

Regular Meeting #41 - 2018
Fairfield County Commissioners' Office
September 27, 2018

Leadership Conference

The Commissioners met at 8:30 a.m. for the 2018 Leadership Conference. Commissioner Davis called the meeting to order with the following Commissioners present: Steve Davis and Dave Levacy. Also present were Carri Brown, Rachel Elsea, Staci Knisley, Shar Bails, Chief Lape, Amy Brown-Thompson, Amy McCoy, Amy Presnell, Ashley Kemmerer, Aunie Cordle, Bart Hampson, Branden Meyer, Brett Riffle, Carolyn Taylor, Carrie Williams, Casie Stanton, Cassie Strickler, Cathie Warner, Cheryl Downour, Corey Clark, Daniel Neeley, Sheriff Phalen, David Henwood, Dennis Keller, Don Rector, Donna Fox-Moore, Donna Stalter, Dr. Brian Varney, Elisa Dowdy, Elyssa Wanosik, Erika Frank, Gina Knight, Heather Kochis, Heather O'Keefe, Jacob Stang, Jan Picklesimer, Jane Hanley, Jeffrey Porter, Jodi Smith, Johanna Pearce, John Pekar, Jon Kochis, Joshua Horacek, Justin Gall, Justin Grant, Kari Atkins, Karla Nelson, Kate Varga, Kathy Hyme, Kelly Shoemaker, Kelly Turben, Kirk Shaw, Krista Humphries, Kristi Burre, Kristin Riddle, Kyle Witt, Judge Laura Smith, Leah Miller, LeeAnn Jennings, Lisa McKenzie, Lisa Notestone, Lori Lovas, Loudan Klein, Marea Jones, Mark Conrad, Mary Jo Fox, Melanie Culbertson, Michael Kaper, Michelle Carper, Mindy VanBibber, Nikki Drake, Park Russell, Patrick Welsh, Rachel Briggs, Sandy Bryan, Sarah Fortner, Sarah Garren, Sharleen Karns, Stacey Bergstrom, Susie Lynch, Rick Szabrak, Tallicia Enright, Tiffany Nash, Tony Vogel, Dave Burgei, Shannon Carter, Judge Berens, representatives from Fairfield Medical Center, and CORSA training representatives.

Commissioner Davis welcomed everyone to the Leadership Conference.

(See attached Leadership Conference PowerPoint for training information)

Approval of the Commissioners Resolution

On the motion of Dave Levacy and the second of Steve Davis, the Board of Commissioners voted to approve the Commissioners resolution authorizing the approval of a proclamation; see resolution 2018-09.27.a.

Discussion: Mr. Porter thanked Fairfield Medical Center for all they do for the county and community as the largest employer in Fairfield County. They have been the County's partner for the health plan clinic for the last two years, and Fairfield County looks forward to continuing that partnership for many years to come. Mr. Levacy presented the proclamation and spoke of FMC's growth. He added that Fairfield Medical Center is a magnificent place and that he is proud of their partnership and service.

Roll call vote of the motion resulted as follows:
Voting aye thereon: Dave Levacy and Steve Davis
Absent: Mike Kiger

Approval of the Juvenile/Probate Resolution

On the motion of Dave Levacy and the second of Steve Davis, the Board of Commissioners voted to approve the Juvenile/Probate Court resolution authoring the approval of an advance from the General Fund to #2745 MSY Pool; see resolution 2018-09.27.b.

Roll call vote of the motion resulted as follows:
Voting aye thereon: Dave Levacy and Steve Davis
Absent: Mike Kiger

United Way Presentation

Mr. Porter and Mr. Reed presented information on the 2018 United Way Campaign. The presentation is attached and the video can be found here:
<https://www.youtube.com/watch?v=xxi2DokuF9Q>.

Regular Meeting #41 - 2018
Fairfield County Commissioners' Office
September 27, 2018

Cybersecurity Overview

Mark Conrad led the cybersecurity training. Topics reviewed included a review of cyber security threats as well as examples. The training in its entirety can be found in the attached power point.

Ethics Training

Dr. Brown, Mr. Horacek, Ms. Brown-Thompson, and Mr. Shaw presented the ethics training including a review of conflicts of interest, public contracts, and examples of these issues. The importance of ongoing discussion was stressed.

Any office or department with questions is encouraged to reach out to their supervisor, department head, Dr. Brown, or from the Prosecutor's Office: Ms. Brown-Thompson, Mr. Horacek, or Mr. Shaw.

CORSA Training – Addressing Employee Performance

Ms. Stephanie Schoolcraft presented a CORSA presentation on Addressing Employee Performance. The presentation is attached.

CORSA Training – Discrimination and Harassment

Ms. Stephanie Schoolcraft presented a CORSA presentation on Discrimination and Harassment. The presentation is attached.

Reflections and Closing Remarks

Dr. Brown asked everyone to complete the one-minute survey to help plan for the second part of the Leadership Conference on May 16, 2019, which will focus on strategic planning.

Commissioner Davis thanked Dr. Brown, the staff, and presenters for their preparation and work.

Adjournment

With no further business, on the motion of Dave Levacy and a second of Mike Kiger the Board of Commissioners voted to adjourn at 11:46 p.m.

Roll call vote of the motion resulted as follows:
Voting aye thereon: Dave Levacy and Steve Davis
Absent: Mike Kiger

The next regular meeting for the Board of Commissioners is scheduled for Tuesday, October 2, 2018, at 10:00 a.m.

Motion by:

Seconded by:

that the September 27, 2018, minutes were approved by the following vote:

YEAS:

NAYS: None

ABSTENTIONS: None

*Approved on October 2, 2018.

Steven A. Davis
Commissioner

Dave Levacy
Commissioner

Absent
Mike Kiger
Commissioner

Rachel A. Elsea, Clerk



AGENDA

BOARD OF COMMISSIONERS

Commissioners:
Steven A. Davis
David L. Levacy
Mike Kiger

County Administrator
Carri L. Brown

Clerk
Rachel A. Elsea

Leadership Conference – Part 1 - 2018 **Cybersecurity, Ethics, & CORSA related Training**

Thursday, September 27, 2018, 8:30 a.m. – noon

Fairfield Medical Center Assembly Rooms

Doors open at 8:15 am

Purpose Statement:

The purpose of the Leadership Conference is for county leaders to further the mission of Fairfield County and improve the organizational knowledge base.

AGENDA

8:30 a.m.	Welcome & Breakfast	Carri Brown
	Proclamation for FMC	Commissioners Davis & Levacy Jeff Porter
8:35 a.m.	United Way Presentation	
9:05 a.m.	Cybersecurity Overview	Mark Conrad
9:25 a.m.	Ethics - Topics in Review	Carri Brown & members of the Prosecutor's Office
9:45 a.m.	Break	All Participants
10:00 a.m.	Leadership Selected CORSA Training Topic	CORSA Presenter
10:45 a.m.	Break	All Participants
11:00 a.m.	New Training on Unlawful Harassment	CORSA Presenter
11:45 a.m.	Reflections & Closing Remarks	Carri Brown All Participants
Noon	Adjourn	

SERVE • CONNECT • PROTECT

Fairfield County Commissioners' Office • 210 East Main Street • Room 301 • Lancaster, Ohio 43130
P: 740-652-7090 • 614-322-5260 • F: 740-687-6048 • www.fairfieldcountyohio.gov



BOARD OF COMMISSIONERS

Commissioners:
Steven A. Davis
Mike Kiger
David L. Levacy

County Administrator
Carri L. Brown

Clerk
Rachel A. Elsea

Save the Date!
May 16, 2019

There will be a strategic planning session to continue the leadership conference following the roundtable on Thursday, May 16, 2019.

At this strategic planning session, we will work on updating the strategic plan, a helpful tool to reach our vision to “secure, attractive residential and commercial neighborhoods where people unite to form a caring, learning, participating, sustainable community where each person is important.” The complete strategic plan can be found here:
<https://www.co.fairfield.oh.us/COMMISH/pdf/Strategic-Plan-for-Fairfield-County.pdf>

Strategic Themes for 2018 - 2020

- Fighting the opioid epidemic & implementing community responses**
- Valuing employees & improving recruitment and retention of employees**
- Improving technology and records retention services**
- Improving business opportunities**
- Securing funding and monitoring expenditures to help provide for resources to meet growing demands on services**

The **mission of Fairfield County** is to improve the quality of life while supporting businesses, protecting citizens, and planning for the future.

1-minute survey (please turn this in prior to leaving today)

Thinking about the strategic themes, what is the next project (initiative or effort) all elected officials and department heads should work on together (choose one project, initiative, or effort)?

SERVE • CONNECT • PROTECT

Social Engineering Red Flags



FROM

- I don't recognize the sender's email address as someone I **ordinarily communicate with**.
- This email is from **someone outside my organization and it's not related to my job responsibilities**.
- This email was sent from **someone inside the organization** or from a customer, vendor, or partner and is **very unusual or out of character**.
- Is the sender's email address from a **suspicious domain** (like micorsoft-support.com)?
- I **don't know the sender personally** and they **were not vouched for** by someone I trust.
- I **don't have a business relationship** nor any past communications with the sender.
- This is an **unexpected or unusual email** with an **embedded hyperlink or an attachment** from someone I haven't communicated with recently.



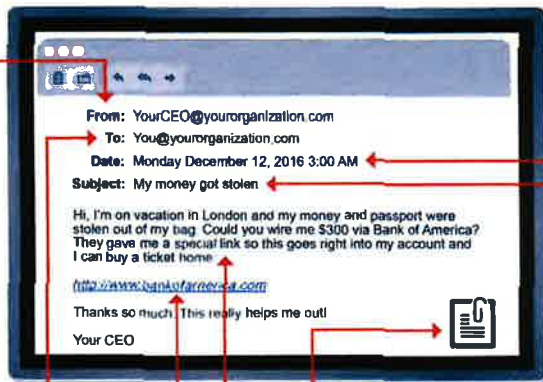
TO

- I was cc'd on an email sent to one or more people, but I **don't personally know** the other people it was sent to.
- I received an email that was also sent to an **unusual mix of people**. For instance, it might be sent to a random group of people at my organization whose last names start with the same letter, or a whole list of unrelated addresses.



HYPERLINKS

- I hover my mouse over a hyperlink that's displayed in the email message, but the **link-to address is for a different website**. (This is a **big red flag**.)
- I received an email that only has **long hyperlinks with no further information**, and the rest of the email is completely blank.
- I received an email with a **hyperlink that is a misspelling** of a known web site. For instance, www.bankofarnerica.com — the "m" is really two characters — "r" and "n."



DATE

- Did I receive an email that I normally would get during regular business hours, but it was **sent at an unusual time** like 3 a.m.?



SUBJECT

- Did I get an email with a subject line that is **irrelevant or does not match** the message content?
- Is the email message a reply to something I **never sent or requested**?



ATTACHMENTS

- The sender included an email attachment that I **was not expecting** or that **makes no sense** in relation to the email message. (This sender doesn't ordinarily send me this type of attachment.)
- I see an attachment with a possibly **dangerous file type**. The only file type that is **always safe to click on is a .txt file**.



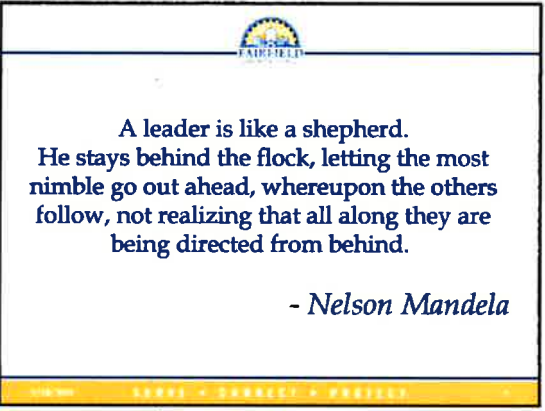
CONTENT


- Is the sender asking me to click on a link or open an attachment to **avoid a negative consequence** or to **gain something of value**?
- Is the email **out of the ordinary**, or does it have **bad grammar or spelling errors**?
- Is the sender asking me to click a link or open up an attachment that **seems odd or illogical**?
- Do I have an **uncomfortable gut feeling** about the sender's request to open an attachment or click a link?
- Is the email asking me to look at a **compromising or embarrassing picture** of myself or someone I know?

