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Not So Fast (Food): Ohio Employer Goes Too Far With Supersized Influence Over His Employees' Voting Decisions

By Brad S. Meyer*

With a hotly debated election season upon us, everyone seems to have an opinion on the candidates and significant ballot issues. While political discussions are common in the workplace, Ohio employers cannot influence their employees' votes.

More specifically, Ohio has a statute limiting an employer's influence over how employees vote on Election Day. Ohio Revised Code 3599.05 makes it illegal for an employer or his agent or a corporation to:

> print or authorize to be printed upon any pay envelopes any statements intended or calculated to influence the political action of his or its employees; or post or exhibit in the establishment or anywhere in or about the establishment any posters, placards, or hand bills containing any threat, notice, or information that if any particular candidate is elected or defeated work in the establishment will cease in whole or in part, or other threats expressed or implied, intended to influence the political opinions or votes of his or its employees.

A violation of this statute is punishable by a fine of $500 – $1,000.

In 2011, the owner of a fast food restaurant violated R.C. 3599.05 when, in the month preceding the election, the employer enclosed a letter containing the company's logo on it with each employee's pay check that stated:

> As the election season is here we wanted you to know which candidates will help our business grow in the future. As you know, the better our business does it enables us to invest in our people and our restaurants. If the right people are elected we will be able to continue with raises and benefits at or above our present levels. If others are elected we will not. As always who you vote for is completely your personal decision and many factors go into your decision.

The letter then listed the candidates the owner believed would help the business move forward.

At least one employee filed a complaint against the owner with local prosecutors. The Ohio Secretary of State investigated the claim and recommended charges against the owner. Ultimately, the owner pled no contest to a violation of R.C. 3599.05 and agreed to pay a $1,000 fine.

Accordingly, Ohio employers must understand that there are limits to the amount of influence they can exert over their employees' choices at the ballot box. If an employer wishes to publish political opinions to their employees, they should consult counsel to help avoid violating the law.

***Brad S. Meyer** practices in all areas of public and private labor and employment law. For more information on political speech in the workplace or other labor and employment questions, please contact Brad at bsm@zrlaw.com or 216.696.4441.

Elections and the Workplace: Employee Time Off for Voting

By Brad E. Bennett*

As Election Day approaches, employers will receive requests from employees for time off from work to go vote. As there is no federal law governing time off for voting, numerous states have enacted laws governing employee leave for voting. In the 29 states that currently have laws providing for voting leave, the requirements vary. For example, 21 of those states require employers to provide paid time off to employees to vote.

The following table summarizes the key aspects of state voting laws:

State	Amount of Time Off	Paid Leave	Can the Employer Designate Hours?	Is the Employee Required to Give Notice of Need for Leave?
Alabama*	Up to 1 hour	Not specified	Yes	Reasonable notice
Alaska*	Not specified	Yes	Not specified	Not specified
Arizona*	Up to 3 hours	Yes	Yes; must be at start/end of shift	1 day
Arkansas	Not specified	Not specified	Must schedule employees so they have time to vote	No
California*	Up to 2 hours without loss of pay	Yes	Time off at start/end of shift, unless otherwise agreed	2 days (if employee knows in advance of his/her need for leave). Employers required to post notice of voting leave rights 10 days prior to election.
Colorado*	Up to 2 hours	Yes	Yes, but must be at start/end of shift if requested	1 day
Georgia*	Up to 2 hours	Not specified	Yes	Reasonable notice
Hawaii*	Up to 2 hours	Yes	Not specified	Not specified
Illinois*	2 hours	Yes	Yes	1 day
Iowa*	Up to 3 hours	Yes	Yes	1 day, in writing
Kansas*	Up to 2 hours	Yes	Yes (except during meal periods)	Not specified
Kentucky	At least 4 hours	Not specified	Yes	1 day
Maryland*	Up to 2 hours	Yes	Not specified	Not specified
Massachusetts *(only certain employers)*	The 2 hours after polls open	Not specified	Not specified	Upon request
Minnesota	Not specified	Yes	Not specified	Not specified
Missouri*	Up to 3 hours	Yes	Yes	1 day
Nebraska*	Up to 2 hours	Yes	Yes	1 day
Nevada*	Up to 3 hours	Yes	Yes	1 day
New Mexico*	2 hours	Not specified	Yes	Not specified

