



Section XI

workplace law

“The right to work, I had assumed, was the most precious liberty that man possesses. Man has indeed as much right to work as he has to live, to be free, to own property.”

– **Barsky v. Board of Regents, 347 U.S. 442, 472 (1954)(Douglas, J. dissenting)**

Employment is regulated to a great extent by both state and federal laws. In many instances, federal laws are limited in the scope of their coverage. Some federal workplace laws may apply to companies of a certain size or dollar volume of business while others are limited to a particular industry.

States have authority to adopt workplace regulations affecting employers of any size, so long as they do not intrude into areas of exclusive federal jurisdiction or conflict with federal laws covering the same subject matter. States may enact laws which provide employees with more rights than federal law gives, but they may not take away federal rights.

Major Workplace Laws: Statutory and Case (or “Common”) Law

Both state and federal laws regulate the conduct of employers and in so doing give rights and protections to employees. There are two sources for these laws. Some, such as Title VII and the Ohio Civil Rights Act are statutory, that is, laws enacted by the legislature. The second type evolves from case law as decided by the courts. Court-created laws are called *common law*.

Federal Law

Federal law covers a variety of employment issues, including discrimination and harassment based on age, race, religion, color, sex, national origin, or physical or mental disabilities. Ohio

law also addresses civil rights issues that arise in the work place; some of these are discussed later in this chapter. These laws are intended to prevent discrimination and to make victims of discrimination “whole” (so that, insofar as possible, the victims might regain what they had lost). They are not intended to regulate behavior or to be a civility code for the workplace.

• Title VII of the Civil Rights Act of 1964

Title VII prohibits employers from discriminating against applicants and employees on the basis of race, color, religion, sex, pregnancy, childbirth or national origin. It also prohibits employers from retaliating against job applicants or employees who assert their rights under the law. Title VII’s prohibition against discrimination applies to all terms, conditions and privileges of employment, including hiring, firing, compensation, benefits, job assignments, shift assignments, promotions and discipline.

Title VII also prohibits employer practices or qualifications that appear neutral, but disproportionately impact those individuals protected by the law. That is, a job qualification must be a bona fide occupational qualification (for example, requiring that someone being hired to play a male character in a play actually be male, or hiring only females to conduct body searches on female passengers at the airport).

• Title VII’s Prohibition on Harassment

Title VII makes it illegal to harass an individual based on race, color, religion, sex, pregnancy, childbirth or national origin. *Sexual harassment* is any unwelcome, unwanted, and/or uninvited sexual advance, any conduct of a sexual nature, or any conduct based on sex that is severe or pervasive and creates an intimidating, hostile, or offensive working environment.

Any such conduct that an employee finds unwelcome has the potential to be sexual harassment. The harasser can be a supervisor, a manager, a co-worker, or even a non-employee who is on the premises with permission. The U.S. Supreme Court ruled in 1998 that Title VII bars sexual harassment between members of the same sex. Harassment based on age is prohibited by the Age Discrimination in Employment Act of 1967, as amended. Harassment based on disability is prohibited by the Americans with Disabilities Act.

• **Employers Subject to Title VII**

Title VII applies to:

- private employers with 15 or more employees;
- state governments and their political sub-divisions and agencies;
- the federal government;
- employment agencies;
- labor organizations; and
- joint labor-management committees and other training programs.

The Civil Rights Act of 1964 established the U.S. Equal Employment Opportunity Commission (EEOC) to enforce Title VII and other principal federal statutes prohibiting employment discrimination.

Americans with Disabilities Act

The Americans with Disabilities Act (ADA) prohibits most employers from discriminating against a person perceived as disabled or against a person with a *non-disqualifying disability* (a disability that does not affect the person's qualifications for or ability to perform the job). The ADA prohibits such discrimination in any aspect of employment, including job application, interviewing, testing, hiring, job assignments, evaluations, disciplinary actions, training, promotion, medical exams, layoffs, firing, compensation, leave and benefits. The ADA also requires every covered employer to provide reasonable accommodations to a qualified individual with a disability.

