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Portage County Case Marks Major Shift in Picketing Rights

By Kyle Walker and Caesar Schanzenbach

In establishing a uniform set of labor laws to govern the public sector in Ohio, the General Assembly sought to regulate various dispute tactics used by employees and their unions to exert pressure on their employers. One such tactic that R.C. Chapter 4117 seeks to limit is the use of picketing – R.C. 4117.11 (as written) makes it an unfair labor practice for public sector unions or employees to picket within three contexts:

- To picket the place of business of a public employer "on account of any jurisdictional work dispute[.]"[1]
- To "[i]nduce or encourage" others in connection with a labor dispute to picket the private residence or place of private employment of a public official or an employer's representative.[2]
- And "any picketing, striking, or other concerted refusal to work" without written notice to both the employer and the State Employment Relations Board (SERB) at least 10 days prior to the action being taken.[3]

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These restrictions have been subject to controversy as SERB developed its jurisprudence over the decades, with outcomes based on these limitations having been appealed through the courts. R.C. 4117.11(B)(7) and (8) in particular have been challenged multiple times in terms of their constitutionality under the First Amendment. The results of these challenges have been mixed. Prior to a Portage County case in 2022, SERB had been restrained from enforcing both R.C. 4117.11(B)(7) and (8) in Cuyahoga County.[4] In Pike County, SERB had likewise been restricted from enforcing R.C. 4117.11(B)(7).[5] Conversely, the 7th District Court of Appeals in Harrison County upheld (B)(7)'s place of private employment restriction, finding it to be "justified without regard to the content" of the speech being regulated.[6]

The Supreme Court of Ohio has generally been reluctant to approach the constitutional questions surrounding R.C. Chapter 4117's restrictions on picketing. For example, after the 8th District Court of Appeals prohibited the enforcement of both R.C. 4117.11(B)(7) and (8) in Cuyahoga County, the Supreme Court declined to hear SERB's appeal.[7] In the only other context in which the court did elect to hear arguments relating to R.C. 4117.11(B)(8)'s written notice requirement, the majority ultimately rendered judgment without addressing the larger constitutional issue.[8]

In *Mahoning Education Assn.*, employees of the Mahoning County Board of Developmental Disabilities (MCBDD) picketed outside a board meeting for the purpose of expressing "their dissatisfaction with the progress of negotiations" on a new labor contract, following the expiration of their prior one.[9] This action was not in relation to any strike, and the union did not provide the required written notice of its intent to picket.[10] After the MCBDD filed an unfair labor practice charge and SERB held that the picketing violated R.C. 4117.11(B)(8), the union argued before the Mahoning County Common Pleas Court that the statute is presumed unconstitutional as "a content-based restriction on its speech and a prior restraint" on its ability to picket.[11] On the other hand, SERB argued the statute "regulates only conduct" and justified the restriction with the notion of "prepar[ing] for disruptions that picketing might impose on public services."[12]

The trial court agreed with SERB and upheld the constitutionality of the notice restriction, but the 7th District Court of Appeals reversed and dismissed SERB's decision after applying strict scrutiny. The court found the statute was a limitation based on the content of speech.[13] Failing the "compelling state interest" and "narrowly tailored" criteria, the 7th District reversed the earlier decisions and declared R.C. 4117.11(B)(8) unconstitutional.[14] The Supreme Court of Ohio affirmed the dismissal of SERB's initial decision but turned its holding away from questions concerning the statute's constitutionality.[15] Instead, the court resolved the issue through statutory interpretation, concluding that the inclusion of the word "other" in R.C. 4117.11(B)(8) limits the notice requirement to "picketing related to a work stoppage," while the picketing in question was informational in nature.[16]

The Ohio Supreme Court's first limitation on the scope of unfair labor practices thus was not one based on constitutional concerns. The court clarified that the 10-day written notice is only required for picketing actions related to concerted refusals to work. Following *Mahoning Education Assn.*, picketing in the public sector did not come before the court again until 2022. That case involved striking unionized employees of a county board picketing outside the homes of members of the board, and in one case, outside a member's private business.[17]

SERB found the picketing constituted an unfair labor practice in violation of R.C. 4117.11(B)(7).[18] On appeal, the Portage County Court of Common Pleas found the statute constitutional, while the 11th District Court of Appeals reversed – a decision that was at odds with the prior ruling in the Harrison County case and one the