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State	Amount of Time Off	Paid Leave	Can the Employer Designate Hours?	Is the Employee Required to Give Notice of Need for Leave?
New York*	Up to 2 hours without loss of pay	Yes	Time off at start/end of shift, unless otherwise agreed	2 to 10 days. Employers required to post notice of voting leave rights 10 days prior to election.
Ohio	Not specified	Not specified	Not specified	Not specified
Oklahoma*	2 hours, unless more time is needed	Yes	Yes	1 day
South Dakota*	Up to 2 hours	Yes	Yes	Not specified
Tennessee*	Up to 3 hours	Yes	Yes	By noon on the day before Election Day
Texas*	Not specified	Yes	Not specified	Not specified
Utah*	Up to 2 hours	Yes	Yes (unless request is for start/end of shift)	1 day
West Virginia	Up to 3 hours	Yes **	Yes, for certain types of employees	3 days, in writing
Wisconsin	Up to 3 hours	No	Yes	1 day
Wyoming*	1 hour	Yes	Yes	Not specified
*These states do not require employers to provide employees with leave if the employee has adequate time outside of work hours to make it to the polls and vote.				
**Time off in West Virginia may be unpaid if the employee has 3 or more hours of time away from work during poll hours, or if the employee fails to actually vote.				
Note: North Dakota has a law encouraging, but not requiring, employers to provide employees with time to vote when the employee's schedule conflicts with poll hours.				

In addition to the state laws summarized above, employers also should know about any local ordinances relating to employee time off for voting. With Election Day fast approaching, employers should understand the validity of an employee request for time off to vote and prepare for the impact of any voting-related absences upon business operations.

AS THERE IS NO FEDERAL LAW GOVERNING TIME OFF FOR VOTING, NUMEROUS STATES HAVE ENACTED LAWS GOVERNING EMPLOYEE LEAVE FOR VOTING.

***Brad E. Bennett** practices in all areas of public and private labor and employment law. For more information on employee leave or other labor and employment questions, please contact Brad at beb@zrlaw.com or 614.224.4411.

EEOC Changes the Notice Employers are Required to Provide Employees Participating in an Employee Health Program

By Patrick J. Hoban*

The Equal Employment Opportunity Commission ("EEOC") recently published final rules under the Americans with Disabilities Act ("ADA") for employers who offer certain wellness programs that collect employee health information. Specifically, the EEOC detailed what type of notice employers must provide regarding the use of employee health information. According to the EEOC, the new rules ensure that Employee Health Programs ("EHPs") "are reasonably designed to promote health and prevent disease, that they are voluntary, and that employee medical information is kept confidential."

Generally, the ADA prohibits employers with 15 or more employees from discriminating against individuals on the basis of a disability. To prevent such discrimination, the ADA restricts employers with respect to obtaining medical information from employees and applicants. Notwithstanding the general restriction, however, the ADA permits employers to make certain inquiries of employees regarding their health and to conduct medical exams of employees when such requests are part of voluntary EHPs.

Voluntary EHPs encompass health promotion and disease prevention programs and activities offered to employees as part of an employer sponsored health plan or as a benefit of employment. The EEOC promulgated the new rules to guide employers who may offer incentives to employees to participate in wellness programs that require them to answer disability-related inquiries or undergo a medical examination.

Under the ADA, participation in an EHP must be voluntary. An EHP is voluntary if: (1) it does not require employees to participate; (2) it does not deny coverage under any of its group health plans or limit the extent of benefits (with some limited exceptions) due to non-participation; (3) it does not result in any adverse employment action or retaliation against any employees; and (4) it provides notice to employees regarding the use of their health information.