In addition, the ADA prohibits employers from refusing to hire someone or discriminating against someone because that person has a record of having a disability or is related to or associates with someone with a disability.

The ADA protects "qualified individuals with disabilities" (QUID), that is, people who have disabilities and are qualified for the jobs that they are either seeking or holding and are able to perform it with or without a reasonable accommodation.

The ADA applies to private employers with 15 or more employees, state and local governments and their agencies, employment agencies and labor unions. The ADA does not apply to the federal government and its agencies.

Age Discrimination in Employment Act

The Age Discrimination in Employment Act (ADEA) prohibits discrimination against employees who are age 40 or older. It also prohibits employers from retaliating against applicants or employees who assert their rights under the ADEA.

The ADEA's prohibition against discrimination applies to all terms and conditions of employment, including hiring, firing, compensation, job assignments, shift assignments, discipline and promotions. The ADEA applies to the federal and state governments and its agencies, private employers with 20 or more employees, employment agencies and labor unions. The ADEA does not apply to private employers with fewer than 20 employees.

Equal Pay Act

The Equal Pay Act (EPA) requires that employers give men and women equal pay for equal work. To be considered "equal," a job must require substantially equal skill, effort and responsibility and be performed under similar working conditions. An employer may, however, pay different salaries to a man and a woman for equal work if the difference is based on a bona fide seniority, merit or an incentive system, or if the difference is based on factors other than gender.

All employers must comply with the Equal Pay Act, including all public and private employers (regardless of the number of employees).

Immigration Reform and Control Act of 1986

The Immigration Reform and Control Act (IRCA) prohibits employers from discriminating against applicants or employees on the basis of their citizenship or national origin. It prohibits discrimination with regard to the terms, conditions and privileges of employment, including hiring, firing, compensation, benefits, job assignments, shift assignments, harassment, promotions and discipline. The IRCA applies to all persons or entities that hire, recruit or refer employees.

The IRCA also makes it illegal for employers to knowingly hire or continue to employ people who are not authorized to work in the United States. Employers must keep records verifying that their employees are authorized to work in the United States.

Uniformed Services Employment and Reemployment Rights Act

The Uniformed Services Employment and Reemployment Rights Act (USERRA) prohibits discrimination based on an employee's or applicant's past, current or future military obligations. It also requires employers to reinstate employees to their former jobs, upon honorable completion of their military duty in the uniformed services. The USERRA applies to all public and private employers.

Uniformed service includes active duty, active duty for training, inactive duty training (such as drills) and initial active duty training, as well as the period an individual is absent from a job for examinations to determine fitness to perform his or her military duty.

USERRA guarantees pension plan benefits that accrued during military service, as well as health benefits for military personnel and their families during military service for up to 18 months.

Separately, the Servicemembers' Civil Relief Act of 2003 (SCRA) requires a delay of any legal proceeding if military service impairs a military member's ability to appear in the proceeding.

Family and Medical Leave Act of 1993

The Family and Medical Leave Act (FMLA) provides certain employees with up to 12 weeks of unpaid, but job-protected, leave per year. While the FMLA does not require the employer to provide paid leave, it does require the employer to continue group health benefits during the leave.

Employees are entitled to family and medical leave under the FMLA if:

- their employer employs 50 or more employees, their employer has 50 or more employees within 75 miles of the work site, or they work for a public agency or private elementary or secondary school;
- they have worked for their employer for at least 12 months; and
- they worked at least 1250 hours during the 12 months before the beginning of the leave.

Employees may take an FMLA leave for:

- the birth or care of a newborn, adopted child, or foster child;
- the care of an immediate family member (spouse, child or parent) with a serious health condition; or
- their own serious health condition that prevents them from performing their job.

An employee may be able to take "intermittent" FMLA leave in small blocks of time that are spaced apart. For example, an employee may need to take one week per month of leave time for treatment of an illness. The employee must demonstrate that taking intermittent leave is medically necessary.