9/24/2018









Servant leadership is a leadership philosophy. Traditional leadership generally involves the exercise of power by one at the “top of the pyramid.”

By comparison, the servant-leader shares power, puts the needs of others first and helps people develop and perform as highly as possible.

- From the Greenleaf Center for Leadership

Home

10000


100000

1000000

10000000

Proclamation for FMC

Commissioners Davis & Levacy



Home

10000


100000

1000000

10000000

United Way Presentation

Jeff Porter, HR & Risk Management Director



Home

10000

100000


1000000

10000000

9/24/2018

Cybersecurity Overview


Mark Conrad


LEARN • CONNECT • THRIVE





You are the weakest link

- The easiest way to get in is to trick someone on the staff
- We can put all sorts of barriers in place, including:
 - Controlled access doors
 - Passwords with required difficulty, length, and expiration parameters
 - Other technical barriers
- In the end, a system is only as secure as the people that use it


LEARN • CONNECT • THRIVE

A 100% Secure Information System





LEARN • UNDERSTAND • PROTECT

The Threat Landscape


- Social Engineering
 - Art of manipulating, influencing, and deceiving you in order to get you to take some action that isn't in your own best interest or in the best interest of your organization
 - Hacker might use the phone, email, postal service, or direct contact to trick you



LEARN • UNDERSTAND • PROTECT

The Threat Landscape

- File types
 - Not all file types are equal
 - .txt is the only file type that is safe to click on
 - Depending on the settings on your computer, you may not see the file type
 - If you are not sure of the file type, assume that it is dangerous



LEARN • UNDERSTAND • PROTECT

9/24/2018

The Threat Landscape

- **Malware**
 - Malicious software
 - Some log your keystrokes, such as your password
 - Some take over your computer and can even turn on your camera
 - Ransomware holds your files hostage until you pay a ransom



SEARCH • SEIZE • SERVE • PROTECT

The Threat Landscape

- **Spear phishing**
 - A small focused attack via email on a particular person or organization
 - Doing research on the target allows the hacker to send a specific, personalized message designed to trick the target into doing something against his or her own best interest



SEARCH • SEIZE • SERVE • PROTECT

The Threat Landscape


- **Social Media**
 - A wonderful source of valuable information for hackers
 - Your itinerary or schedule can be used to send emails to your friends or families saying that while you were away, you encountered problems and need money sent to you



SEARCH • SEIZE • SERVE • PROTECT

The Threat Landscape

- **Phishing**
 - Emails sent out to a broad group of people from some trusted organization (bank, realtor, sheriff)
 - Clicking on the link to update information as requested or opening an attachment can infect your PC with malware



FAIRFIELD COUNTY SHERIFF'S OFFICE

The Threat Landscape

- **Websites**
 - Any website is potentially dangerous
 - Game sites, porn sites, download sites are among the more dangerous
 - However, even reputable high traffic sites can also have malicious advertising and can infect your computer just by visiting the site



FAIRFIELD COUNTY SHERIFF'S OFFICE

The Threat Landscape

- **Smart phones**
 - Malicious links sent to you via text or tweet
 - Clicking can compromise your identity or your data



FAIRFIELD COUNTY SHERIFF'S OFFICE

Example 1: Sent to My Gmail Account

First Choice is to disregard my email message. Let us see what will happen if you choose this option. I will certainly send out your video to **your entire contacts** including close relatives, co-workers, and so forth. It won't help you avoid the humiliation you and your family will feel when friends and family learn your sordid videotape.

Second Option is to send me \$5000. We will name it my "confidentiality charges". Now Lets see what happens if you pick this choice. Your dirty secret remains your secret. I'll delete the **sextape**. After **you you** pay me my fees, You can freely keep your routine life and family as though nothing ever happened.



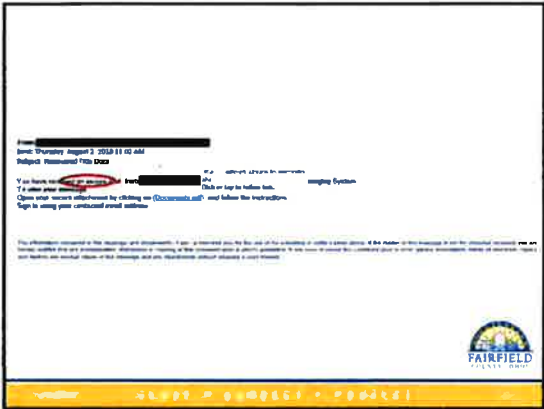
Example 1: Sent to My Gmail Account

- Important: You have **one day** in order to make the payment. (I have a **unique pixel** in this email, and right now I know that you have read through this message). Don't tell anyone what you will be using the Bitcoins for or they might not give it to you. The process to get bitcoin usually takes a **couple of days** so do not put it off.

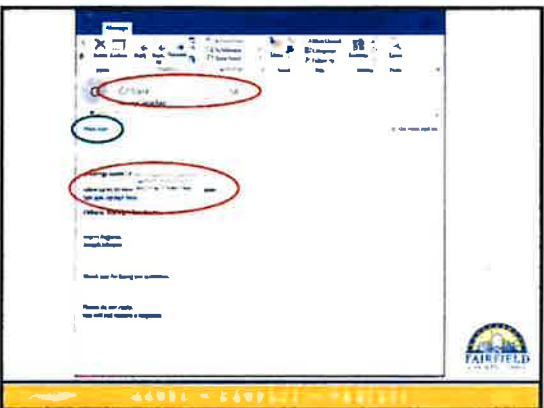


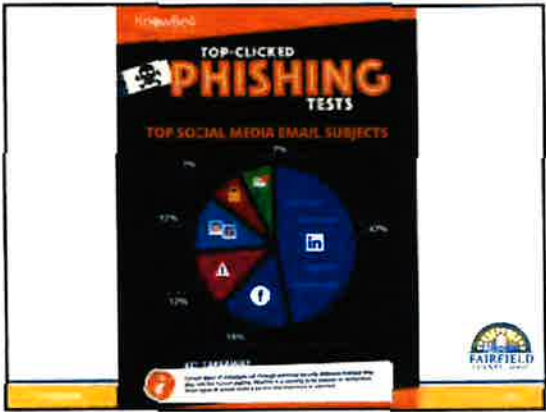


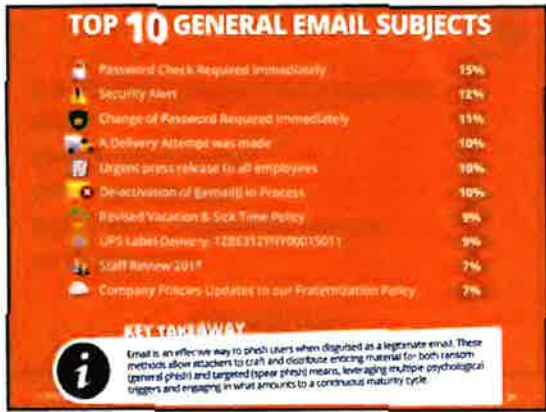
9/24/2018














9/24/2018

Proverbs 4:16 *The Message*

Evil people are restless
unless they're making trouble;
The can't get a good night's sleep
unless they've made life miserable for somebody.



FAIRFIELD
COUNTY OHIO

1-800-368-3333 • 740-652-7076 • 740-243-4933

Questions?

Mark E. Conrad
Information Technology Director
Desk: 740-652-7076
Mobile: 740-243-4933
Email:
mark.conrad@fairfieldcountyohio.gov




FAIRFIELD
COUNTY OHIO

1-800-368-3333 • 740-652-7076 • 740-243-4933

Ethics - Topics in Review

*Carri Brown & Assistant County
Prosecutors:
Josh Horacek, Amy-Brown Thompson,
& Kirk Shaw*




FAIRFIELD
COUNTY OHIO

1-800-368-3333 • 740-652-7076 • 740-243-4933

Ethics Training

Purpose: To provide an overview of The Ohio Ethics Commission and Ohio Ethics Law, meeting county requirements for annual training



- Conflicts of Interest
- Public Contracts
- Post Employment Situations



1-614-466-7090
www.ethics.ohio.gov

What are Ethics?

Ethics are defined as moral principles that govern a person's or group's behavior.
How do *ethics* relate to your job?




1-614-466-7090
www.ethics.ohio.gov

The Ohio Ethics Commission

- Established in 1973 along with the Ohio Ethics Law
- Promotes ethics in public service to strengthen the public confidence that government business is conducted with *impartiality and integrity*



1-614-466-7090
www.ethics.ohio.gov



9/24/2018

Purpose of Ohio Ethics Law

- To ensure public employees are not influenced by personal interests when spending public dollars or making public decisions




The Ohio Ethics Law

- State and local public officials and employees - *more than half a million people*
- Private parties and corporations who conduct business with public offices





The Ohio Ethics Law: A Working Understanding

- The Ethics Law contains *criminal* restrictions to:
 - *Restrict participation* in public matters involving direct and definite personal, family and business interests of a public official or employee;
 - *Limit compensation* for public duties to their public employer;
 - Restrict personal, family, and business interests in *public contracts*;
 - Prohibit *nepotism* in public hires and services;
 - Condition former officials and employees' *post-employment activity*;
 - *Control the disclosure of confidential information*; and
 - Provide protections against *influence peddling* in public agencies for personal benefit.



General Rule

Whenever the interests of the public official or the public official's family or business associates are present in an issue before the public official, there is an ethics question.



Home

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

29

30

31

32

33

34

35

36

37

38

39

40

41

42

43

44

45

46

47

48

49

50

51

52

53

54

55

56

57

58

59

60

61

62

63

64

65

66

67

68

69

70

71

72

73

74

75

76

77

78

79

80

81

82

83

84

85

86

87

88

89

90

91

92

93

94

95

96


97

98

99

100

Public Contracts & Ethics



Home

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

29

30

31

32

33

34

35

36

37

38

39

40

41

42

43

44

45

46

47

48

49

50

51

52

53

54

55

56

57

58

59

60

61

62

63

64

65

66

67

68

69

70

71

72

73

74

75

76

77

78

79

80

81

82

83

84

85

86

87

88

89

90

91

92

93

94

95

96

97


98

99

100

Express Contracts

- Public employees who deal with contracts with vendors are on the frontline of this issue on a daily basis
- Many different eyes see these contracts
 - Contract submitter
 - Department Head
 - County Administrator
 - County prosecutor's office



Home

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

29

30

31

32

33

34

35

36

37

38

39

40

41

42

43

44

45

46

47

48

49

50

51

52

53

54

55

56

57

58

59

60

61

62

63

64

65

66

67

68

69

70

71

72

73

74

75

76

77

78

79

80

81

82

83

84

85

86

87

88

89

90

91

92

93

94

95

96

97


98


99

100

9/24/2018

County Contracts






FAIRFIELD COUNTY

Ethical considerations to keep in mind when dealing with contracts


- Cannot use your authority or influence to secure a contract for a family member, yourself, or business associates in which they have an interest
- Cannot have an interest in a contract when you are connected to the vendor and your employment
- Cannot personally profit from a self-approved contract



FAIRFIELD COUNTY

Express Contracts (cont'd)


- Why is it important to be aware of ethics in public contracts?
 - Every public employee and elected official is subject to the prohibitions under R.C. 2941.21 (Unlawful Interest in a Contract) and 102.03 (Ethical Restrictions During and After Employment)
 - If a public employee or elected official is aware of an improper contract and does nothing about it, they could be criminally liable
 - If you are an elected official, you can avoid this by not entering into the public contract
 - However, what can a public employee do if he/she suspects or knows a public contract is improper?