The new rules issued by the EEOC provide employers further guidance on the fourth prong of the voluntary test – the notice requirement. While the EEOC provides a **Sample Notice for Employee-Sponsored Wellness Programs**, employers are not required to use the EEOC sample. Under the new rules, an employer is required to provide employees with notice that: "(A) is written so that the employee from whom medical information is being obtained is reasonably likely to understand it; (B) describes the type of medical information that will be obtained and the specific purposes for which the medial information will be used; and (C) describes the restrictions on the disclosure of the employee's medical information, the employer representatives or other parties with whom the information will be shared, and the methods that the covered entity will use to ensure that medical information is not improperly disclosed (including whether it complies with the measures set forth in the HIPAA regulations)."

After much debate, the EEOC declined to include a requirement that employees participating in EHPs provide prior written and knowing confirmation that their participation is voluntary. In making its determination, the EEOC sought to ensure that no employee unwittingly authorized the dissemination of confidential and protected information, while refusing to place unwieldy burdens on an employer. In order to balance those competing interests, the EEOC ruled that "a covered entity may not require an employee to agree to the sale, exchange, sharing, transfer, or other disclosure of medical information, or to waive confidentially protections available under the ADA as a condition for participating in a wellness program or receiving a wellness program incentive."

The EEOC rules go into effect on the first day of the first plan year for benefits beginning on or after January 1, 2017. With open enrollments quickly approaching, it is important for employers to make sure they are familiar with the new EEOC rules. Employers can expect the EEOC and employee groups to enforce compliance with the new notice rules through litigation.

Employers also must understand that this is just one of the rules that govern EHPs. Implementation of these programs requires compliance with a host of laws and regulations, including but not limited to: HIPAA, Title II of GINA (also enforced by the EEOC), the Affordable Care Act and others.

***Patrick J. Hoban** practices in all areas of employment and labor law. If you have questions about employee health programs or other employment and labor law issues, please contact Pat (pjh@zrlaw.com) at 216.696.4441.

Religious Discrimination on the Horizon: EEOC Targets Enforcement

By Drew C. Piersall*

In a series of moves, the Equal Employment Opportunity Commission ("EEOC") recently demonstrated its intent to pursue religious discrimination claims more actively. In July, the EEOC released a fact sheet "designed to help younger workers understand their rights and responsibilities" under anti-discrimination laws. The EEOC also announced its improved coordination with the Department of Labor ("DOL") to prevent religious discrimination among federal contractors and subcontractors.

Title VII of the Civil Rights Act of 1964 ("Title VII") forbids religious discrimination. Specifically, the statute's "disparate treatment" provision prohibits employers from failing/refusing to hire, discharging, or otherwise discriminating against an applicant/employee "because of" the applicant's/employee's religion. Title VII defines religion to include all aspects of religious observance, practice, and belief.

Religious disparate treatment claims often arise in the form of "failure to accommodate" allegations. Generally, to succeed on a failure to accommodate claim, the applicant/employee initially must prove that: (1) he/she holds a sincere religious belief that conflicts with a job requirement; (2) he/she informed the employer about the conflict; and (3) the employer discharged or disciplined the applicant/employee for failing to comply with the conflicting job requirement.

Title VII defines religious belief broadly. For example, one court acknowledged that Title VII provides atheists with the same protections as members of other religions and found a plaintiff's atheistic beliefs sincere. *See Mathis v. Christian Heating and Air Conditioning, Inc.*, 158 F. Supp. 3d 317 (E.D. Pa. 2016). There, the plaintiff's atheistic beliefs conflicted with a job requirement to wear an I.D. badge that included a religious mission statement.

The United States Supreme Court recently relieved applicants/employees from demonstrating, in some cases, that the applicant/employee informed the employer of a conflict between the job requirement and religious belief. In *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015), the Court held the employer does not need specific knowledge of the applicant's/employee's religion or need for accommodation in intentional religious discrimination cases. Rather, an employer who acts with the motive to avoid an applicant's/employee's religious practice or need for religious accommodation – even if based on nothing more than an unsubstantiated suspicion – may violate Title VII. An applicant's/employee's religion cannot be a "motivating factor" in the employer's decision.