Upon an employee's return from FMLA leave, he or she must return to the same job, or be given an equivalent job. If an employee takes intermittent leave, he or she may be transferred

temporarily to a position that better accommodates the need for short blocks of leave time.

The FMLA does not cover “key” employees (top executives, for example) who must be given leave but not reinstatement when it would cause substantial economic harm to the employer. The theory behind this is that key employees are essential to the smooth functioning of the workplace. If key employees take leave anyway, they are still eligible for continuing health benefits. However, the employer is not obligated to take them back or guarantee that a job suited to their experience will be available if they do return.

Worker Adjustment and Retraining Notification Act

The Worker Adjustment and Retraining Notification Act (WARN) is a federal statute that requires employers of 100 or more full time employees to provide written notice to employees subject to a “mass layoff” or plant closing. This notice must be given in writing 60 days before the layoff or closing. The law defines a “mass layoff” as a reduction in force that results in an employment loss at the *site of employment* of at least 33 percent of the employees during any 30-day period for at least 50 employees. In interpreting the scope of the WARN Act, federal circuit courts have held that it applies to quasi-public employers such as housing authorities as well as private employers.

State Laws

• Employment at Will

In Ohio, an employee is an *employee at will* unless the employee’s relationship with the employer is governed by a contract or protected by law. Most employee handbooks contain a notice that employment is considered at will.

At will means the employee serves at the will of the employer, and the employer is free to terminate the employee at any time, for no reason or for any lawful reason, with or without notice. It is not necessary for the employer to “have cause” to terminate an at-will employee. The employer has no duty to treat employees fairly, only lawfully.

By the same token, an at-will employee is free to resign at any time, for no reason or for any reason, with or without notice. Employees who do not have a contract with the employer, are not in a union, and/or are not in the classified service of public employment are at-will employees subject to termination at any time, regardless of fairness. For example, an employer can terminate a good employee, as long as the employer does not use age, race, national origin, physical or mental disability or some other protected status as the reason for the termination.

An employer’s ability to terminate an employee can be restricted through the use of a contract. A contract can be verbal or even implied from the circumstances of the parties. For example, an employer may be bound by promises made to an employee with respect to termination procedures, reasons for termination or length of employment. If the employee reasonably relies upon these promises and is harmed as a result, the employer may be held responsible. Generally, the burden is on the employee to prove he or she is not an employee at will or that an enforceable promise has been made. A written employment contract may make a clearer statement that the employee is not an employee at will.

Ohio’s Employment Discrimination Laws

Ohio’s employers, employment agencies, employees and job applicants must comply with all applicable federal laws regarding discrimination. However, Ohio also addresses some discrimination issues in its state laws. The *Ohio Revised Code* makes it illegal for employers, labor unions or employment agencies to discriminate against an employee or applicant based on race, color, religion, sex, national origin, non-disqualifying disability, age or ancestry. In fact, it is unlawful, for those reasons, to discriminate against any person directly or indirectly with respect to hiring, tenure, employment terms, conditions or privileges, or by firing any person without just cause.

Labor Unions

Government Employment

Federal Labor Law

Congress passed the National Labor Relations Act (NLRA) after World War II to cover private industries other than transportation. The NLRA guarantees workers the right to form unions. It also ensures the right to engage in collective bargaining, or to negotiate as a group with employers about wages, hours and working conditions. It applies to all employers involved in interstate commerce, except airlines, railroads, agriculture and government. The law also excludes supervisory and managerial employees from coverage. Federal employees are covered by the Federal Labor Relations Act (which addresses labor relations in a specialized area).

The NLRA prohibits employers from interfering with union-organizing efforts. The act also requires employers to negotiate with duly elected union representatives. The act established the National Labor Relations Board (NLRB) to enforce the provisions of the NLRA.

Ohio Labor Law

Ohio law mirrors the NLRA in ensuring the right to engage in union activity, but Ohio law deals only with public employees, which would include those who are employed by a state agency, board, or commission, or by a local government.

Public employees have the right to strike unless their collective bargaining agreement prohibits a strike while the agreement is in force. Certain employees are prohibited by statute from engaging in a work stoppage, including police officers, state hospital employees and public employees engaged in safety and health professions.

