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If It Ain't Broke, Keep Fixing It! USCIS Releases Another Revision of Form I-9

By Scott H. DeHart*

In January, Zashin & Rich reported that the U.S. Citizenship and Immigration Services ("USCIS") had given its Employment Eligibility Verification Form I-9 a "smart" makeover, complete with new features such as drop-down menus, hover text for on-screen instructions, real-time error prompts, and quick response codes. Employers were required to begin using the new version of Form I-9 to verify employment eligibility for new hires on January 22, 2017.

The USCIS has made some additional changes and has issued another new Form I-9. Starting September 18, employers must begin using USCIS's latest revision (which has a revision date of 07/17/2017).

The most-recent revisions to Form I-9 are minimal. References to the "Office of Special Counsel for Immigration-Related Unfair Employment Practices" have been replaced with that office's new name: "Immigrant and Employee Rights Section." The USCIS also removed "the end of" from the phrase "the first day of employment" and made changes to the order of the "List C" acceptable documents that may be submitted for employment authorization.

The USCIS also made corresponding updates to its Handbook for Employers: Guidance for Completing Form I-9 (M-274), which should make the Handbook easier for users to navigate.

Further revisions are expected between now and March 2018, when new regulations will take effect that will necessitate minor changes to the acceptable "List A" documents.

Employers can download a PDF version of the new Form I-9 at the USCIS website, along with instructions about how to complete the form: https://www.uscis.gov/i-9. The new Form I-9 may be completed using a computer and then printed for signing. Employers also may print and complete an alternate version of the form (without any smart features and fillable fields) by hand.

*Scott H. DeHart is a member of the firm's Labor and Employment Groups and practices out of the firm's Columbus, Ohio office. If you have questions regarding the new Form I-9, contact Scott (shd@zrlaw.com) at (614) 224-4411.

CONGRATULATIONS

2018 Best Lawyers List

George Crisci, Jon Dileno, Deanna DiPetta, Jonathan Downes, Amy Keating, Christopher Reynolds, Jonathan Rich, Jeffrey Wedel, Andrew Zashin, Stephen Zashin

Zashin & Rich is pleased to announce that it was named a recipient of the **2017 Smart Business Family Business Achievement Award**

Fire Captains Are Not "Public Employees" Under Ohio Collective Bargaining Law

By Jonathan J. Downes*

Municipalities have struggled for years with the limitations on the exclusions of management positions in police and fire departments from collective bargaining. Supervisors in fire and police safety forces, with limited exceptions, have had bargaining rights in Ohio. The State Employment Relations Board ("SERB") recently provided clarification on the exemptions that apply. Municipalities should consider the clarified standards.

In April, SERB clarified the exemptions from collective bargaining for confidential and management employees in fire and police departments. In 2016, the fire union in West Chester Township, Butler County, petitioned SERB to include the rank of Captain in the union contract. SERB issued a Directive on April 21, 2017, adopting the staff attorney recommendations that the opt-in request for recognition by the West Chester Professional Firefighters, IAFF, be dismissed with prejudice. *In re West Chester Township, Butler County*, Case No. 2016-REP-07-0067 (Apr. 21, 2017).

SERB found that the Fire Bureau and Shift Captains are "confidential" and "management" employees within the meaning of R.C. 4117.01(K) and (L) and are, therefore, excluded from the definition of "public employee" under R.C. Chapter 4117 and are not to be included in the union contract.

The IAFF filed an "Opt-in Request for Recognition" to include the Fire Bureau and Shift Captains in an existing bargaining unit of firefighters. SERB directed the matter to an inquiry. The Township presented testimony and documentary evidence to show that the Captains were "confidential" and/or "management level" employees and should be excluded from the definition of "public employee" in R.C. Chapter 4117. The SERB Report instructs that exclusions to the definition of "public employee" must be construed narrowly, and that the party seeking exclusion bears the burden of establishing it by a preponderance of the evidence. SERB provided specific guideposts for the confidential and management exclusions.