FAIRFIELD COUNTY

Signs to look for if you think a public contract is improper


- Vendor and Public Employee/Official share same last name that isn't super common
 - If a vendor is "Foster Construction" and your department head or official has the last name of "Foster", ask the question to see if there is a relationship between them.
- Vendor and Public Employee/Official share a personal/business relationship that you are aware of
- Your office receives lots of complimentary goodies and swag from the vendor



Home > Home > Contract > Project

Employment


- Employment is also a type of contract where the ethics law comes into play
 - Public officials are prohibited from hiring a family member into their office or department
 - What does "hiring" mean?
 - Participating in the decision-making
 - Recommending the person
 - Supervising the person
 - All of this a problem if related to the new hire



Home > Home > Contract > Project

Employment (cont'd)

- Bottom Line: DON'T DO IT
- Better practice is:
 - Be transparent and upfront about the relationship
 - Divorce yourself completely from the hiring and employment process
 - Family member can be hired so long as you have no personal involvement in that decision and no supervisory role over this person




Home > Home > Contract > Project

9/24/2018


Improper Public Contracts

- What to do if you see an improper Public Contract?
 - Report it to supervisor
 - Contact department head
 - Contact Prosecutor's Office
 - Contact Ohio Ethics Commission to report
- No one is on their own and you can always reach out if you are unsure about what to do




123456789101112131415161718192021222324252627282930313233343536373839404142434445464748495051525354555657585960616263646566676869707172737475767778798081828384858687888990919293949596979899100

Conflicts of Interest




123456789101112131415161718192021222324252627282930313233343536373839404142434445464748495051525354555657585960616263646566676869707172737475767778798081828384858687888990919293949596979899100

What Is a Conflict for Public Employees?




- Taking official actions
- Making decisions
- Regarding matters that benefit
 - Self
 - Close Family
 - Business Associates




123456789101112131415161718192021222324252627282930313233343536373839404142434445464748495051525354555657585960616263646566676869707172737475767778798081828384858687888990919293949596979899100


Don't Be That Person




- Lynn Kraner, Walnut Twp Fiscal Officer
 - Recommended her sister to Walnut Twp Trustees for job
 - Said she was a friend of hers
 - Did not disclose relationship
 - Pleaded guilty this month to Unlawful Interest in a Public Contract



Or This Person





- Cliff Rosenberger, Speaker of House
 - FBI investigating for conflict
 - Took trip to London with two lobbyists from title lending industry
 - During time when house considering legislation putting interest rate caps on payday lenders



Gifts

- Public employees must not solicit, accept, or use public position to secure anything of value of such a nature as to manifest a **substantial and improper** influence on that employee with respect to her duties.







9/24/2018

Anything of Value?

Broad Category!

- The ORC includes, "Every other thing of value."
- Money
- Goods and chattels
- Promissory notes, checks, drafts, warrants, bonds
- Receipts given for payment of money or property
- Rights in action
- Improvements upon realty or fruit of the land
- Any interest in realty in any shape and form
- Promise of employment



◀ ▶ 🔍 ⌂

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89 90 91 92 93 94 95 96 97 98 99 100

100

What Are Gifts?

Examples include

- Cash
- Vacations
- Timeshares
- Property valuation
- Sports or concert tickets
- Ski passes
- Jobs or benefits for family members
- Manure




◀ ▶ 🔍 ⌂

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89 90 91 92 93 94 95 96 97 98 99 100

100

Exceptions?

- Free book from publisher who does business with court is OK, de minimis (but free year of Westlaw is not)
- Public college employee can sit on private student loan lender's board as long as doesn't receive travel, meals, and lodging to attend board meetings
- The major rule is that each situation is fact-specific. A public employee or official should always ask supervisor, prosecutor, or Ethics Commission if there is any doubt.




◀ ▶ 🔍 ⌂

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89 90 91 92 93 94 95 96 97 98 99 100


100

Discussion


JAMES H. HARRIS • JAMES H. HARRIS • JAMES H. HARRIS

Scenario:

- 5 member board issues an RFP for services. Only one vendor responds, and that vendor is selected to provide services. A lunch-time meeting is set to negotiate the contract. At the meeting the vendor's representative brings a platter of Jimmy Johns sandwiches for the Board members to the contract negotiation meeting. Is this a conflict of interest?


JAMES H. HARRIS • JAMES H. HARRIS • JAMES H. HARRIS

Other considerations

- Does it change the analysis if it just donuts?
- What about steak and lobster?
- What if vendor rep just brings lunch for Board clerk when he submits his sealed proposal?




JAMES H. HARRIS • JAMES H. HARRIS • JAMES H. HARRIS

9/24/2018

Scenario:


- Attorney Jane Brown is appointed as a special prosecutor to prosecute a case in which the Prosecutor's Office has a conflict. Brown request that her law partner Hanna Brown be appointed as a special prosecutor to assist her with the case. Any red flags?




FAIRFIELD COUNTY

Other considerations

- Are law partners sisters?
Mother/daughter?
- What if the firm of Brown and Brown is hired instead of individual lawyers? (Independent contractors?)
- What if the Judge appointing the special prosecutor was Sam Brown?




EGGERS EGGERS EGGERS
ATTORNEYS AT LAW
STACY C. EGGERS JR.
STACY C. EGGERS JR.
REBECCA EGGERS-GRYDER
TACY C. EGGERS JR.
KIMBERLY M. EGGERS
AUSTIN P. EGGERS



FAIRFIELD COUNTY

Scenario:

- An employee of economic development has minor son who is in rodeo. Business who has been applying for tax incentive program offers to sponsor son.



FAIRFIELD COUNTY

Other considerations

- What if the son is an adult?
- What if the sponsorship relationship existed **BEFORE** the business applied for tax incentives?
- What if the sponsorship offer occurs after the tax incentives are already approved?



Do you have an ethics question?

There will always be questions.

- ***Standing agenda*** item in meetings; continue ***group discussion***
- Take ***training & reflect on the training***
- Review ***newsletters and articles*** on the topic
- Talk with your ***supervisor or their supervisor***
- Contact ***HR***; consult the ***Prosecutor's Office***
- Contact the ***Ohio Ethics Commission***




Break

9/24/2018

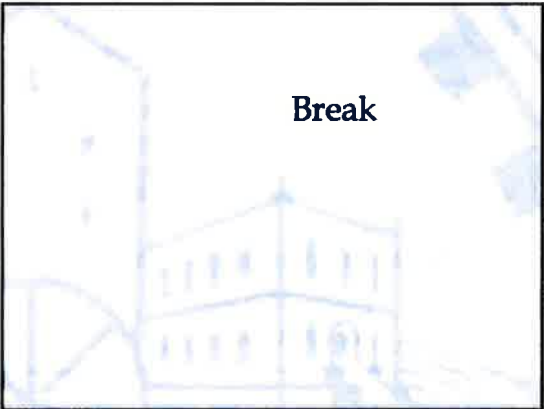
Leadership Selected CORSA
Training Topic

CORSA *Presenter*




11:00 AM - 12:00 PM - 12:30 PM

Break



Unlawful Harassment
Training


CORSA *Presenter*



1:00 PM - 2:00 PM - 2:30 PM

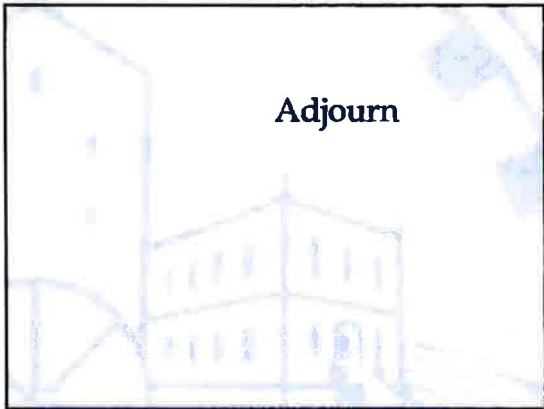
Reflections & Closing Remarks
1 minute survey

Carri Brown
Carri.Brown@fairfieldcountyohio.gov
740 652 7096



FAIRFIELD
COUNTY
OHIO

Adjourn



Addressing Employee Performance

2018

PRESENTED TO YOU BY

County Risk Sharing Authority

209 East State Street

Columbus, Ohio 43215-4309

Phone: (614) 221-5627

Toll Free: (888) 757-1904

Fax: (614) 220-0209



County Risk
Sharing Authority



FISHEL DOWNEY
ALBRECHT & RIEPENHOFF LLP
Attorneys at Law

Benjamin S. Albrecht – balbrecht@fisheldowney.com

Jennifer H. George – jgeorge@fisheldowney.com

Stephanie L. Schoolcraft – sschoolcraft@fisheldowney.com

FISHEL DOWNEY ALBRECHT & RIEPENHOFF LLP
7775 Walton Parkway, Suite 200 | New Albany, Ohio 43215
P (614) 221-1216 | F (614) 221-8769

A Service Program of the County Commissioners Association of Ohio

TABLE OF CONTENTS

	<u>PAGE NO.</u>
	WHAT IS THE ROLE OF A PERFORMANCE EVALUATION ON THE WORKPLACE? 1
I.	WHAT IS A PERFORMANCE EVALUATION “SYSTEM”? 1
II.	WHAT SHOULD BE INCLUDED IN A PERFORMANCE EVALUATION? 3
III.	THE IMPORTANCE OF ACCURATE AND HONEST PERFORMANCE EVALUATIONS 8
IV.	ATTENDANCE AND PERFORMANCE 11
V.	THE AMERICAN WITH DISABILITIES ACT, GENERALLY 22
VI.	QUALIFIED INDIVIDUAL WITH A DISABILITY: WHO HAS A DISABILITY?... 23
VII.	QUALIFIED INDIVIDUAL WITH A DISABILITY: WHO IS A “QUALIFIED INDIVIDUAL”? 23

I. WHAT IS THE ROLE OF A PERFORMANCE EVALUATION IN THE WORKPLACE?

Employers must consistently evaluate both the workplace and employee performance. Performance evaluation systems are the most effective tools for employers to use to review performance. Further, effective performance evaluation systems in the workplace can strengthen the notions of providing good and efficient service. A successful performance evaluation is effective for employers to not only evaluate the workplace, but also serves as a tool to reinforce the expected standards of conduct of employees. Additionally, effective performance evaluations can be used to assist in determining whether/how much raise is appropriate. Performance evaluations can also assist employers in appeals concerning employee discipline. Finally, to ensure success during a lawsuit or EEOC Charge, a properly conducted performance evaluation may be a necessary piece of evidence to make a winning defense.

In short, effective performance evaluations have many roles within the workplace. However, it is necessary that employers effectively conduct evaluations of employee performance. As a result, employers should consider implementing and/or evaluating performance evaluation systems.

Sample CORSA Performance Evaluations Policy

- The County may complete annual performance evaluations.

II. WHAT IS A PERFORMANCE EVALUATION “SYSTEM”?

A. Traits of Effective Evaluation Systems

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, 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 performing the essential functions of the position. Supervisors and employees both 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 to emphasize 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.

B. Why Have Performance Appraisals?

1. Performance appraisal systems have many benefits in the workplace. Effective performance appraisal systems:
 - a. Measure past employee performance;
 - b. Manage expectations regarding future employee performance;
 - c. Obtain better performance from employees/agency;
 - d. Determine department/individual needs, such as training, staffing and equipment;
 - e. Communicate policies/standards of conduct;
 - f. Help supervisors make better hiring decisions; and
 - g. Determine pay increases.

If these 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.

III. WHAT SHOULD BE INCLUDED IN A PERFORMANCE EVALUATION?

A. An Effective Performance Evaluation Should:

1. Communicate the goals and objectives of the organization;
2. Include a scoring system that can easily be used for administrative results;
3. Be cost effective—both in development and use;
4. Strive to eliminate rater errors; and
5. Allow employers to evaluate the performance and growth of employees compared to defined performance objectives.

Scenario #1: Criteria

Director: The Board let me know that there is money for raises this year. However, the Board wants to provide raises based upon employee performance. Therefore, we should probably update our performance evaluations. What types of skills should we evaluate?

Supervisor: I don't know.

Director: Really?! What are the traits and skills that you find in a successful employee?