Government or public employees are those who work for the federal, state, or local government. Public employees have additional protections in civil service laws as well as the U.S. and Ohio constitutions.

Civil Service Laws

Federal and state civil service laws require that employment decisions are based on merit. Such laws attempt to eliminate political considerations that might be factors in hiring, firing, and other employment decisions. Some jobs, however, are exempt from civil service laws, including high-level policy-making positions. Those without protection, called “unclassified” employees, are those higher-level employees who are appointed by the governor or state agency director and/or whose responsibilities include carrying out the policies of a current political administration. The thinking is that the governor or director, or other officeholder ought to be able to select those high-level employees who will implement their particular policies and terminate those who will not.

Civil service systems include guidelines for recruiting and screening applicants, job classifications based on job duties and protection against arbitrary discipline and discharge. A civil service employee who has completed a probationary period may usually be fired only for cause (for a good reason, such as failing to carry out the duties of the job or violating a workplace rule). This differs from employment at will, where an employer may fire an employee for any lawful reason or for no reason.

State Employment Relations Board

The State Employment Relations Board (SERB), established by statute in 1983, has the exclusive right to remedy alleged unfair labor practices between Ohio's public employers and employee's unions.

Where an employee's claims are founded on rights created or addressed in a *collective bargaining agreement* (union contract), the employee may file a grievance seeking a remedy. Employees can challenge a failure to promote, wrongful discharge or retaliation. If a union refuses to pursue a grievance, the employee may have a claim against the union for breach of the duty of fair representation.

Constitutional Protections

All public employees in Ohio are protected by the U.S. and Ohio constitutions. Public employees have rights to freedom of speech, association, religion and freedom from unlawful search and seizure. In some cases, a government employee also may have a "property" interest (such as a continuing employment contract or tenure) in his or her position, which the government cannot take away without due process. Due process requires notice to the public employee about any disciplinary action to be taken against him or her and a chance to answer charges before the discipline is administered.

Workplace rules lawfully limit a public employee's speech or conduct only when the government's interest in establishing the rules outweighs the interest of the individual. For example, if the speech or conduct disrupts the efficient operation of the government, the employee may lawfully be disciplined.

Wages and Hours

Both federal and state laws govern minimum wages and overtime pay for Ohio employees. When federal law does not cover an employee's claim, state law applies. When both state and federal laws cover a claim, the law with the higher standard controls. For instance, if the state sets a minimum wage that is higher than

the federal minimum wage, the state's minimum wage would control.

Federal Wage and Hour Laws

The federal Fair Labor Standards Act (FLSA) establishes minimum wage, overtime pay, record keeping and child labor standards affecting full-time and part-time workers in the private sector and in federal, state and local governments. The FLSA covers employees who produce, handle or sell goods moved in interstate commerce.

The Wage and Hour Division of the U.S. Department of Labor administers and enforces the FLSA for private, state and local government employees, and most federal employees. Special rules govern the use of compensatory time off in place of overtime pay.

• Minimum Wage

Covered, nonexempt workers are entitled to a minimum wage of not less than \$5.15 an hour (as of January 2002). Nonexempt employees who work more than 40 hours in a work week are entitled to overtime pay at the rate of one-and-one-half times their regular rates of pay.

• Tip Credit

An employer may credit tips employees receive against the employer's minimum wage obligation. In such cases, the employer's cash-wage obligation must be at least \$2.13 an hour. If an employee's tips and cash wages do not equal the minimum hourly wage (\$5.15), the employer must make up the difference.

• Overtime

An employer must pay a nonexempt employee premium pay for overtime work. Employees covered by the FLSA must receive overtime pay for hours worked in excess of 40 in a single workweek at a rate not less than one-and-one-half times their regular rate of pay. There is no legal limit on the number of hours employees aged 16 and older may work in any workweek. The FLSA does not require overtime pay for work on Saturdays, Sundays, holidays,

or regular days of rest. Nor does it require breaks or meal periods.