"Confidential employees," a concept borrowed from private sector labor relations under the National Labor Relations Act, are those employees with access to the employer's confidential labor relations information. They must either: (1) work in the personnel offices of a public employer and deal with information to be used in collective bargaining; or (2) work in a close, continuing relationship with public officers or representatives directly participating in collective bargaining on behalf of the employer. SERB accepted the conclusion that Captains are "confidential employees" under the latter prong of the test because of their relationship to the Assistant Fire Chiefs who participate directly in collective bargaining for the employer. The Captains attend biweekly Command Staff meetings where personnel issues are discussed. In negotiations, the Captains provide information, make recommendations, and are sometimes even present at the bargaining table.

"Management-level" employees are top-level, high ranking personnel who perform one or more of the job responsibilities in R.C. 4117.01(L). SERB accepted the determination that Captains may reasonably be required on behalf of their public employer to assist in the preparation for the conduct of collective bargaining negotiations. Here, the Captains provided information and made recommendations, and four of the six Captains had sat at the negotiations table. Their participation at the negotiation table was not a prerequisite to being "management-level" employees, however, given their behind-the-scenes activities throughout the negotiation process.

SERB rejected several other bases presented by the Township in this matter, which may apply in other instances. Under R.C. 4117.01(L), Captains (or others) may be "management-level employees" if they formulate policies on behalf of the employer, "responsibly direct" the implementation of policy, administer the parties' union contract, or have a "major" role in personnel administration.

As the operations of safety forces continue to develop, management must consider the structural application of their organizations. Petitions to amend existing bargaining units can be filed at SERB. Careful application of the standards and the procedural steps must be taken. These cases are fact specific and require careful consideration of these standards.

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When Policies Become Promises: Are Municipal Employers Liable for Promissory Estoppel?

By Sean S. Kelly*

We have all heard the adage, "a promise is a promise." This adage can apply in the employment context and can have unintended consequences for employers.

In legalese, the adage is called promissory estoppel, but it means the same thing. If an employer makes a statement knowing that an employee might rely on it – and the employee makes a decision based on the promise – a court can bind the employer to the promise. These promises can come in various forms, from policies, to statements made during pre-employment screenings, to salary negotiations or disciplinary proceedings.

But there is good news for public-sector entities. The doctrine of promissory estoppel appears to apply only to private-sector employers. That is the holding of an important recent case, *Patterson v. Licking Twp.*, 2017-Ohio-5803 (5th Dist.).

Charles Patterson, an employee of Licking Township, did not have a formal employment agreement. During his employment, however, the Township adopted written Personnel Policies and Procedures. Through 2010, the Township reimbursed employees at the standard hourly rate for up to 15 unused sick days at the end of each year. In 2011, the Township changed its policies to provide a single $500 attendance bonus to employees who had not used any of their 15 sick days.

Patterson had stellar attendance. In 2010, under the old policy, Licking Township paid Patterson $2,040 for 120 hours of unused sick leave. After changing the policy, Licking Township paid Patterson $500 each year from 2011 through 2015 for his perfect attendance record.

When Patterson retired, he demanded $6,600 for 45 days of accumulated sick leave. The Township refused, and Patterson filed a lawsuit seeking damages for breach of contract and – you guessed it – promissory estoppel. The Township filed a motion for summary judgment, and the trial court dismissed the case.

On appeal, Patterson argued that the Township's written Personnel Policies and Procedures amounted to an enforceable contract. If the policies were not a contract, Patterson argued that they at least formed an enforceable promise upon which he relied when he remained in the Township's employment.

The court of appeals disagreed. The court first addressed the breach of contract argument. Like any good employee handbook, the policies contained a clear disclaimer. The disclaimer stated that that the Personnel Policies and Procedures are "not to be considered a contract" and "may be changed by the Board of Trustees without notice." In light of this disclaimer, the court refused to find that the policies amounted to a written employment agreement.

