired by medical condition; or (2) the employee poses a direct threat due to the medical condition.

b. If a supervisor believes that an employee's injury or condition is interfering with the employee's job performance or may keep the employee from performing the essential functions of the job, the employee may be recommended for a medical fitness for duty evaluation.

c. Likewise, if it is suspected that personal traits, disorders, etc., are causing or contributing to an employee's subpar performance or creating other issues at work, a psychological fitness for duty evaluation may be recommended.

d. In both situations, the evaluating doctor or physiatrist is provided with a copy of the employee's job description and is taxed with determining the following:

    i. Determine that the employee is physically/psychologically capable of performing the essential functions of the job and therefore capable of remaining in the position.

e. If the medical professional determines otherwise, it is then determined what steps can be taken that will allow the employee's condition to improve so he or she can adequately perform the job and return to work.

f. Finally, the reasonable accommodations that need to be in place to allow the employee to work despite his or her physical or mental condition.

g. Employers should ensure that the referral is specific, including any incidents that preceded the referral, as this will help the medial professional determine the correct course of action as accurately as possible.

h. The doctor or psychiatrist's evaluation will include the following:

    i. The employee's information;

    ii. The reason for the evaluation;

    iii. Background information including past incidents, etc.;

iv. Observations (including clinical interview and behavioral observations if it is a psychological fitness for duty test as well as psychological test findings if necessary);

v. Review of the employee's medical/mental health records; and

vi. Conclusions and Recommendations.

i. Employers must beware of violating anti-discrimination laws in this context, including the ADA and FMLA.

j. An employer is entitled only to the information necessary to determine whether an employee can perform the essential functions of the job without posing a direct threat.

k. Generally, an employer cannot request an employee's medical records because they are likely to contain information unrelated to whether the employee can perform his/her essential functions.

2. An employer may require an employee to provide a medical certification that he/she can safely perform a physical agility or physical fitness test. However, the employer is only entitled to a note stating that the employee can perform the test, not the employee's complete medical records or any information about any conditions that do not affect the employee's ability to perform the tests safely.

XI. FMLA: INTRODUCTORY POINTS

A. **Family Leave**: 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.

1. **"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).

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)

2. **"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.

      i. **NOTE:** If employer fails to maintain accurate records, presumption 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.

B. Military Leave: 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. Upon the birth of an employee's child and in order to care for the child.

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

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

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

   b. "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.

c. 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).

d. "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.

e. "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."

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

5. 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.

6. 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).

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