- **Child Labor**

The FLSA requires that children must be at least 14 years old before they can work at a “real” job. Those younger than 14 can work around the home, baby-sit on an informal basis and deliver newspapers. Children ages 14 and 15 cannot work in manufacturing, mining, construction or the transportation industries. Further, children under the age of 18 cannot work around machinery, or in certain unsafe jobs. Unsafe jobs include cooking or baking in restaurants and working on ladders or scaffolds. In addition, the FLSA limits both the number of hours and the time of day that 14- and 15-year-old children can work.

Ohio Wage and Hour Laws

The Wage and Hour Bureau of the Ohio Department of Commerce administers and enforces Ohio’s minimum wage, child labor and prevailing wage laws. When the FLSA does not cover a matter, then state law applies. When the FLSA sets a higher standard than the state, the FLSA controls. Likewise, if a state sets a higher standard than federal law, the state law controls.

- **Ohio Minimum Wage**

Ohio sets a separate minimum wage rate for employees. Ohio employers must pay a minimum wage of \$6.85 per hour, which will be increased by the rate of inflation beginning in 2008. Almost every Ohio employer is covered by the Ohio minimum wage law, but some employees are not entitled to it.

- **Prevailing Wage Law**

Ohio’s *prevailing wage law* applies to construction projects undertaken by certain public authorities and requires that the public authorities pay the locally prevailing rate of wages to workers on the project. The Director of the Ohio Department of Commerce determines Ohio’s prevailing wage rate.

Workplace Safety

Federal and state laws protect the safety and health of workers while on the job. They also exist to ensure that no job causes long-term health or safety complications.

Occupational Safety and Health Act

The Occupational Safety and Health Act (OSHA) is a federal law designed to ensure, to the extent possible, safe and healthful working conditions for all employees. The act applies to almost all private-sector employees and federal workers except military personnel. (State employees are covered by PERRP, as explained below.)

The Act requires employers to:

- provide a workplace that is free of known hazards that are likely to (or do) subject employees to death or serious physical harm;
- comply with the safety and health standards adopted by OSHA; and
- maintain a log and summary of all occupational injuries and illnesses.

Surface Transportation Assistance Act

The Surface Transportation Assistance Act (STAA) is a federal law that says an employer may not fire or discipline an employee for refusing to operate a commercial motor vehicle (CMV) if the employee reasonably believes that, by operating the vehicle, he or she would violate a federal regulation, standard, or order regarding commercial motor vehicle safety or health.

Ohio Workplace Safety Laws

The Public Employment Risk Reduction Program (PERRP) ensures that public employees in Ohio are provided with a safe and healthful working environment. The law does not cover peace officers, firefighters, and correctional officers in county or municipal correctional institutions.

Ohio law is similar to OSHA in that it allows a public employee, acting in good faith, to refuse to work in conditions presenting imminent danger when the conditions do not normally exist for that particular occupation. While Ohio's private sector employers are subject to federal OSHA regulations, Ohio's PERRP covers public employees (that is, those who work for state or local governments, and, thus, are not covered by OSHA).

Ohio's Case Law Prohibiting Sexual Harassment

Sexual harassment on the job is prohibited by both state and federal statutes. It is also dealt with in case law, and an employee may bring such a claim to court as a common law tort. In Ohio, an employer has a duty to provide employees with a safe working environment. In 1991, the Supreme Court of Ohio broadly interpreted this duty to require an employer to prevent employees from intentionally harming others or creating an unreasonable risk of bodily harm. An employer that knows or has reason to know that an employee poses a risk may be liable for failing to take appropriate action to prevent the harm.

This duty extends to an employer's obligation to prevent sexual harassment. If there is evidence that an employer knew or should have known that an employee had a past history of sexually harassing behavior, the employer may be liable to an employee who brings a claim of workplace sexual harassment.

Workers' Compensation

Workers' compensation laws provide money to pay for medical expenses and replace lost income due to on-the-job injuries and illnesses. The employee is not required to prove that the injuries were caused by some negligence of the employer in order to recover under workers' compensation laws. Employers are liable even if they are not at fault.

