



2010 EMPLOYMENT LAW SEMINAR

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- I. Overview of Analysis of Public Employment Issues
- II. Current Public Employment-Related Case Law
- III. Residency Law
- IV. Civil Service Law Update and Issues



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I. Overview of Analysis of Public Employment Issues

Analysis of issues involving public employees and public positions is much more complicated than in the private sector. A virtual maze of statutes, rules, regulations, and court rulings exists at the local, state, and federal levels that must be navigated.



- A. Is employee or position covered by a collective bargaining agreement ("CBA")? (Caveat: The CBA may incorporate provisions of municipal civil service regulations, state code, or municipal ordinance provisions on various issues.) CBA provisions supersede local law on issues that are covered by the CBA, even municipal charter provisions.



B. If employee/position is not covered by a CBA, the CBA is silent on the issue, or CBA incorporates civil service rules, is employee/position a *classified* civil service position, as opposed to unclassified? If classified, civil service rules govern. Where civil service rules are silent, municipal charter and ordinances and/or state statute (generally Ohio Revised Code Chapter 124) for answers.



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- C. If employee/position is unclassified, review of all pertinent municipal charter and ordinances must be made for guidance, as well as state statutes where charter and ordinances are silent. (Caveat: There may be some issues where courts have held that state law supersedes local law -- e.g., residency of public employees and transfer of vacation leave.)



- D. Depending upon the nature of issue, there may be state statutory law, as written and interpreted by the courts, that should be considered --e.g., state civil rights laws.



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- E. Finally, always be aware that the issue involved may be governed by federal constitutional and statutory law that will always supersede both local and state law on an issue -- e.g., overtime, compensatory time, family medical leave, and civil rights laws -- unless federal law expressly makes exceptions for local governments.



II. Current Public Employment-Related Case Law

A. Civil Rights & Title VII

- *Ricci v. DeStefano* (2009), 129 S.Ct. 2658
 - » In 5 to 4 decision U.S. Supreme Court reversed and remanded case finding the city's decision to abandon its firefighter promotional list was race-based and impermissible under Title VII unless city demonstrates strong basis in evidence that had it not taken the action, it would have been liable under the disparate theory of liability under Title VII.





- *U.S v. City of New York*, 2010 WL 234768 (E.D.N.Y)
 - » Federal district judge held City intentionally discriminated against minority candidates for firefighter in its tests for position over eight-year period after seeing the low minority hiring numbers. No evidence of intentional discrimination.



B. Civil Service

- *Dworning v. Euclid* (2008), 119 Ohio St.3d 83
 - » “a public employee alleging employment discrimination in violation of R.C. Chapter 4112 need not exhaust the administrative remedy of appeal to a civil service commission before pursuing the civil action allowed in R.C. 4112.99”; and
 - » “Until the General Assembly expressly incorporates an exhaustion requirement into R.C. Chapter 4112, we have no basis for requiring it as a matter of course to those workers who have available civil service remedies.”



C. Residency

- *City of Lima v. State of Ohio* (2009), 122 Ohio St.3d 155
 - » The decision prevents municipalities from requiring employees to live within municipality which employs them as being a violation of O.R.C. 9.481. Any power of local self government, pursuant to Ohio Const. Art. XVIII, § 3, cannot “limit or impair” the rights afforded employees by state laws passed pursuant to Ohio Const. Art. II, § 34.





- *Paxson v. Dayton* (Montgomery Cty. 2009), 183 Ohio App.3d 89
 - » Court upheld city employee's discharge for violation of city residency ordinance that occurred prior to effective date of O.R.C. 9.481, but where civil service appeal decision to uphold discharge was after statute's effective date. O.R.C. 9.481 was not applied retroactively.





D. Sovereign Immunity from Employee Tort Claim

- *Price v. Austintown Local School Dist. Bd. of Edn.* (Mahoning Cty. 2008), 178 Ohio App.3d 256
 - » In defamation and malicious prosecution case by employee charged with theft in office, court of appeals reversed trial court concluding:
 1. political subdivisions are immune from liability from intentional tort claims;
 2. defamation claim was based on activities related to governmental function and there is no applicable exception to general rule of immunity that is afforded to governmental actions.