Supervisor: Well...first, that they come to work regularly.

Director: Attendance can certainly be factor. What else? How can we determine which traits matter? Are our desired traits the same as other agencies in the County.

Supervisor: How many criteria do we want to consider?

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.

Sample CORSA Performance Evaluation Policy

- Evaluations, if conducted, will be based upon defined and specific criteria...

-
- a. **Sample Evaluation Criteria:**
- i. Quality of Work: focus on efficiency, quality, and accuracy of work.
 - ii. Leadership: focus on responsibility for work, trust, credibility, honest and ethical behavior.
 - iii. Communication: focus on relationship building, active listening, sharing of information, demonstration of effective oral and written skills.
 - iv. 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.
 - v. Respect/Inclusiveness: focus on respecting co-workers and customers, promoting fairness and equity, engaging the talents/skills of others.
 - vi. 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.
 - vii. Safety: focus on reduction of injuries and risk, continual planning for safety of customers and others.
 - viii. Any other suggestions? This may vary by department.
- b. 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.

Scenario #2: Scoring

Director: Now that we have decided on the criteria to evaluate employees, how should we score them?

Supervisor: 1-10? With 10 being best?

Director: Is 10 too much? What about 1-5?

Supervisor: That could work.

Director: What about: Fails/Below Average/Average/Above Average/Exceptional or Does not Meet Standards/Meets Standards/Exceeds Standards?

Supervisor: I think numbers or standards will work fine. However, we will need to define what the various terms mean.

- c. 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.

II. HOW TO PROVIDE EFFECTIVE PERFORMANCE EVALUATIONS?

- A. The Supervisors Conducting the Evaluations are Very Important to Ensure that the Performance Evaluation System will be Effective.**

Sample CORSA Performance Evaluations Policy

- 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.

B. The Most Common Evaluation Errors

Supervisors can also be guilty of subconscious errors in providing evaluations. Therefore, it is necessary for supervisors to evaluate how they conduct performance evaluations.

- 1. **Duties Poorly Communicated:** What is the employee supposed to be doing with his/her time? Has he/she been told that?

- a. Vagueness of standards.

Scenario #3(a): Corrections officers are required to “check-on” inmates. Should this standard be more defined?

- b. Appraisals are late or done sporadically.

Scenario #3(b): Evaluations are to be conducted by January 15 of each year. Supervisor reschedules performance evaluation with subordinate employee. Therefore, the evaluation is not completed until April 15. Is this problematic?

- c. Employee surprise.

Scenario #3(c):

Supervisor: I reviewed my notes from the prior year. In January, you failed to properly...; in February, you did not...; in March, you were untimely in doing...

Employee: Oh...I wish I would have known sooner, I would have adjusted those.

- How should the supervisor have handled this?

- d. Lack of employee buy-in.

Scenario #3(d):

Supervisor: At the end of the day, it seems that you do not take pride in your work. Your reports are sloppy and untimely.

Employee: Whatever.

Supervisor: Well...feel free to provide a response.

2. Rater Errors: Yes, management, as the raters, can cause the evaluation process to be polluted and unreliable if they engage in errors, including:

- a. 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.

- b. Recency. Allowing the employee's most recent performance to taint/positively impact the employee's performance during the entire period.
 - c. 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.
 - d. 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.
 - e. 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.
 - f. Clone. Giving someone 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.
 - g. Spillover. Continuing to downgrade someone for prior performance. The reviewer believes that there is no hope for improvement.
 - h. 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 is key.
3. 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-eye to review 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.
- 4. 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:
 - a. Establish performance standards that are based on what needs to be done, not on the person who will be doing them.
 - b. Evaluate consistently between and among employees.
 - c. Employees should sign-off on the appraisal and be given a copy.
 - d. Set specific job-related future goals that form part of the next evaluation. It should be a continuum, not a series of isolated events.
 - e. Complete the evaluation form legibly, sign and date it.
 - f. The form should state the evaluation period and all documentation should be within that period.
 - g. Stick with the facts you can actually support.
 - h. What's on the paper should be consistent with what you say, don't undermine the form by sugarcoating the message.

IV. THE IMPORTANCE OF ACCURATE AND HONEST PERFORMANCE EVALUATIONS

A. The Performance Appraisal as the Employee's "Sword".

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

Caselaw:

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

Facts:

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 other males were given the opportunity.

Holding:

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. The Performance Appraisal as the Employer's "Shield".

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

Caselaw:

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

The Plaintiff brought 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 judgement, 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 judgement in favor of the employer.

C. Other Supervisor Tips for Performance Evaluations

1. **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.

2. 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.
3. 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.
4. Stick with What Works: Use A Standard Form/Procedure. By developing and using standard forms, employees are more likely to know what job performance is expected of them, while giving them a standard to look to for improvement. However, 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.

5. 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!!

V. ATTENDANCE AND PERFORMANCE

Many times, an employee's performance is directly related to the employee's attendance records. As a result, employers want to penalize employees in their evaluations. However, it is imperative the employers exercise caution in "penalizing" an employee for their use of certain types of leaves.

Scenario #4: In preparing for an annual performance evaluation, a supervisor was reviewing an employee's prior year's attendance records. The Supervisor noticed that the employee had more absences than any other employee. Therefore, the Supervisor wishes to provide the employee a low score for attendance. Should she?

- What additional facts would you need? For example, does it matter that it is Family Medical Leave?

Sample CORSA Family Medical Leave Act Policy

- Eligible employees may request time off for family and/or medical leave of absence with job protection and no loss of accumulated service provided the employee meets the conditions outlined in this policy and returns to work in accordance with the Family and Medical Leave Act of 1993.

Sample CORSA Military Leave Policy

- Military leave is governed by O.R.C. Chapters 5903, 5906 and 5923 and the Uniformed Services Employment and Reemployment Rights Act (USERRA).

A. Does Family Medical Leave Impact the Ability to Obtain an Incentive Bonus?

Pursuant to 29 CFR 825.19(C)(2), "if a bonus or other payment is based on the achievement of a specified goal such as hours worked, products sold or perfect attendance, and the employee has not met the goal due to FMLA leave, then the payment may be denied, unless otherwise paid to employees on an equivalent leave status for a reason that does not qualify as FMLA leave." (29. CFR 825/19(C)(2)).

B. Is it FMLA Protected—FMLA Refresher?

1. Is the employee eligible?

-
- a. Make sure the employee is eligible:
- i. Has worked for your agency for 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.;
 - ii. Has actually worked one thousand two hundred fifty (1,250) hours in the preceding twelve (12) months. Exclude paid vacation leave, sick leave, holiday pay, and any paid FMLA leave.;
 - iii. Employee has not used all twelve (12) weeks of FMLA;
 - iv. Entitlement for the twelve (12) month period.

Sample CORSA Family Medical Leave Act Policy

- To be eligible for leave under this policy, an employee must meet all of the following conditions:
 1. Worked for the agency for at least twelve (12) non-consecutive months, or fifty-two (52) weeks.
 2. Actually worked at least one thousand two hundred fifty (1,250) hours during the twelve (12) month period immediately prior to the date when the FMLA leave is scheduled to begin.
 3. Work at a location where the Employer employs fifty (50) or more employees within a seventy-five (75) mile radius.
- The entitlement to FMLA leave for the birth or placement for adoption or foster care expires at the end of the twelve (12) month period following such birth or placement.
- Spouses who are both employed by the agency are jointly entitled to a combined leave total of twelve (12) weeks (rather than twelve (12) weeks each) for the birth of a child, upon the placement of a child with the employees for adoption or foster care, and for the care of certain family members with serious health conditions.

C. Is it an Appropriate Use of Leave?

1. Inpatient hospitalization.
2. Birth of child or placement of a child in the home (and absences related to pregnancy).
3. A serious health condition of the employee that makes the employee unable to perform the functions of his/her position.
5. A serious health condition of the employee's spouse, parent, or child that requires the employee's presence.
6. 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.

Sample CORSA Family Medical Leave Act Policy

- **Use of Leave.**

The provisions of this policy shall apply to all family and medical leaves of absence as follows:

- **Generally:** An employee is only entitled to take off a total of twelve (12) weeks of leave per year under the FMLA. As such, employees will be required to utilize their accumulated unused paid leave (sick, vacation, etc.) in conjunction with their accumulated unused unpaid Family Medical Leave. Employees will be required to use the type of accumulated paid leave that best fits the reason for taking leave and must comply with all procedures for requesting that type of leave as stated in the relevant policy. Any time off that may legally be counted against an employee's twelve (12) week FMLA entitlement will be counted against such time.
- **Birth of An Employee's Child:** An employee who takes leave for the birth of his or her child must first use all available accrued paid vacation leave prior to using unpaid leave for the remainder of the twelve (12) week period. However, if

the employee requests leave for the employee's own serious health condition as a result of the pregnancy or post-partum recovery period, the employee will be required to exhaust all of her sick leave prior to using unpaid leave for the remainder of the twelve (12) week period. *(Note: See section E below for information on disability leaves.)*

- Placement of a Child for Adoption or Foster Care: An employee who takes leave for the placement of a child for adoption or foster care must first use all available accrued paid vacation leave prior to using unpaid leave for the remainder of the twelve (12) week period.
- Employee's Serious Health Condition or Family Member's Serious Health Condition: An employee who takes leave because of his serious health condition or the serious health condition of his family member must use all available accrued paid sick and vacation leave prior to using unpaid leave for the remainder of the twelve (12) week period.

D. What's a "Serious Health Condition?"

1. More than three (3) calendar days of "incapacity", i.e., employee is unable to perform his/her job.

AND

Two (2) or more treatments by a healthcare provider, the first visit must occur within seven (7) days of the 1st day of incapacity; OR
Treatment by a healthcare provider that results in a regimen of continuing treatment under the supervision of a healthcare provider.

- a. What about an employee who goes to the doctor for a cold or the flu? It depends:
 - i. Is the employee incapacitated for more than three (3) days?
 - ii. Has the employee been to the doctor at least once and gotten a "regimen of continuing care?"
2. A chronic, serious health condition:
 - a. Requires periodic visits for treatment to a healthcare provider, at least two in a twelve (12) month period;

- b. Continues over an extended period of time;
 - c. May be a periodic rather, than a continuing incapacity.
3. A period of incapacity which is permanent, or long term, and for which treatment may not be successful (i.e., cancer or other terminal illness).
 4. Absence for restorative surgery after an accident or injury, or for a condition that would likely result in an absence of more than three (3) days without medical intervention (i.e., dialysis, chemotherapy, etc.).

Sample CORSA Family Medical Leave Act Policy

- “Serious health condition”: Any illness, injury, impairment, or physical or mental condition that involves:
 1. Inpatient care.
 2. Any period of incapacity of more than three consecutive calendar days that also involves:
 - Two or more treatments by a health care provider, the first of which must occur within seven (7) days of the first day of incapacity and both visits must be completed within thirty (30) days; or
 - 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.
 3. Any period of incapacity due to pregnancy or for prenatal care.
 4. A chronic serious health condition which requires at least two “periodic” visits for treatment to a health care provider per year and continues over an extended period of time. The condition may be periodic rather than continuing.
 5. 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.).
 6. Absence for restorative surgery after an accident/injury or for a condition that would likely result in an absence of more than

three days absent medical intervention. (i.e. chemotherapy, dialysis for kidney disease, etc.).

- “Licensed health care provider”: A doctor of medicine, a doctor of osteopathy, podiatrists, dentists, optometrists, psychiatrists, clinical psychologists, and others as specified by law.
- “Family member”: Spouse, child, parent or a person who stands “*in loco parentis*” to the employee.

Performance Issues Discovered While on FMLA?

Scenario #5: An employee gave birth to a child and is off for twelve (12) weeks on Family Medical Leave. During the employee’s FMLA absence, several performance deficiencies are noted. For example, significant mail is located in her office unopened; reports have not been filed; employee leave requests have not been granted; and, job descriptions and policies have not been updated as requested. Can I discipline the employee upon their return to work?