Under Ohio's workers' compensation law, participating employers pay workers' compensation premiums into a state fund. The Ohio Bureau of Workers' Compensation (OBWC) administers the fund, and an employee who is injured in the course of his or her employment may apply for and receive benefits out of the fund. The employee may not make a direct claim against his or her employer except in the case of intentional torts, discussed below. In other words, employers who comply with Ohio's workers' compensation laws generally cannot be sued in court for negligence.

Pension and Welfare Laws Affecting Employment

Federal and state laws protect the money people invest in public and private retirement plans.

Employee Retirement Income Security Act of 1974

The Employee Retirement Income Security Act of 1974 (ERISA) is a federal law that sets minimum standards for pension plans in private industry. ERISA does not require any employer to establish a pension plan. It only requires that those who establish plans must meet certain minimum standards. The law generally does not specify how much money a participant must be paid as a benefit.

Social Security

The federal Social Security program allows workers and employers to contribute a part of their earnings to provide financial protection for themselves and their families if certain events, such as retirement and disability, occur. Each worker pays Social Security taxes and earns the right to receive Social Security benefits without regard to need. Though the Social Security program is often thought of as a retirement

program, nearly 40 percent of current Social Security beneficiaries are non-retirees.

For people who have not earned enough work credits under Social Security to qualify for benefits, or whose Social Security benefits are very low, Supplemental Security Income (SSI) payments may be available. The program makes monthly payments to people who have limited income and resources if they are 65 or older or if they are blind or have another physical or mental disability. Children as well as adults can get benefits because of disability.

Privacy On and Off the Job

Computers and other Electronics

Employees are generally entitled to a “reasonable expectation of privacy” and to be free from wrongful intrusion into their private activities.

Employers also have the right to monitor and control employees’ use of the Internet, e-mail, or Web sites. Because employers must comply with federal and state workplace regulations and have duties to protect their employees from certain actions, including sexual harassment, they can prohibit an employee’s use of the Internet and e-mail to access or distribute unacceptable content. Employers usually have policies that inform their employees about what activities are permitted and prohibited. Regardless, employees should not expect privacy when using the Internet or e-mail at work.

An employer’s right to monitor employee conduct off the job and to make decisions based on that conduct is limited. Employees of government and public entities have a constitutional right to privacy. This protects employees from most employer monitoring of or inquiry about off-the-job conduct.

In the private sector, it is generally illegal for an employer to intrude unreasonably into the seclusion of an employee, including places an employee has a reasonable expectation of privacy (the home, for instance), unless there is a legitimate business reason to intrude and the

behavior being monitored is related to the employee’s job. An employer is never allowed to physically enter an employee’s home without consent, even when searching for allegedly stolen employer property.

Employee Testing

Pre-employment tests (skills tests, aptitude tests, psychological tests, personality tests, honesty tests, medical tests or drug tests) can be used in Ohio, but must comport with the Americans with Disabilities Act (ADA). To be legal, the tests must accurately measure an individual’s skills and not his or her disabilities.

Medical Exams and Medical Records

To avoid violating the ADA, employers should not conduct any medical exam or ask an applicant to provide a medical history before making a job offer. Once the employer decides to offer the applicant a job, the employer can make the offer conditional on the applicant passing a medical exam. Any medical exam an employer may require should be required for all entering employees who are doing the same job, and, to satisfy the ADA, the results of the medical exam must remain private.

Drug Tests

The federal and state courts continue shaping laws regarding drug use in the workplace and the practice of testing employees for drugs. The Drug-Free Workplace Act, a federal law passed in 1988, requires that workplaces receiving federal grants or contracts must remain drug free to receive federal funding. It does not require testing or monitoring of workers; neither does it generally prohibit employers from testing employees.

In general, employers have the right to test new job applicants for the presence of drugs in their systems as long as:

- the applicant knows that such testing will be part of the screening process for new employees;
- the employer has already offered the applicant the job;

- all applicants for the same job are tested similarly; and
- the tests are administered by a state-certified laboratory.