III. Residency Law

A. The Statute

- R.C. 9.481 Residency requirements prohibited for certain employees.

(B)(1) Except as otherwise provided in division (B)(2) of this section, no political subdivision shall require any of its employees, as a condition of employment, to reside in any specific area of the state.



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(b) To ensure adequate response times by certain employees of political subdivisions to emergencies or disasters while ensuring that those employees generally are free to reside throughout the state, the electors of any political subdivision may file an initiative petition to submit a local law to the electorate, or the legislative authority of the political subdivision may adopt an ordinance or resolution, that requires any individual employed by that political subdivision, as a condition of employment, to reside either in the county where the political subdivision is located or in any adjacent county in this state.

* * *



(C) Except as otherwise provided in division (B)(2) of this section, employees of political subdivisions of this state have the right to reside any place they desire.



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B. The Case Law

1. *City of Lima v. State of Ohio* (2009), 122 Ohio St.3d 155. (Also, cities of Akron, Cleveland, Dayton, Toledo and Warren)
2. *Paxson v. Dayton* (Montgomery Cty. 2009), 183 Ohio App.3d 89. (R.C. 9.481 not applied to final decision of discharge by civil service commission where initial decision before statute's effective date.)



C. Can a municipality enforce a residency requirement through a term in an employment contract? Likely not a contract entered into after effective date of R.C. 9.481.



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IV. Civil Service Law Update and Issues

Issues & Possible Amendments to Civil Service Rules

1. Specify “assessment centers” as type of examination in local rules
2. Make absolutely clear that neither temporary nor provisional appointment becomes permanent except upon conditions specified by municipality.





3. Amend language to include a reason for discipline being: “violation of any policy or work rule of the appointing authority or the appointing authority’s designee”.
4. Certain safety sensitive positions in government can require citizenship as a prerequisite to employment.
5. Use the term “uniformed services” in lieu of “armed forces” for purposes of extra credits on examinations. Define “uniformed services”.



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6. For purposes of a basis for layoff, define the term “lack of funds” which is often undefined in local rules.
7. Address issue of “last chance agreements” in rules.
8. Reference to “whistleblowers” statute in rules.



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9. Provide for appointing authority to exercise discretion to place an employee charged with a felony on unpaid administrative leave for an indefinite period of time until felony charge is resolved.





10. Ohio Revised Code 124.44 now gives City authority to require longer than a 12-month tenure as a prerequisite for promotions in police departments.



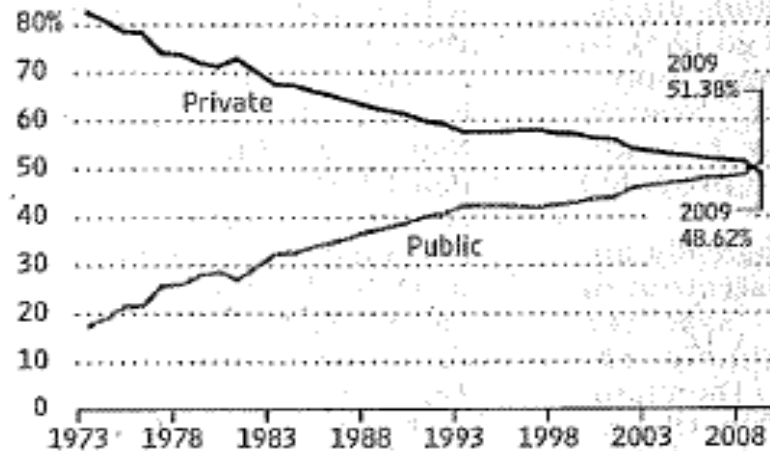
11. Ohio Revised Code 124.45 now provides tenure of 48 months, rather than 24 months, for fire fighter to be eligible for a promotion to a higher rank in fire departments.





Labor's Changing Membership

Private versus public employee share of overall union workforce, since 1973



Source: Bureau of Labor Statistics

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