Caselaw:

***Schaaf v. SmithKline Beecham Corp, d.b.a GlaxoSmith Cline*, 2010 WL 1286781 (11th Cir. 2010).**

In Schaaf, while the vice president was off on FML for the birth of a child, several performance deficiencies were noted. As a result, upon her return, she was demoted. Because she was demoted based upon performance deficiencies noted during her absence, she alleged a violation of the FMLA. The court rejected her claim noting that it was not her leave that led to the demotion, but rather prior deficiencies that were noted while she was on FML. In order to succeed, the employee would have to show that the leave was the cause of the demotion, not the performance deficiencies.

E. How Can I address Employee Attendance Issues?

Scenario #6: What can I do as a supervisor to address employee attendance issues?

1. Define Patterned Absences.
 - a. Fridays and Mondays;
 - b. Days before or after holidays or vacation;
 - c. Paydays or the day after.

Not so easy:

- a. Days or times of year when there is peak workload or critical projects to be completed.
 - b. Patterns that include use of sick leave and then use of “emergency” vacation or personal leave when sick leave runs out.
2. Define Excessive Absenteeism.
1. Random days off, usually single days, but never working a full pay period.
 - a. A tool you can use:
 - i. Calendars or attendance cards that give you a complete visual of the employee’s attendance.

Sample CORSA Sick Leave Policy

- Application by an employee for sick leave through fraud or dishonesty will result in denial of such leave together with disciplinary action up to and including dismissal. Patterns of sick leave usage immediately prior or subsequent to holidays, vacation, days off and/or weekends or excessive sick leave usage may result in sick leave denial and appropriate disciplinary action. The County reserves the right to investigate allegations of sick leave abuse. The County reserves the right to question employees concerning their sick leave use. Whenever an employee is on sick leave he/she must be at home during his/her scheduled work hours or obtaining treatment or medication.
- Proof of illness, such as a doctor’s excuse, may be required when the County believes absence to be excessive, chronic, patterned, or abusive. A satisfactory licensed medical practitioner’s certificate may be required at any time, but will generally be required in each case when an employee has been absent more than three (3) consecutive days. When a licensed medical practitioner’s certificate is required, it must be submitted to [Designed Position Title, Phone Number] before an employee will be permitted to return to work from leave. The licensed medical practitioner’s certificate must be signed personally by the treating practitioner, and must verify that the employee was unable to work during the period in question, not simply that the employee was “under the doctor’s care.” For absences where a licensed medical practitioner’s certificate is not

required, the employee must submit a written statement to the [Designed Position Title, Phone Number] explaining the nature of the illness.

- When an employee is unable to report to work due to illness or other acceptable sick leave reason, he shall notify his supervisor as instructed by the Appointing Authority or Agency Head. An employee must continue such notification each succeeding day of absence except in cases of prolonged illness or absence where the employee has been granted a set period of leave. Failure of an employee to make proper notification may result in denial of sick leave and/or appropriate disciplinary action.

Sample CORSA Family Medical Leave Act Policy

Procedures For Requesting FMLA Leave.

- Requests for FMLA leave must be submitted in writing at least thirty (30) days prior to taking leave or as soon as practicable prior to the commencement of the leave. If the employee fails to provide thirty (30) days notice for foreseeable leave with no reasonable excuse for the delay, the leave may be denied until at least thirty (30) days from the date the employer receives notice. The employee must follow the regular reporting procedures for each absence.
- FMLA requests must be submitted on a standard leave form prescribed by the Employer. The Employer will determine whether the leave qualifies as FMLA leave, designate any leave that counts against the employee's twelve (12) week entitlement, and notify the employee that the leave has been so designated.
- When an employee needs foreseeable FMLA leave, the employee shall make a reasonable effort to schedule the treatment so as not to unreasonably interfere with the Employer's operations.

Certification of Need for FMLA Leave for Serious Health Condition.

- An employee requesting FMLA leave due to his family member's serious health condition must provide a doctor's certification of the serious health condition, which must designate that the employee's presence is reasonably necessary. Such certification shall be submitted at the time FMLA leave is requested, or if the need for leave is not foreseeable, as soon as practicable. An employee requesting FMLA leave due to the birth or placement of a child must

submit appropriate documentation at the time FMLA leave is requested.

- The Employer, at its discretion, may require the employee to sign a release of information so that a representative other than the employee's immediate supervisor can contact the medical provider. If the medical certification is incomplete or insufficient, the employee will be notified of the deficiency and will have seven (7) calendar days to cure the deficiency.
- The Employer may require a second medical opinion prior to granting FMLA leave. Such opinion shall be rendered by a health care provider designated or approved by the Employer. If a second medical opinion is requested, the cost of obtaining such opinion shall be paid for by the Employer. If the first and second opinions differ, the Employer, at its own expense, may require the binding opinion of a third health care provider approved jointly by the Employer and the employee. Failure or refusal of the employee to submit to or cooperate in obtaining either the second or third opinions, if requested, shall result in the denial of the FMLA leave request.
- Employees who request and are granted FMLA leave due to serious health conditions may be required to provide the Employer periodic written reports assessing the continued qualification for FMLA leave. Further, the Employer may request additional reports if the circumstances described in the previous certification have changed significantly (duration or frequency of absences, the severity of the condition, complications, etc.), or if the employer receives information that casts doubt on the employee's stated reason for the absence. The employee must provide the requested additional reports to the Employer within fifteen (15) days.

F. What about Performance Issues and Disabled Employees?

Scenario #7: Supervisor notices an employee is unable to meet the same performance standards as other employees. Because of known disability, the supervisor has concerns regarding how to address those concerns. As a result, the supervisor reaches out to you and asks: Can I hold employees with disabilities to the same standards?

Generally, yes. Employers can hold employees with disabilities to the same standards as similarly-situated employees without disabilities. However, if the disability impairs an employee's ability to perform marginal functions, the employer must provide a reasonable accommodation. Employees must be evaluated with respect to the performance of their job duties in light of the receipt of an accommodation. Employees with disabilities should

not be evaluated on a lower standard. The employer may be required to provide the employee a reasonable accommodation to participate in the performance evaluation.

Scenario #8: A co-worker advises a supervisor that an employee is having difficulty performing essential functions of the job. More specifically, during a training session that required some physical activity, the employee noted that the co-worker was unable to physically complete the tasks and was winded. The employee suspects it is because of the employee's hips and/or weight issues. Can the employer require the employee to submit to a medical examination?

Yes, so long as the need to send out for a medical examination is based upon "an objective, legitimate basis to doubt an individual's ability to perform the duties. (*Brownfield v. City of Yakima*, 612 F.3d 1140 (9th Cir.).

Sample CORSA Medical Examination and Disability Separation Policy

- The County may require an employee to take an examination, conducted by a licensed medical practitioner, to determine the employee's physical or mental capacity to perform the essential functions of his job, with or without reasonable accommodation. This examination shall be at the County's expense. If the employee disagrees with the County's licensed medical practitioner's determination, he may request to be examined by a second licensed medical practitioner of his choice at his own expense. If the reports of the two practitioners conflict, a third opinion shall be rendered by a neutral party chosen by the County and paid for by the County. The third opinion shall be controlling.

1. With respect to medical examinations, an employer can only require an employee to submit to a medical examination if the examination is job-related and consistent with business necessity. 42 U.S.C. 12112 (d)(4)(A). In other words, an employer may not inquire as to whether an employee is an individual with a disability or as to the nature and extent of a disability, unless the employer can prove that the exam is related to the job and consistent with business necessity.

Caselaw:

***Kroll v. White Lake Ambulance Authority*, 691 F.3d 809 (6th Cir. 2012).**

Kroll was employed as an Emergency Medical Technician. The Employer became concerned about her well-being shortly after she began dating a co-worker and started having emotional issues. At one point, her Employer received a complaint that she had been driving an ambulance with a patient

and lights and sirens, while on her cell-phone “screaming at a male acquaintance.” Her supervisor became concerned about her ability to perform her job safely and told her that she must attend counseling in order to continue working. She refused and did not return to work. She later filed suit against her employer under, among other things, the ADA.

The Sixth Circuit held that Kroll presented sufficient evidence that her employer-ordered counseling would constitute a “medical examination” under the ADA based upon the EEOC’s guidance on whether something constitutes a “medical examination.” The EEOC provides the following seven considerations to determine if something is a “medical exam”: (1) whether the test is administered by a health professional; (2) whether the test is interpreted by a health care professional; (3) whether the test is designed to reveal an impairment or physical or mental health; (4) whether the test is invasive; (5) whether the test measures an employee’s performance of a task or measures his/her physiological responses to performing a task; (6) whether the test normally is given in a medical setting; and (7) whether medical equipment is used.

Here, Kroll presented evidence that her counseling would be administered by a psychologist who would have done some interpretation of the counseling in order to help Kroll with her issues. The undisputed facts also suggest that the Employer intended for Kroll to attend counseling to explore her possible affliction with depression. These facts were sufficient for the Sixth Circuit to find that a reasonable jury could find that the Employer’s order that Kroll attend counseling satisfied the EEOC’s test for “medical examination,” and therefore had to be job-related and consistent with business necessity. However, since the District Court did not decide whether the counseling was job-related and consistent with business necessity, the Sixth Circuit remanded the case for the District Court to decide this issue in light of the Sixth Circuit’s holding.

Scenario #9: After a medical examination, is determined that the employee has a disability that renders them incapable of performing the essential functions of the position. What are your obligations?

Sample CORSA Americans With Disabilities Act Policy

- The County prohibits discrimination in hiring, promotions, transfers, or any other benefit or privilege of employment, of any qualified individual with a permanent disability. To be considered a qualified individual, the employee must satisfy the requisite skills, experience, education and other job-related requirements of the position he holds or desires and must be able to perform the essential functions of his position, with or without a reasonable accommodation.

- 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 complaint. 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.

Scenario #10: An employee with a disability has performance and attendance issues. Specifically, the use of illegal drugs and alcohol are interfering with their ability to perform the functions of their job. Can I discipline them for poor performance and/or attendance issues?

So long as they are treated the same as similarly-situated employees. However, if the reason the employee's work performance is poor is because of a lack of an accommodation that did not constitute an undue hardship, then the discipline would be improper.

VI. THE AMERICAN WITH DISABILITIES ACT, GENERALLY

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

VII. QUALIFIED INDIVIDUAL WITH A DISABILITY: WHO HAS A DISABILITY?

- A. 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.
- B. 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. An inability to “get along with others” is not a disability. *Soileau v. Guilford of Maine, Inc.*, 150 F. 3d 12 (1st Cir. 1997). The EEOC recognizes that irritability, chronic lateness, and poor judgment are not, in and of themselves, disabilities.
 2. EEOC Guidance on Psychiatric Disabilities (Mar. 25, 1997) may be found at: https://www.eeoc.gov/laws/types/disability_guidance.cfm.
 3. Stress and depression may or may not be considered mental impairments. The determination turns on whether or not the condition is the result of a documented mental disorder.

VIII. QUALIFIED INDIVIDUAL WITH A DISABILITY: WHO IS A “QUALIFIED INDIVIDUAL”?

A. Generally

1. An individual with a disability must be qualified to perform the essential functions of the position with or without reasonable accommodation.
2. The individual must satisfy educational, experience, skill, license, and any other job qualification standards.
4. 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.

B. Two-Step Process. The determination of whether an individual is a “qualified individual” is a two-step process:

1. First, the employer must determine if the individual is “otherwise qualified.”
2. Second, the employer must determine if the individual can perform the “essential functions” of the position with or without “reasonable accommodation.”

C. Otherwise Qualified

1. An employee is otherwise qualified if he or she satisfies the prerequisites for the position, such as possessing the appropriate educational background, employment experience, skills, licenses, etc.
2. For example, 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.