But the court went further, granting political subdivisions a blanket exemption from promissory estoppel claims. The court began by stating that a political subdivision cannot be held liable on a theory of promissory or equitable estoppel when it is engaged in a government function. Moreover, the court held that a political subdivision can only be bound by a written contract that has been ratified through proper channels. This is a departure from the rule applicable to private-sector employers, who can face liability for policies contained in handbooks, or statements made during interviews and negotiations.

The court found that Licking Township, a political subdivision, was engaged in a government function when it set policies concerning the compensation of its employees. The Township was, therefore, insulated from liability for promissory estoppel claims.

Public-sector employers should be cautious when relying on this blanket exemption, however. Like private-sector employers, public-sector employers should always include a strong disclaimer in their handbooks and policy documents. They should be wary of including any provisions in employment contracts referring to handbooks or other policies outside the contract. They also should be careful about the representations they make in their interactions with employees. Whether a public or private-sector employer, all employers should be leery of binding themselves unintentionally.

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Massachusetts Court Bluntly Holds an Employer Failed to Consider Off-Duty Medical Marijuana Use as a Reasonable Accommodation

By Patrick M. Watts*

Is an employer required to engage in the "interactive process," and possibly grant a waiver of compliance with its drug-testing policies, to accommodate a prospective employee who uses marijuana for medical purposes? Yes, according to a recent decision from Massachusetts's highest court in *Barbuto v. Advantage Sales and Marketing, LLC*, 78 N.E.3d 37 (Mass. Jul. 17, 2017).

As background, in 2012, Massachusetts's voters approved a statute that protected "qualifying patients" (i.e. those diagnosed by a licensed physician as having a debilitating medical condition) from being arrested, prosecuted, or facing any civil penalty for the medical use of marijuana. Qualifying patients receive registration cards and are limited in the amount of marijuana they may possess for treatment purposes. The act provides that such persons "shall not be penalized . . . in any manner, or denied any right or privilege, for such actions." Massachusetts is one of twenty-nine U.S. states that have enacted statutes to legalize the medical use of marijuana, including Ohio (see H.B. 523, effective September 8, 2016). However, under federal law, marijuana remains a "Schedule I" controlled substance under the Controlled Substances Act, 21 U.S.C. § 812(b)(1), and the possession of marijuana is a federal crime regardless of whether it is prescribed by a physician for medical use.

In an opinion applying and interpreting the Massachusetts state law, the Massachusetts Supreme Judicial Court reversed the dismissal of an employee's claims, concluding that she had alleged a facially-valid claim of disability discrimination because her employer terminated her after she tested positive for marijuana in a pre-employment drug screen. The decision might have significant trend-setting implications in other states where the use of medical marijuana has been legalized, and may influence future marijuana-related discrimination cases arising under state and federal disability discrimination laws, including the Americans with Disabilities Act.

In *Barbuto*, after the plaintiff accepted an offer of employment, she was informed that she would be required to take a drug test. She then candidly disclosed she would test positive for marijuana. The plaintiff explained she had been diagnosed with Crohn's disease, a debilitating gastrointestinal condition, and her physician had certified she should use marijuana for medicinal purposes.

To mitigate the symptoms of Crohn's disease, the plaintiff typically consumed marijuana in small quantities at her home, usually in the evening, two or three times per week. Her condition, along with concomitant symptoms of irritable bowel syndrome, left her with "little to no appetite" and she had difficulty maintaining a healthy weight. However, after beginning to take medical marijuana, the plaintiff had gained fifteen pounds and had been able to maintain a healthy weight. The plaintiff told the employer's representative she did not use marijuana daily, nor would she consume it before work or at work.

Initially, the employer's representative told the plaintiff that her marijuana use "should not be a problem," but he would need to confirm with others. He later telephoned the plaintiff again to confirm that her lawful use of marijuana would not be an issue. Shortly thereafter, the plaintiff completed her pre-employment urinalysis drug screening, attended a training program, and even completed her first day of work.