If an applicant/employee establishes a prima facie failure to accommodate claim, the employer must show that accommodating the employee would impose an undue hardship on the employer. Undue hardship means more than a *de minimis* cost. Historically, courts have considered accommodations that result in the following undue hardships: requiring an employer to pay overtime; requiring an employer to hire replacement employees; requiring an employer to make additional contributions to insurance and pension funds; requiring an employer to take action that compromises schedule or seniority systems; and requiring an employer to risk regulatory or criminal sanctions.

In addition, Title VII mandates that an employee cooperate with the employer's attempts to provide a religious accommodation. Courts may be more likely to find undue hardship where the employee refuses to compromise. For example, a FedEx employee insisted that she keep her operations manager position and get all Saturdays off. The company showed such arrangement would have created a safety risk because the company needed all managers available every day during peak season to assist in loading and launching aircraft. The court found that allowing the employee not to work during peak season imposed an undue hardship. *See Burdette v. Federal Express Corp.*, 367 Fed. App'x 628 (6th Cir. 2010).

Employers should address claims of religious discrimination and requests for accommodation carefully and on an individualized basis. In its *Abercrombie & Fitch* decision, the United States Supreme Court concluded Title VII does not demand mere neutrality with regard to religious practices. Rather, "it gives [employees seeking religious accommodations] favored treatment." When evaluating accommodation requests, employers should evaluate carefully the costs of an accommodation, work with the employee to find a solution, and contact employment counsel with questions.

***Drew C. Piersall** practices in all areas of employment and labor law. If you have questions about religious discrimination, accommodations, or the EEOC's enforcement efforts, please contact Drew (dcp@zrlaw.com) at 614.224.4411.

Z&R SHORTS

Please join Z&R in welcoming Scott DeHart to its Employment and Labor Groups.

Scott DeHart's practice will focus on all areas of private and public sector labor and employment law and litigation. Scott graduated *summa cum laude* from New York Law School, where he focused his studies on labor and employment law. As a law student, Scott was selected as Champion of the NKU Grosse Moot Court Competition. Prior to joining Zashin & Rich, Scott pursued a career as a Human Resources practitioner, most recently as a Director of Human Resources at Columbia University. In that capacity, Scott ensured the effective design and administration of a broad range of HR programs and served on the university's collective bargaining team.

Upcoming Speaking Engagements

Monday, November 7, 2016

George S. Crisci presents "*The National Labor Relations Board – Obligations and Compliance*" and "*Other Employment Laws You Need to Know*" at the National Business Institute's Seminar on Human Resource Law from Start to Finish.

Location: The CMBA Conference Center, One Cleveland Center, 1375 E 9th St, Cleveland, Ohio 44114.

Friday, November 18, 2016 | 9:00am – 10:30am

Jonathan J. Downes presents "*FLSA – New Rules and Practical Solutions*" at the CAAO Winter Conference during the 9:00 am – 10:30 am session.

Location: The Embassy Suites Dublin, 5100 Upper Metro Place, Dublin, Ohio 43017.

Thursday, December 8, 2016 | 12:30pm and 1:45pm

George S. Crisci will participate, as the Management Panelist, in the presentation "*A View from the Chair of the National Labor Relations Board.*" The featured panelist will be NLRB Chairman Mark G. Pearce. **Patrick J. Hoban** will participate, as the Management Panelist, in the presentation "*Applying the NLRA to Employer Handbooks and Other Employer Policies.*" The presentations will occur at 12:30 pm and 1:45 pm, as part of the Ohio State Bar Association's "National Labor Relations Board Update: Times and Laws are Changing" seminar.

Location: The Ohio State Bar Association headquarters, 1700 Lake Shore Drive, Columbus, Ohio 43204.

For more information regarding this seminar, please contact Linda Morris – CLE Program Coordinator for the Ohio State Bar Association at 614-487-4408 or email at lmorris@ohiobar.org.