In Ohio, the laws on drug testing depend on whether an employee works in the private or public sector or is a member of a union. Public and private employers are prohibited from unlawfully discriminating against employees. Therefore, all employers should ensure that any drug testing is conducted on some basis other than age, disability, sex, race, national origin, ancestry, or religion. Public employers must also ensure that drug testing complies with the Fourth Amendment to the U.S. Constitution. Thus, in the absence of special circumstances, a public employer must have a reasonable suspicion of drug abuse based on specific grounds in order to conduct the drug test. An exception arises when the public employee works in a position that affects public safety or security. In this case, the government can perform drug testing under less rigid standards of selection.

Lie Detector Tests

The federal Employee Polygraph Protection Act generally prohibits private employers from requiring their workers to submit to lie detector tests. However, the law permits testing by businesses that provide armored car services or guard services, or that manufacture, distribute or dispense pharmaceuticals. The law also allows employers in those industries to administer polygraph tests to any workers accused of theft or embezzlement, under certain prescribed conditions.

Whistleblowing and Retaliation

Employer Retaliation

Many federal laws which regulate employment contain specific provisions protecting employees from retaliation for a *protected activity*. Employees can sue for economic, emotional and punitive damages if their

employer subjects them to an adverse employment action for engaging in protected activities.

Employees engage in protected activities when, reasonably and in good faith, they assert their individual employment rights, such as those under OSHA, STAA, Title VII and the ADA.

Examples of protected activity include:

- asking for overtime pay;
- filing a complaint with the Department of Labor;
- reporting sexual harassment;
- serving in the armed forces or reserve;
- consulting or retaining an attorney; or
- applying for medical benefits or leave.

Generally, an employee engages in protected conduct any time he or she exercises an individual right or does something recognized by law as having public importance.

Whistleblowing in Ohio

Ohio has a general “catch-all” *whistleblower* law. Ohio’s whistleblower statute was passed to protect the right of employees to report violations of the law by employers or fellow employees. The protection is available only if the employee strictly follows the law’s provisions.

To be protected when reporting a violation, the employee must:

- be sure that the alleged violation of a state, local or federal statute, ordinance or regulation is one that the employer has authority to correct;
- reasonably believe that the violation is a criminal offense likely to cause physical harm or is a hazard to public health or safety;
- tell a supervisor or other responsible officer about the violation; and
- file a written report with the supervisor or officer that provides enough detail to identify and describe the violation.

If the employer fails, within 24 hours of the complaint, to notify the employee about good faith efforts to correct the violation, then the employee may report the violation to outside authorities.

The law also protects employees who report co-workers' violations of local, state or federal statute, ordinance or regulation, or any work rule or company policy that is a hazard or a crime.

When the Job Ends

Unemployment Compensation

Ohio's unemployment system is an insurance program that helps unemployed workers who are out of work through no fault of their own (for example, due to a *layoff*). Unemployment benefits are paid out of employer taxes.

To be eligible for unemployment compensation an applicant must:

- be unemployed at the time of filing;
- have at least 20 qualifying weeks of covered employment in the base period (first four of the last five completed calendar quarters immediately before the first day of an applicant's benefit year [a 52-consecutive-week period]); and
- have earned, at the time of the discharge, a certain qualifying average weekly wage (this amount changes each year due to cost of living increases).

Severance Pay

Severance pay is a payment or benefit provided by employers to terminated employees. An employer has no obligation to provide severance pay. The only benefit that employers must, by law, provide is unemployment compensation. However, an employer may be obligated to pay severance because of an employment contract or a promise made to an employee or because the employer has a severance plan.

Covenants Not To Compete

A *covenant not to compete* or *non-compete agreement*, as it is more often called, prohibits a former employee from working for a competitor or soliciting customers for a certain period of time after the employment ends. Although these agreements are commonly used for service professionals and commercial salespeople, they are not limited to any particular types of work.