On the evening of her first day, however, the employer's human resources representative contacted the plaintiff and informed her that she was being terminated for testing positive for marijuana. The representative noted that the lawful nature of the plaintiff's use of marijuana was immaterial because the employer followed "federal law, not state law."

The plaintiff filed a discrimination charge with the Massachusetts Commission Against Discrimination, which has jurisdiction to investigate charges filed under the state's anti-discrimination statutes. The plaintiff later withdrew her charge and filed a complaint directly in Massachusetts state court. She claimed that the employer and its human resources representative personally engaged in "handicap discrimination" against her in violation of state law. The Superior Court dismissed the plaintiff's anti-discrimination claim in favor of the employer, and the plaintiff appealed her case to Massachusetts's highest court.

The Massachusetts Supreme Judicial Court analyzed the state's anti-discrimination statutes, which prohibit any employer from dismissing or refusing to hire a person "because of [her] handicap" if she is qualified and capable of performing the essential functions of the position with accommodations that are reasonable and pose no undue hardship to the employer.

The plaintiff alleged that she was handicapped by her Crohn's disease, but was capable of performing the essential functions of her position with a reasonable accommodation – i.e., a waiver of the employer's policy that bars anyone from employment if he or she tests positive for marijuana. Citing specifically the

deleterious effects of her medical conditions on her appetite and weight, the court had no trouble finding the plaintiff to be a "handicapped person" under state law. The plaintiff also clearly suffered an adverse employment action vis-à-vis her termination. Accordingly, the question of whether she adequately stated a claim for disability discrimination essentially turned on whether her requested "accommodation" was reasonable on its face. Although the court noted an absence of "hard and fast" rules of reasonability and emphasized the contextual nature of the analysis, it characterized the plaintiff's burden as one of showing that her requested accommodation was "feasible for the employer under the circumstances."

The employer raised two primary arguments in opposition to the plaintiff's claims. It argued that: (1) because medical marijuana use is still a punishable federal crime, the requested accommodation was facially unreasonable and therefore the plaintiff was not a "qualified handicapped person" under state law; and (2) even if plaintiff could state a claim for disability discrimination, the employer terminated her employment because she had used marijuana and failed a drug test that all employees are required to pass, and not due to her "handicap" status (Crohn's disease). The court rejected both arguments.

First, the court noted that employers have no sound reason to interfere with an employee taking medication to alleviate or manage a debilitating medical condition, and should not terminate an employee for using such medication. Also, if an employer's drug policy prohibits the use of a particular medication, that policy does not alleviate the employer of its duty to engage in the interactive process with the employee to attempt to identify equally effective alternative treatments that would not violate the policy.

Even where no such alternative treatment exists, the employer still carries the burden of showing that a waiver of its drug policy would cause an "undue hardship" to the employer's business to justify its refusal to make an exception. Even though marijuana remains a Schedule I controlled substance under federal law, that status did not make the plaintiff's request "facially unreasonable," nor did it relieve the employer of its obligation to engage in an interactive process before terminating the plaintiff's employment. The employer's failure to engage in such a process was sufficient to support the facial validity of the plaintiff's claim.

As to the employer's second argument, the court explained that terminating an employee for the use of a certain medication to alleviate or manage a handicapping medical condition is the same as a denial of employment because of the handicap. The court likened the employer's conduct to an employer separating a diabetic employee because its policy barred the use of insulin.