29 C.F.R. Part 1630 Appendix.

D. Essential Functions

1. Essential functions are the basic job duties that an employee must be able to perform, with or without reasonable accommodation.
2. Employers should carefully examine each position to determine what functions are essential. In particular, before recruiting, advertising, hiring, promoting or firing, a position description listing the essential functions should be drafted if one does not currently exist.
3. Helpful factors for determining if a function is essential include:
 - a. Whether the purpose of the position is to perform that function;
 - b. The number of other employees available to perform the function or among whom the performance of the function can be distributed;
 - c. The degree of expertise required to perform the function; and
 - d. Time spent performing the particular function.

E. Evidence of Essential Function That the EEOC Will Consider:

1. The employer's judgment as to which functions are essential;
2. Written job descriptions prepared before advertising or interviewing for a job. 29 C.F.R. §1630.2(n)(3). *Again, well drafted accurate job descriptions prepared before a dispute are exceedingly valuable to an employer's defense of ADA, FMLA, discrimination, and a host of other claims.*

F. Aside from These Two Most Important Considerations, The EEOC Will Also Consider:

1. The actual work experience of current and past employees in that position;
2. The actual time spent performing that function;
3. The consequences of not requiring that employee to perform that function; and
4. The terms of a collective bargaining agreement.

G. Employer is not required to cut an essential job function to accommodate an employee with a disability.

H. Reasonable Accommodation

1. Examples of reasonable accommodations include:
 - 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.

I. Defenses to Not Making a Reasonable Accommodation.

1. Undue hardship.

Scenario #11: An employee continually submits information from a physician indicating that they cannot return to work. Unfortunately, the employee has exhausted all paid leaves and Family Medical Leave. We have provided a short unpaid leave of absence. How long do we have to let this continue? If we separate the disabled employee, are we violating the ADA?

Uncertain Return Dates from Leave Constitutes Undue Hardship: Even though the Employer, a manufacturing company, admitted to terminating an employee due to his disability, the Sixth Circuit determined it did not violate the ADA. Plaintiff had already been on an extended leave once before, and at the time of his termination, was on his second leave of unknown duration. He had exhausted his FMLA leave in addition to 14 weeks of short-term disability. The Court determined the Employee was unable to physically perform the essential job functions, which included physical labor, with or without an accommodation. Further, the Employee's impending need to take additional leave beyond the maximum leave allowed by the Employer (12-weeks of leave required by the FMLA) constituted an undue hardship to the Employer. "We have found that when an employee's return date is not so certain, an employer is not required to keep open a job for an employee indefinitely ... With no certain or credibly proven end in sight, we therefore maintain ... that when, as here, an employer has already provided a substantial leave, an additional leave period of a significant duration, with no clear prospects of recovery, is an objectively unreasonable accommodation." *Aston v. Tapco Int'l Corp.*, 631 Fed. Appx. 292, 2015 U.S. App. LEXIS 20610 (6th Cir., Nov. 23, 2015)

Harassment and Discrimination

2018

PRESENTED TO YOU BY

County Risk Sharing Authority

209 East State Street

Columbus, Ohio 43215-4309

Phone: (614) 221-5627

Toll Free: (888) 757-1904

Fax: (614) 220-0209



County Risk
Sharing Authority



FISHEL DOWNEY
ALBRECHT & RIEPENHOFF LLP™
Attorneys at Law

Benjamin S. Albrecht – balbrecht@fisheldowney.com

Jennifer H. George – jgeorge@fisheldowney.com

Stephanie L. Schoolcraft – sschoolcraft@fisheldowney.com

FISHEL DOWNEY ALBRECHT & RIEPENHOFF LLP
7775 Walton Parkway, Suite 200 | New Albany, Ohio 43215
P (614) 221-1216 | F (614) 221-8769

A Service Program of the County Commissioners Association of Ohio

TABLE OF CONTENTS

	<u>PAGE NO.</u>
I. BASIC UNDERSTANDING OF LAW	3
II. CATEGORIES OF UNLAWFUL DISCRIMINATION AND HARASSMENT	3
III. SETTING STANDARDS IN THE WORKPLACE	6
IV. WELCOMENESS – DEFENSE TO HARASSMENT?	9
V. CAN THIS HAPPEN OFF-DUTY?	10
VI. WHAT AM I REQUIRED TO DO IN THE EVENT OF AN ALLEGATION OF HARASSMENT AND/OR DISCRIMINATION?	12
VII. WHAT SHOULD EMPLOYERS DO?	19
VIII. OTHER ISSUES	20

I. BASIC UNDERSTANDING OF LAW

A. What is The Difference Between Harassment and Discrimination?

1. **Unlawful discrimination** occurs when an individual's compensation, terms, condition, or privileges of employment is negatively impacted due to that individual's membership in a protected classification.
2. **Unlawful harassment** is a subset of discrimination and occurs when abusive and harassing behavior is directed at an individual due to his membership in a protected class and adversely affects that individual's terms, conditions, or privileges of employment.
 - a. Is all discrimination and harassment unlawful?
 - b. Are there other forms of unlawful harassment?

II. Categories of Unlawful Discrimination AND Harassment

A. What Are the Protected Classes?

1. Sex/Gender
 - a. Gender Identity?
 - b. Sexual Orientation?
 - c. Pregnancy?
2. Race/Color
3. National-Origin/Citizenship
4. Religion
5. Age
6. Disability
7. Genetics
8. Military Status

Sample CORSA Discrimination and Harassment Policy

- The County is committed to providing a facility that is safe and free from unlawful discrimination and harassment. Unlawful discrimination or harassment is behavior directed toward an employee because of his membership in a protected class such as: race, color, religion, sex, national origin, age, ancestry, disability, genetic information, or military status. Unlawful discrimination and harassment is inappropriate and illegal and will not be tolerated. All forms of unlawful discrimination and harassment are governed by this policy and must be reported and addressed in accordance with this policy.

Scenario #1(a): An employee comes to you and indicates she is pregnant. As a result, she needs a light duty assignment. What do you do?

Considerations:

- Is pregnancy a protected class?
- Is she eligible for a light duty assignment?

Caselaw:

***Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338 (2015)**

UPS denied light duty accommodations to a pregnant employee, citing their policy of only extending light duty or reassignments to employees who were injured on the job or to employees qualifying as disabled within the meaning of the Americans with Disabilities Act. The employee brought suit, alleging the policy resulted in disparate treatment for pregnant workers compared to other employees who were similarly situated in their inability to work. The employee alleged that UPS's actions were in violation of the Pregnancy Discrimination Act, which prohibits employers from discriminating against individuals based on an employee's pregnancy.

The Supreme Court held that individual pregnant workers bringing these types of disparate treatment claims may show disparate treatment through indirect evidence, and may do so using a modified *McDonnell-Douglas* analysis. Under this analysis, the individual pregnant worker can make out a prima facie case of discrimination by showing:

- (i) The worker belongs to a protected class (i.e. she is or was pregnant);

(ii) She sought accommodations from her employer;

(iii) The employer did not accommodate her; and

(iv) The employer accommodated other employees similar in their ability or inability to work.

Once the worker has met these four elements, the employer can then show that it did not accommodate the employee based on legitimate, non-discriminatory reasons. The Court made it clear that those reasons cannot include that it is more expensive or less convenient to accommodate pregnant workers. Once the employer has offered a legitimate reason, the worker can then show that these reasons are pretextual.

- Is she entitled to leave?

Sample CORSA Family and Medical Leave Policy

- Eligible employees may request time off for family and/or medical leave of absence with job protection and no loss of accumulated service provided the employee meets the conditions outlined in this policy and returns to work in accordance with the Family and Medical Leave Act of 1993.

Scenario #1(b): A female employee at the County Engineering Department (the only female employee) frequently complains to her coworkers that the snow plow she is assigned to for this year's snow runs is the oldest in the Department's fleet. Every time she gets called out on a run in the early winter months, she reiterates her complaints to every coworker she sees. She tells everyone the assignment is because she is the only woman in the Department. In reality, the supervisor made the plow assignments based on seniority, as required by the Department's CBA, and the female employee was the least senior employee.

The supervisor is notified of these complaints. In January, the employee submits a doctor's note to her supervisor, which details that the employee needs a snow plow that contains an ergonomically adjustable seat because the employee's legs are becoming numb while driving. The note is from a reputable doctor and establishes that it is medically necessary for the employee to use a vehicle with the adjustable seat. The supervisor is suspicious because only the newest snow plows have such seats and he thinks the employee is just trying to get reassigned and get special treatment. He grants her the accommodation, but tells her that she does not get special treatment at the department because she is the only female employee in their division, and that she should stop making everything about her gender.

-
- What protected classes are implicated here?
 - Should the Department have granted the accommodation in light of the supervisor's suspicion?
 - Is the supervisor's comment problematic? Why or why not?

III. SETTING STANDARDS IN THE WORKPLACE

A. Why Do We Care About Harassment?

1. One in four workers claim to have been in a romantic relationship with a colleague.
2. One in three relationships result in someone being fired.
3. 17% of employees who remain, get transferred.
4. 5% of office affairs lead to litigation.

B. How Do We Set Standards?

1. Understand what is unlawful.
 - a. Conduct that unreasonably interferes with a person's work performance or creates an intimidating, hostile, or offensive work environment is unlawful. Harassment is a subset of discrimination that protects employees from harassing behavior in the workplace as a result of the employee's membership in a protected class. The theory behind harassment is that abusive and harassing behavior can adversely affect the terms, conditions or privileges of employment, thereby violating Title VII.
 - b. Workplace conduct in the nature of lewd or explicit sexual remarks, innuendoes, jokes, gestures, touching, discussions of sexual activity, indecent exposure, whistles, display of obscene or suggestive pictures or cartoons, pornographic posters, requests for dates or sexual favors, displayed swastikas or rebel flags.

Caselaw:**Franchina v. City of Providence, 881 F.3d 32 (1st Cir. 2018):**

Plaintiff, a firefighter for the City of Providence, was constantly harassed by her co-workers. Plaintiff was also spit on, propositioned for sex, shoved, and in one instance had the blood and brain matter of a suicide victim thrown on her. Plaintiff filed suit against the City for harassment and discrimination under Title VII of the Civil Rights Act and after a jury trial was awarded \$700,000.

The First Circuit Court of Appeals upheld the jury award, holding that the Plaintiff's treatment by the City was a violation of Title VII. The Court outlined the "sex-plus theory" under Title VII, which occurs when an employer classifies employees on the basis of gender plus another characteristic, in this case the Plaintiff's sexual orientation. The Plaintiff showed that the basis of the discrimination was both her gender and her identification as a lesbian. The Court found that women who were perceived as willing to sleep with their male co-workers were treated better than those who were not. As the Court concluded, "employers should be cautioned that turning a blind eye to blatant discrimination does not generally fare well under anti-discrimination laws like Title VII."

2. Establish a policy.

CORSA Sample Discrimination and Harassment Policy

- **Definitions.**

Unlawful discrimination occurs when individuals are treated less favorably in their employment because of their membership in a protected classification. An employer may not discriminate against an individual with respect to the terms and conditions of employment, such as promotions, raises, and other job opportunities, based upon that individual's membership in that protected class.

Harassment is a form of discrimination. Harassment may be generally defined as unwelcome conduct based upon a protected classification. However, harassment becomes unlawful where:

1. Enduring the offensive conduct becomes a condition of continued employment.

-
2. The conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.

CORSA Sample Discrimination and Harassment Policy

- By way of example, sexual harassment is one type of unlawful harassment. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:
 1. Submission to the conduct is made either explicitly or implicitly a term or condition of an individual's employment.
 2. Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual.
 3. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment. Harassment on the basis of an employee's membership in any protected classification (as set forth above) is unlawful, will not be tolerated, and must be reported.

- a. Are these Examples of Unlawful Harassment?

Scenario #3: My supervisor is creating a hostile work environment by yelling at me?

Scenario #4: My supervisor is creating a hostile work environment by making jokes, comments, and gestures about having an affair with me? She has also indicated she can provide me a better assignment if I go on a date with her?

- Quid Pro Quo ("This for That")

The employee's submission to harassment was an express or implied condition for receiving job benefits or the employee's refusal to submit to supervisor's harassment resulted in tangible job detriment. By definition, quid pro quo claims can only be brought against a supervisor or someone with supervisory authority over the complaining individual. The Supervisor need not be the employee's direct supervisor to impose liability, but must have the ability to affect the employee's terms & conditions of employment.