Ohio courts enforce non-compete agreements to the extent necessary to protect the employer's legitimate business interest. An employer can require at-will employees to sign a non-compete agreement in Ohio after their employment has already begun. Continued employment is enough of a benefit to the employee to make the agreement binding. Also, many employers condition severance packages or enhanced severance packages on the employee's signing of a non-compete agreement.

Older Workers' Benefit Protection Act of 1990

The Older Workers Benefit Protection Act (OWBPA) was passed by Congress to protect the rights and benefits of older workers (workers age 40 and over). Under that statute, an employer may obtain a waiver of a departing employee's right to sue the company in exchange for money or some other consideration to which the employee agrees and is not otherwise entitled. The OWBPA creates a series of prerequisites for the employer to follow in order for an employee's waiver to be effective against a claim that the Age Discrimination in Employment Act has been violated.

The Consolidated Omnibus Budget Reconciliation Act of 1985

The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) requires employers with 20 or more employees to allow employees and their dependents to keep their group health coverage for up to 18 months after they lose their jobs or have their work hours reduced. However, employees can be required to pay the full premium cost.

Covering Workplace Law

There are several challenges for journalists covering workplace law. The first challenge involves the scope of employment law and regulations. With both federal and state statutes

guiding employers, the depth and breadth of regulations may take some time and research for the journalist to sort out. Secondly, the intersection of state and federal law is unique in each state, and so journalists are advised to consult with attorneys and other employment experts well-versed in workplace law to understand which laws are controlling and under what

circumstances. Finally, explaining these laws to readers and viewers—and their history—is no small task. But like other parts of the law, the journalists’ role in reporting on workplace law is often one of educator as well as storyteller. Most readers and viewers don’t spend time reading these statutes, though nearly all are affected by the laws’ provisions.

Web Links:

From the OSBA:

OSBA’s “Law You Can Use” articles:

(go to <http://www.ohiobar.org/pub/lycu> and search for article by title or topic)

“Are Noncompetition Agreements Enforceable in Ohio?”

“Civil Rights Commission Investigates Discrimination Cases”

“Employers Have ‘Qualified Privilege’ when Conveying Information about Employees”

“Employers Should Know Extent of Responsibility for Employees’ Injuries”

“Family and Medical Leave: Rights and Responsibilities”

“Immigrants Must Be Authorized to Work in the U.S.”

“Know Your Rights When Faced with Layoff”

“Law Protects Employees from Employer Retaliation”

“Members of the Military Have Civilian Job Protections”

“Understand Employment Rights of Non-Citizens”

“Understanding Recent Changes in Overtime Exemptions”

“What You Should Know about Unemployment Compensation”

“Workers’ Compensation: When Is An Injury or Disease Covered?”

OSBA’s *Legal Basics for Small Business*:

<http://www.ohiobar.org/pub/?articleid=86>

Includes a variety of employment-related articles

From other sources:

<http://www.myemploymentlawyer.com>

Answers to employment law questions from a community of employment lawyers

Continued on Page 100

Web Links: *continued*

<http://www.dol.gov/>

U.S. Department of Labor Web site

(includes information about a wide variety of employment topics)

<http://www.workplacefairness.org/>

The Workplace Fairness Web site

Offers information, education and assistance to workers

<http://www.eeoc.gov/>

The U.S. Equal Employment Opportunity Commission Web site

<http://www.nolo.com/>

Information about employee rights (click on “rights and disputes” tab and choose “employee rights”)

<http://crc.ohio.gov/employment.htm>

Ohio Civil Rights Commission Web site – employment discrimination

<http://www.com.ohio.gov/laws/>

Ohio Department of Commerce Wage and Hour Bureau Web site

<http://www.com.state.oh.us/>

Ohio Department of Commerce Web site

<http://www.ssa.gov/>

U.S. Social Security Administration Web site

<http://jfs.ohio.gov>

Ohio Department of Jobs and Family Services Web site – unemployment information

<http://www.ohiobwc.com>

Ohio Bureau of Workers’ Compensation Web site

<http://das.ohio.gov/>

Ohio Department of Administrative Services Web site – information for state employees