The court did leave the door open for the employer to produce evidence of an "undue hardship" justifying its denial of a waiver of its drug policy for the plaintiff's marijuana use. For example, allowing the plaintiff's use of medical marijuana would not be a reasonable accommodation if it was shown to impair the performance of her work; pose an "unacceptable significant" safety risk to the public, the employee, or her coworkers; or violate a contractual or statutory obligation. As to this third basis for denying such a waiver as an accommodation, the court specifically referenced U.S. Department of Transportation regulations that prohibit any safety-sensitive employee subject to drug testing under those regulations from using marijuana (see 49 C.F.R. §§ 40.1(b), 40.11(a)). The court also noted that federal contractors and federal grant recipients are obligated to comply with the Drug Free Workplace Act, 41 U.S.C. §§ 8102(a), 8103(a), which prohibits employees from using controlled substances in the workplace and requires employers to make a good-faith effort to have a drug-free workplace. The court hinted that this argument might be unavailing for the employer, however, as nothing in the Massachusetts marijuana legalization statute required employers to allow employees to use marijuana on-duty and/or in the workplace.

Fortunately for Ohio employers, Ohio's recently-enacted medical marijuana law states, in part, that nothing in the law: (1) "Requires an employer to permit or accommodate an employee's use, possession, or distribution of medical marijuana;" (2) "Prohibits an employer from refusing to hire, discharging, disciplining, or otherwise taking an adverse employment action against a person with respect to hire, tenure, terms, conditions, or privileges of employment because of that person's use, possession, or distribution of medical marijuana;" or (3) "Prohibits an employer from establishing and enforcing a drug testing policy, drug-free workplace policy, or zero-tolerance drug policy." R.C. 3796.28. However, as more states legalize medical or recreational marijuana and more courts address marijuana-related discrimination claims – raised under both state and federal laws – all employers should keep apprised of legal developments. Otherwise, they may be in for a major buzzkill.

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Leveling the Fee-Shifting Playing Field: Can Ohio Employers Now Recover Fees and Costs after Defending against a Discrimination Charge?

By Ami J. Patel*

A recent change to Ohio's anti-discrimination statutes has opened the door for Ohio employers to potentially recover attorney's fees and costs from plaintiff employees after mounting a successful defense against charges of employment discrimination.

The new law – Substitute House Bill 463 – passed the 131st General Assembly on December 8, 2016 and went into effect on April 6, 2017. Among the various provisions of H.B. 463, which also amended other unrelated sections of the Ohio Revised Code, the Ohio Legislature added new language to a section of Ohio's anti-discrimination statutes. The new language, which can be found in R.C. 4112.05(H), provides:

> If, upon all the evidence presented at a hearing under division (B) of this section on a charge, the commission finds that a respondent has not engaged in any unlawful discriminatory practice against the complainant or others, it may award to the respondent reasonable attorney's fees to the extent provided in 5 U.S.C. 504 and accompanying regulations.

Under this new provision, the Ohio Civil Rights Commission ("OCRC") now has discretion to award attorney's fees and costs to Ohio employers if, after a hearing, the OCRC finds that the employer did not unlawfully discriminate against the employee who filed the charge of discrimination.

Fee Shifting and the "American Rule"

Generally, each party to a legal dispute is responsible for paying for its own legal expenses, a principle that courts across the country refer to as the "American Rule" (as opposed to the "English Rule," under which fee shifting is common). Under this American Rule, a prevailing party usually cannot force the opposing party to pay the attorney's fees it has incurred in connection with the parties' dispute. As with many legal principles, of course, there are important exceptions. Parties may be able to obtain costs and attorney's fees from the opposing party if a court has awarded a judgment of punitive damages in the case, or if the plaintiff's claims were frivolous or brought in bad faith. Attorney's fees and costs are also routinely recovered from the losing party where there is a contract or a statute that expressly allows for such fee shifting to occur.

Various federal anti-discrimination laws – such as Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act – are notable examples of statutory exceptions to the American Rule in the context of employment-discrimination proceedings. These federal laws contain fee-shifting mechanisms, so that a "prevailing party" (a legal term of art) becomes entitled to recover reasonable attorney's fees from the losing party. For employee plaintiffs who prevail in advancing their claims, this fee shifting is an automatic feature and can represent a significant cost to employers, above and beyond their own expenditures in mounting a defense.