Scenario #5(a): I used to date a supervisor and we broke up three (3) weeks ago. However, he keeps calling, driving by my house, and asks about going out again. I keep saying no. I want to file a complaint. Is this improper by the supervisor?

CORSA Sample Workplace Romances Policy

- To avoid concerns of sexual harassment, preferential treatment and other inappropriate behavior, employees are required to inform [At Least Two, No More Than Four Designees, Title, Phone Number] if they currently are, or if they intend to become, romantically involved with a co-worker. Such relationships are not necessarily prohibited, but must be appropriately addressed. Should the County determine that a conflict exists between an employee's employment and a personal relationship with a co-worker, the County will attempt to work with the employees to resolve the conflict. Should operational needs prevent resolution, the relationship must cease or one or both of the parties must separate from employment. Supervisors are expressly prohibited from engaging in romantic or sexual relationships with any employee they directly, or indirectly, supervise.

Scenario #5(b): You investigate the allegation, and the supervisor shows you several explicit emails, texts, and photos from the employee? Does that make a difference?

IV. Welcomeness – Defense to Harassment?

A. Factors to Consider:

1. Whether the complaining employee solicited or incited the behavior;
2. Whether the conduct was regarded as undesirable or offensive;
3. Whether the complaining employee told the harasser to stop; and
4. Who instigated the behavior?

Note: Acquiescence does not necessarily mean consent. To be held to have "welcomed" the behavior, the complaining employee must have voluntarily participated in the conduct. Keep in mind that a fear of reprisal or job detriment may silence or coerce an employee – an employee who "plays along" so as not to upset her supervisor or co-worker is not a voluntary participant. Additionally, the

“welcome” or “voluntary” defense is more suspect if the harasser has authority over the complaining employee.

B. Remember:

1. Make sure the policy has various ways to report allegations;
2. Make sure supervisors and HR know their responsibilities; and
3. Don’t promise confidentiality.

V. CAN THIS HAPPEN OFF-DUTY?

A. Employees Must Understand That Conduct Off-Duty Is Just as Actionable.

Off-Duty Conduct

CasekawL

Satterfield v. Karnes, 736 F. Supp. 2d 1138, 1159 (S.D. Ohio 2010).

The court considered whether an obscene phone call that took place after hours and outside of the workplace should be taken into consideration in deciding a hostile work environment claim. The court acknowledged that the 6th Circuit had not yet taken a position on the issue of whether off premises, after-hours conduct by a non-supervisory employee may be considered in this analysis. However, the court went on to quote *Duggins v. Steak ‘n Shake*, stating “when an employee is forced to work for, or in close proximity to, someone who is harassing her outside the workplace, the employee may reasonably perceive the work environment to be hostile.” The court considered the phone call in the “totality of the circumstances.”

Gelpi v. AutoZoners, LLC, 2014 WL 1224457 (N.D. Ohio March 24, 2014).

The Court awarded summary judgment to the employer on an employee’s claim alleging she was subject to a hostile work environment as a result of sexual harassment. Plaintiffs bringing these claims must prove that the alleged harassing conduct is unwelcome. Here, Gelpi alleged that sexual jokes and banter that occurred in the workplace were offensive to her. The Court evaluated Gelpi’s Facebook page to show that she was actually very comfortable with sexual humor because there were numerous posts containing sexual references and jokes. The Court concluded the employee could not prove the harassing conduct was unwelcome because based on her Facebook posts, and the fact that she was Facebook friends with nearly all of her coworkers including the alleged harassers, other employees could reasonably believe she liked sexual humor.

CORSA Sample Discrimination and Harassment Policy

- Unlawful discrimination or harassment that affects an individual's employment may extend beyond the confines of the workplace. Conduct that occurs off duty and off premises may also be subject to this policy.
- Unlawful discrimination and harassment does not generally encompass conduct of a socially acceptable nature. However, some conduct that is appropriate in a social setting may be inappropriate in the work place. A victim's perceived acquiescence in the behavior does not negate the existence of unlawful discrimination or harassment. Inappropriate conduct that an employee perceives as being "welcome" by another employee may form the basis of a legitimate complaint.

Scenario #6(a): We were at a bar after work and a co-worker touched me inappropriately. Is this harassment?

Concerns:

- Off-duty
- Impact on the workplace
- Welcomeness
- Sexual in nature
- See Policy

Scenario #6(b): I am friends with my supervisor on Facebook. He appears to be a member of a "hate group." I am an African-American female. My supervisor has recently denied my leave requests and gave me a poor evaluation score. Is this harassment or discrimination?

Scenario #6(c): A member of the public comes into the office and makes sexual, suggestive gestures and comments. Do we have to stop it?

CORSA Sample Discrimination and Harassment Policy

- Coverage

This policy covers all employees, supervisors, department heads and elected officials. Additionally, this policy covers all suppliers, subcontractors, residents, visitors, clients,

volunteers and any other individual who enters County property, conducts business on County property, or who is served by County personnel.

VI. WHAT AM I REQUIRED TO DO IN THE EVENT OF AN ALLEGATION OF HARASSMENT AND/OR DISCRIMINATION?

A. Investigate

B. Prompt Remedial Action

Scenario #7(a): A new supervisor is hired by the County Building Department. The supervisor has the authority to hire assistants and write them up, but cannot fire, demote, or transfer his assistants without approval from the County's Human Resources Director. Shortly after his hire, the supervisor starts making lewd and obscene comments to one female building inspector, one female office manager, and one female administrative assistant. He inappropriately touches the female building inspector while inspecting an office building together. The supervisor also shows the office manager pornography on his phone. Finally, he massages the administrative assistant shoulders and lets his hands "slip" to inappropriately touch her chest. The supervisor engages in similar actions for the next three months, but the three female employees stay silent. After hearing about the hand slip from the administrative assistant, the female building inspector has enough and reports the supervisor to the Director of the Building Department.

- What is the first thing the Director should do?
- Is an investigation appropriate?
- If yes, what should you do with the building inspector?
- The female employees?

Caselaw:

Kalich v. AT&T Mobility, LLC, 679 F.3d 464 (6th Cir. 2012).

A male employee cannot prevail on a sexual harassment claim against his employer, based on his allegation that his male supervisor repeatedly subjected him to inappropriate comments. Specifically, he claimed that his supervisor said things to him such as "I like your glasses - you should change your name to Virginia or Margaret" and "Do you not eat? You look like a girl!" and "You know you can sew." The supervisor also made comments about the employee's dog, noting its small size, and saying "How cute. It figures." The supervisor also referred to the dog as Fluffy or Princess. The supervisor also called the employee a necrophiliac and said in front of others that the employee had sex with dead people. The employee alleged that the supervisor made these comments because he knew or suspected that the employee was homosexual and was trying to "bring him out of the closet."

In order to establish a claim for unlawful hostile work environment sexual harassment, the plaintiff employee must prove that “but for the fact of his sex, he would not have been the object of harassment.” In addition, to prove “same sex harassment,” the plaintiff must show that the alleged harasser: (1) made sexual advances or acted out of a sexual desire for the plaintiff; (2) was motivated by a general hostility towards the presence of men in the workplace; or (3) treated women more favorably than men in the workplace. In this case, the Court found the supervisor’s conduct to be “crude, bullying and despicable,” but not unlawful. There was no evidence that the employee was singled out or treated differently than other employees because of his gender. The supervisor never made any sexual advances toward him or indicated a sexual interest in him, and the supervisor did not have a general hostility to men in the workplace. Instead, he was generally rude and disrespectful of all of the employees he supervised. The Court also noted that the Employer properly investigated the employee’s complaints and took adequate remedial measures, which involved discipline, required training and removal of the supervisor from the employee’s chain-of-command.

Compare *Kalich* with *EEOC v. Boh Bros. Const. Co., LLC*, 731 F.3d 444 (5th Cir. 2013), en banc.

The Court found that a male employee could bring a same-sex harassment claim against a male supervisor. The supervisor called the employee a “p****”, “f****”, and “princess” 2-3 times each day, would come up from behind and simulate anal sex with the employee, showed the employee his genitalia, and once, when the employee was in his car sleeping, told him that if the car was not locked the employee would have ended up with “his d*** in his mouth.” Employer had no policies regarding sexual harassment, other than to discourage it, and when the Plaintiff complained of the harassing behavior to his supervisor, the supervisor only did a 20 minute investigation, took no notes, and merely informally interviewed the supervisor.

The Court stated the 3 ways to prove same-sex harassment are not the only ways; plaintiffs can use evidence of sex-stereotyping (gender stereotyping), which is discrimination or harassment based on the fact that an individual fails to conform to traditional gender stereotypes, and is prohibited under Title VII. The Court found there was sufficient evidence to support same-sex harassment, and affirmed the jury’s verdict in favor of the employee.

CORSA Sample Discrimination and Harassment Policy

- **Complaint Procedure**
 - Employees who feel they have been subject to unlawful discrimination or harassment by a fellow employee, supervisor, or other individual otherwise affiliated with the County shall immediately report the conduct, in writing, 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 complaint. Similarly, employees who feel they have knowledge of discrimination or harassment, or who have questions or concerns regarding discrimination or harassment, shall immediately contact [At Least Two, No More Than Four Designees, Title, Phone Number]. Late reporting of complaints and verbal reporting of complaints will not preclude the County from taking action. However, so that a thorough and accurate investigation may be conducted, employees are encouraged to submit complaints in writing and in an expedient manner following the harassing or offensive incident. All supervisors are required to follow up on all claims or concerns, whether written or verbal, regarding unlawful discrimination and harassment.
 - Although employees may confront the alleged harasser at their discretion, they are also required to submit a written report of any incidents as set forth above. When the County is notified of the alleged harassment, it will timely investigate the complaint. The investigation may include private interviews of the employee allegedly harassed, the employee committing the alleged harassment and any and all witnesses. Information will be kept as confidential as practicable, although confidentiality is not guaranteed. All employees are required to cooperate in any investigation. Determinations of harassment shall be made on a case-by-case basis. If the investigation reveals the complaint is valid, prompt attention and disciplinary action designed to stop the harassment and prevent its recurrence will be taken.

C. Why Do I Need to investigate?

Scenario #7(b): Think back to the Building Department scenario. The Building Department Director notifies the County's Human Resources Director about the sexual harassment allegations. The HR Director decides to put the supervisor on paid leave pending the investigation. As part of the investigation, the HR Director interviews each woman, learns the supervisor has been engaging in this conduct for a few months, determines the allegations are substantiated, and terminates the supervisor. The female employees file an EEOC claim, alleging a hostile work environment even though the supervisor is terminated.

- Is the County still subject to liability since the women worked in this environment for multiple months?
- Were the actions of the HR Director appropriate?
 1. Vicarious liability can be imputed to the Employer.
 - a. One defense to vicarious liability is that the Employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior. Proof that an employee's allegations were investigated and properly handled can protect the Employer from vicarious liability.

Caselaw:

***Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998).**

The Plaintiff worked for Burlington for 15 months as a salesperson before quitting, allegedly because of the constant sexual harassment of one of her supervisors. The supervisor allegedly continuously harassed her and threatened to retaliate against her by denying tangible job benefits if she did not give in to his advances. However, the supervisor never acted on these threats. The Plaintiff filed suit, and the question before the Court was whether the employer was vicariously liable for the hostile work environment created by its supervisor. The Court ultimately held that Burlington could be held vicariously liable for the supervisor's actions, but remanded the case to provide the company the opportunity to provide a defense, such as that it exercised reasonable care to prevent and promptly correct the behavior.

-
2. Employer obligations:
 - a. Once an Employer is put on notice it must act.
 - b. Supervisors and employees must know the policies and establish/follow expectations.
 - c. Understand obligations during investigation.
 - i. Scope of investigation depends upon the allegations
 - ii. Piper
 - iii. Garrity
 - iv. Union representative
 - v. Document all of the steps
 - d. No retaliation against the accuser.
 - i. Materially adverse change to a term and condition of employment
 - ii. Temporal proximity
 - iii. Is there a link between protected activity and the action against the accuser?
 3. Examples of adverse actions:
 - a. Constructive discharge, termination, demotion, decreased salary, lower job title, or material loss of benefits or responsibilities. It must be more than a mere inconvenience or alteration of job duties.