Most state anti-discrimination laws mirror their federal counterparts in both substantive and procedural aspects, and likewise contain fee-shifting provisions. Unfortunately, fee shifting mechanisms for employment discrimination claims are one-sided: the prevailing employee can recover fees and costs for bringing and pursuing the lawsuit, but the employer is not entitled to the same benefit when it prevails. This one-sided design for fee shifting traces its roots to the social policies of the civil rights era. Congress and state legislatures allowed for one-sided fee shifting in employment-related lawsuits to provide a financial incentive to would-be plaintiffs and their lawyers, as a means of encouraging them to help advance emerging civil rights protections.

Does H.B. 463 Signal a New Fee–Trend?

Prior to the enactment of H.B. 463, Ohio's anti-discrimination statutes (which can be found in Revised Code Chapter 4112) permitted only a one-sided fee-shifting mechanism that favored employees. Ohio employees could recover attorney's fees and costs if they prevailed over their employers in a discrimination charge or in a lawsuit, but their employers had no reciprocal right to recover attorney's fees and costs if they prevailed over the employees.

H.B. 463 effects an important change in the law, but it does not fully place employers and employees on equal footing with respect to fee shifting. Under the new language of H.B. 463, the OCRC now has discretion to award attorney's fees and costs to prevailing employers. Thus, the fee shift in favor of employers is not automatic, but depends on case-by-case determination

by the OCRC. The fee shift in favor of employers only applies in actions before the OCRC, and is not a remedy available from Ohio courts.

Because the new fee-shifting provision for employers depends on the OCRC's discretion, it remains to be seen whether employers now have a viable mechanism under R.C. 4112.05(H) to recover fees and costs from unsuccessful employee claimants. The OCRC very well may limit the exercise of its new statutory discretion to extreme circumstances where employees have acted in bad faith or have advanced frivolous claims.

Also, the 132nd General Assembly currently is debating a series of significant substantive changes to Ohio's anti-discrimination laws in the form of Substitute House Bill 2, which was introduced on February 1, 2017. Sub. H.B. 2 is currently under review by the Economic Development, Commerce, and Labor Committee of the Ohio House of Representatives. While the current text of the bill does not vary the new fee-shifting provision of R.C. 4112.05(H), the OCRC's implementation of the current provision might influence the evolution of Sub. H.B. 2 or other future legislation.

The General Assembly's renewed attention to Ohio's anti-discrimination statutes might signal the start of a new trend benefitting employers. On the other hand, the new fee-shifting position of H.B. 463 might turn out to be business-as-usual for Ohio employers. Zashin & Rich will continue to monitor future developments from the OCRC and the General Assembly as Ohio continues to refine its anti-discrimination remedial scheme.

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Z&R SHORTS

Upcoming Speaking Engagements

September 20–22, 2017

Jonathan J. Downes presents *"FLSA and Storms on the Horizon"* at the Ohio GFOA 30th Annual Conference & Membership Meeting at the Cleveland Marriott Downtown in Cleveland, Ohio.

Wednesday, September 27, 2017

Brad E. Bennett presents *"Dealing with Guns, Marijuana, and Background Checks in the Workplace: Top Employment Policies for 2017"* at the 2017 PCSAO Conference at the DoubleTree in Columbus, Ohio.

Monday, October 2, 2017

Jonathan J. Downes presents *"Labor and Employment Law Challenges"* at the Ohio Association Chiefs of Police New Chiefs' Workshop held at the Crowne Plaza Columbus North-Worthington in Columbus, Ohio.

Thursday, October 12, 2017

Stephen S. Zashin presents *"Emerging Issues with Trade Secrets and Non-Competes"* and **George S. Crisci** presents *"Latest Developments from SERBia"* at the Ohio State Bar Association's 54th Annual Midwest Labor and Employment Law Seminar held in Columbus, Ohio.

Tuesday, October 24, 2017

Lisa A. Kainec presents *"Employment Law Hot Topics and Legislative Update"* at the Medina Society for Human Resource Management seminar held at Weymouth Country Club in Medina, Ohio.