Scenario #8: A new male Prosecutor is elected. Within the first few months, the Prosecutor decides he wants his employees to use a time clock. He also notifies all office employees he will begin to check employee internet history because he feels like too much time is being wasted messing around on the internet. The Prosecutor is also someone who likes to pull pranks on people; he likes to jump out of closets and scare his co-workers, and also messes with employee's desks while they are not in the office. The following year, Susan, a victim's advocate, notices that only she and the office's 4 other female employees are actually required to use the new time clock. The office's male employees initially started out using it, but stopped over time. She suspects the Prosecutor told the men they did not need to use the time clock. Susan also notices that the Prosecutor never asks the male employees any questions about their internet

usage and does not monitor their internet history. Susan also notices that the Prosecutor does not pull any pranks on any male employees.

One day, the Prosecutor comes to talk to Susan. He is holding an AR-15 rifle that is evidence in a case. He stands over her desk, holding the rifle, and starts making off-color jokes and makes a few references to the gun being loaded. Susan, terrified, complains about the Prosecutor's conduct to a friend, who is also a Sheriff's Deputy. The Sheriff's Deputy notifies the Prosecutor he is investigating the Prosecutor's conduct with the rifle following a complaint from Susan. That same day, the Prosecutor tells Susan she is terminated. Susan sues for gender discrimination, hostile work environment, and retaliation.

- Was Susan subject to a hostile work environment?
- Do you think she was discriminated against?
- Do you think the Prosecutor retaliated against her?

CORSA Sample Discrimination and Harassment Policy

- Retaliation

Anti-discrimination laws prohibit retaliatory conduct against individuals who file a discrimination charge, testify, or participate in any way in an investigation, proceeding, or lawsuit under these laws, or who oppose employment practices that they reasonably believe discriminate against protected individuals, in violation of these laws. The law also prevents retaliatory conduct against individuals who are close personal friends or family members with an individual who engaged in protected conduct. The County and its supervisors and employees shall not in any way retaliate against an individual for filing a complaint, reporting harassment, participating in an investigation, or engaging in any other protected activity. Any employee who feels he has been subjected to retaliatory conduct as a result of actions taken under this policy, or as a result of his relationship with someone who took action under this policy, shall report the conduct to [At Least Two, No More Than Four Designees, Title, Phone Number] immediately. Disciplinary action for filing a false complaint is not a retaliatory act.

Scenario #9(a): A JFS Director is accused of various acts of misconduct by her Administrative Assistant. After returning from administrative leave with pay at the conclusion of the investigation, the Director wants to fire the Administrative Assistant. Can she?

Considerations:

- Review Discipline Policy
- Did the Assistant violate other rules?
- Is termination how others in similar situations were treated?
- Was she honest during the process?

CORSA Sample Discrimination and Harassment Policy

- False Complaints

Legitimate complaints made in good faith are strongly encouraged; however, false complaints or complaints made in bad faith will not be tolerated. Failure to prove unlawful discrimination or harassment will not constitute a false complaint without further evidence of bad faith. False complaints are considered to be a violation of this policy.

Scenario #9(b): The Director does not fire the Administrative Assistant, but rather gives a poor performance evaluation.

- Is this retaliation?

Scenario #9(c): The Investigation does not find any unlawful harassment or discrimination. However, the Director engaged in improper behavior in violation of other policies.

- Is she still able to be disciplined?

Scenario #9(d): The Director engaged in unlawful harassment.

- Must she be terminated?

CORSA Sample Discrimination and Harassment Policy

- Corrective Action

If the County determines unlawful discrimination, harassment, or retaliation has taken place, appropriate corrective action will be taken, up to and including termination. The corrective action will be designed to stop the unlawful conduct and prevent its reoccurrence. If appropriate, law enforcement agencies or other licensing bodies will be notified. Any individual exhibiting

retaliatory or harassing behavior towards an employee who exercised a right under this policy, or who is a close personal friend or family member of someone who exercised a right under this policy, will be subject to discipline, as will any employee who has knowledge of unlawful conduct and allows that conduct to go unaddressed.

VII. WHAT SHOULD SUPERVISORS DO?

- A. **Report Immediately:** Report the behavior to your employer immediately. Delay can hamper an investigation and allow the harassment to escalate.
- B. **Confront the Harasser:** Inform him or her that you are offended by his/her conduct and to stop it immediately.
- C. **Keep Notes:** Report the offensive behavior, noting the time, place, and substance of each incident and any witnesses.
- D. **Follow Your Policy:** Know it and follow it.
- E. **File an Internal Complaint:** If the unlawful conduct continues, submit a complaint to your supervisor, or if necessary to your harasser's supervisor, and send a copy to the harasser.
- F. **Monitor Own Conduct:** Be careful of your own conduct, and make certain that it is not inconsistent or ambiguous - don't laugh at an unwelcome joke one day, then cry foul the next day. If it is offensive, tell them so immediately. Do not smile or flirt back.
- G. **Supervisors Must be Self-Aware: Are You Engaging in Unlawful Conduct?**
 - 1. Would you be embarrassed to see your remarks or behavior reported in the newspaper or described to your spouse?
 - 2. How would you view this behavior if it was directed by someone else toward your spouse, significant other, child or parent?
 - 3. Do not assume your coworkers or employees enjoy comments about their appearance, hearing sexually or racially oriented jokes or comments, being touched, stared at, or propositioned. It may not be considered a compliment.
 - 4. Recognize that everyone may have different thresholds as to what they consider offensive.
 - 5. Develop awareness that another person's heritage or cultural background may result in different reactions or conduct.

-
6. Politely explain personal sensitivities to those who may not understand.

VIII. OTHER ISSUES

A. OCRC/EEOC Charges

The Ohio Civil Rights Commission and Equal Employment Opportunity Commission provide additional avenues for employees to pursue actions against their Employer.

B. Grievances

Employee grievances can hurt the employer in many different ways. For example, if the employee ultimately prevails, he/she may be owed backpay, etc. The extra cost of outside counsel to represent the Employer, as well as the cost of an arbitrator, lost work time due to employees testifying, and the possibility of the grievance negatively impacting workplace office morale all are additional risks of grievances that should not be overlooked.

Check the language in your grievance procedure. Recent caselaw prohibits grievance procedures from requiring an employee to hold his or her grievance in abeyance if the employee also files an EEOC/OCRC Claim. This would likely also extend to any FLSA claims an employee reports to the Department of Labor.

Caselaw:

Watford v. Jefferson County Pub. School, 840 F.3d 448 (6th Cir. Sept. 1, 2017).

Joyce Watford was terminated from her position as a teacher for the Jefferson County Public School District. Watford was the member of a union, the Jefferson County Teachers Association, so she also filed a grievance, alleging her termination was based on race, sex, and age discrimination. Watford filed an EEOC charge as well, about four months after she filed the grievance.

The CBA between the School District and the Teacher's Association permitted employees to file a grievance alleging he or she was discriminated against but requires that grievance proceedings be held in abeyance if the employee also files a charge of discrimination with the EEOC.

After Watford was notified her grievance would be held in abeyance pending the results of her EEOC charge, Watford filed a second EEOC charge. In the second charge, Watford argued that holding her grievance in abeyance was retaliation for filing an EEOC charge. The EEOC issued a decision finding there was reasonable cause to believe that holding the grievance proceedings in abeyance was retaliation for filing an EEOC claim.

Watford filed a lawsuit, alleging the CBA provision that required grievances to be held in abeyance was retaliatory on its face, among other claims. After filing the lawsuit, Watford filed additional EEOC claims against the Teacher's Union and the School District.

The lower court found the School District and Teacher's Union were entitled to summary judgment on Watford's claims, which Watford appealed.

The Sixth Circuit reversed in favor of Watford, finding the CBA was retaliatory on its face because holding grievance proceedings in abeyance would dissuade an employee from making a discrimination charge because filing a charge of discrimination was likely to stall the grievance proceedings indefinitely. The Sixth Circuit also found both the School Board and the Teacher's Union's conduct, holding the grievance in abeyance, constituted an adverse employment action.

The Court reasoned the CBA's language gave Watford two choices: choose the CBA's grievance procedure or file an EEOC charge. Those choices, though, did not actually give Watford options because, "many reasonable employees would be dissuaded from filing an EEOC charge, preferring instead to resolve their claims quickly outside of the judicial process."

C. Public Records Law

Employers should keep in mind that all of the steps in the investigation process will most likely be public record and therefore available upon request.

So, don't promise confidentiality!

D. Workplace Bullying

1. Definition

- a. Any behavior that is repeated, systematic and directed toward an employee or group of employees that a reasonable person under the circumstances would expect to victimize, humiliate, undermine or threaten another employee and which creates a risk to health and safety.
- b. Attitude distinguished - Employers cannot discipline someone for his/her attitude, defined as "a mental position or a feeling or emotion with regard to a fact or state" (Webster's 9th New Collegiate Dictionary). However, attitude manifests itself in behaviors and employers can, and should, discipline for any behavior that does not meet the standards expected in the agency.

2. A Common Problem for Employers

- a. Common complaints falling under this category include: being excluded from work related gatherings; others being consistently late to your meetings; being given the “silent treatment”; receiving rude treatment; given little or no feedback; being yelled at or talked to in a hostile manner; being the target of rumors and/or others will not deny the falsity of those rumors, etc.
- b. While some of the aforementioned behavior seems innocuous, employees and employers should be aware of the frequency with which the behaviors occur, whether the behaviors are targeted toward a certain individual or group, and note any escalation of the behavior or incidents. It is significantly easier to address these behaviors early on rather than allow them to become part of the culture.

3. Characteristics

- a. Verbal Abuse
 - i. Shouting, swearing, using foul language, spreading gossip, blaming the employee, threatening job loss, unwarranted criticism, putting employee down in front of others, teasing.
- b. Non-verbal Abuse
 - i. Ignoring employee, consistent failure to follow-up, excluding employees from meetings and social events, treating employee rudely, unreasonable work demands, rolling eyes.

4. Harassment vs. Bullying

- a. Harassment or discrimination in the legal sense involves actions or inactions taken against an individual for legally impermissible reasons (race, color, sex, age, religion, national origin, disability status, military status).
- b. Bullying often does not occur because of a protected status, which can make it difficult to pursue legally.

5. **Personality Clashes vs. Bullying**

- a. **Clash in perceptions, goals or values versus attempts to demean a co-worker.**
- b. **Does anyone stand to gain out of the interaction?**



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
- Model Personnel Policies
- 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
- Fleet Risk Control
- Loss Control Surveys
- Flood Risk Control
- Departmental Risk Control Training

CORSA Loss Control Staff:

Frank Hatfield
Risk Control Manager
614-220-0639 (office)
614-560-1474 (cell)
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

HR Helpline:

Counties located north of I-70
Mazanec, Raskin and Ryder
Tami Hannon
440-424-0009

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 Policy Models
- Policy Development with LLRMI
- Policy Review & Revision with LLRMI
- Training Seminars
- Online Training from LLRMI (Bridge)
- MILO Training Simulator
- Leadership Perspective Classes
- NAMI Classes
- Performance Reviews for Law Enforcement & Corrections Operations
- Law Enforcement & Corrections Help Desk
- HR Helpline for employee issues
- Online Training (CORS University)

CORSA Loss Control Staff:

Frank Hatfield
Risk Control Manager
614-220-0639 (office)
614-560-1474 (cell)
fhatfield@ccao.org

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

MILO Training:

Steve Flory
419-769-1133
countylinefirearms@yahoo.com

HR Helpline:

Counties located north of I-70
Mazanec, Raskin and Ryder
Tami Hannon
440-424-0009

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

LLRMI/Help Desk:

For more information please
contact Ken Hilty

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