Supreme Court of Ohio chose to review.[19] The threshold question in this case was whether the statute is a content-based or content-neutral regulation.[20] While government restriction of speech will always raise questions regarding the First Amendment, if the speech is regulated in a content-based manner, the action will be subjected to the heightened standard of strict scrutiny.[21] SERB, as in *Mahoning Education Assn.*, argued that the statute was content-neutral, regulating only the time, place and manner of speech, and therefore only incidentally burdening the freedom of speech.[22] Further, SERB argued that the statute is focused on a particular *manner* of expression rather than the expression's content.[23]

The Supreme Court disagreed, finding that the regulation was "based on the content of the message and the identity of the messenger."[24] The court found that the statute regulated actions "in connection with a labor relations dispute."[25] This specificity meant that, on its face, the regulation identified the subject matter being regulated.[26] The court also held that for SERB to determine whether a violation occurred in relation to the statute, the board would need to examine the message being conveyed.[27] Finally, the court noted that not only was the subject matter of expression being regulated by the statute, but the regulation targeted specific speakers, i.e., "an employee organization, its agents, or representatives, or public employees."[28] The Supreme Court found that strict scrutiny applied to its analysis because "R.C. 4117.11(B)(7) is a content-based regulation of speech."[29]

The court only upholds a challenged law under strict scrutiny if the regulation serves a compelling government interest, is narrowly tailored and is thereby the least-restrictive means readily available.[30] In this case, the court found the statute failed to meet all three criteria. It held that SERB and the county board did not advance any compelling government interest despite SERB arguing that protecting the privacy of public officials, thereby encouraging citizens to run for public office, and preserving labor peace in Ohio was compelling.[31] However, in *City of Seven Hills v. Aryan Nations*, the court found that preserving residential peace and privacy, while significant, was not a compelling government interest.[32] Citing that precedent, the court likewise found that encouraging citizens to run for office was not compelling and that preservation of labor peace was too vague.[33]

Even if a compelling interest was served by the picketing restriction, it was held that the statute's means were not the least restrictive available.[34] The court referenced local ordinances and state criminal codes that are enacted for the very purpose of handling disruption and securing privacy in residential areas.[35] Similarly, the court found that there was no evidence that banning picketing outside of the residences and the places of private employment of public officials was the only way to encourage citizens to serve as public officials.[36]

The court also rejected the argument that the statute was similar to the federal prohibition on "secondary picketing."[37] Under federal law and jurisprudence, a union or its agents cannot "threaten, coerce, or restrain" a neutral party engaged in commerce with a primary party to a labor dispute, if an objective of such action is to force the neutral to cease its commerce and it is reasonably expected to threaten "ruin or substantial loss."[38] The court rejected this assertion, finding the analogy inappropriate as the private employer in this case was not doing business with the primary party to the dispute and the union's picketing only caused incidental injury.[39] The majority further reiterated that it had not been established that the statute is narrowly tailored to serve a compelling public interest.[40]

Ultimately, the Ohio Supreme Court found that R.C. 4117.11(B)(7)'s limitations on picketing failed to pass the strict scrutiny test applied to content-based regulations and, accordingly, the law violated the First Amendment. While the court was unanimous in this disposition, Justice Kennedy, joined by Justices Fischer and DeWine, wrote a concurrence that arrived at the conclusion in a different way. This conservative faction stated that the issue with the statute is its prohibition on "*inducing or encouraging* others to picket . . . a residence or place of private employment," not its indirect regulation of picketing itself.[41] In these justices' opinion, the concepts of inducement and encouragement are themselves "speech and expressive conduct," thereby creating the need for the statute to be tested under strict scrutiny.[42]

Both the majority opinion and the concurrence of the court in *Portage County* made it clear that this particular restriction within R.C. Chapter 4117 could not stand in light of the First Amendment. The decision marks a major change in the recognition of picketing rights for public employees and their unions, especially within the context of the Supreme Court's previous tepidity towards this controversial topic. Indeed, picketing as an unfair labor practice in Ohio has been the cause of First Amendment challenges for over 20 years, and this decision reflects a win for public employees – they may peacefully picket outside of their employers' residences or private places of employment, so long as they are not violating any other laws or ordinances. With (B)(7) now in the history books, only time will tell if the court will have another opportunity to return to the Revised Code's still-standing written notice requirement.

About the Authors

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Endnotes

[1] R.C. 4117.11(B)(4).
[2] R.C. 4117.11(B)(7).
[3] R.C. 4117.11(B)(8).
[4] *United Elec., Radio & Machine Workers of Am. v. State Emp. Rels. Bd.*, 126 Ohio App.3d 345, 710 N.E.2d 358 (8th Dist. 1998); 2003 Ohio Att'y.Gen.Ops. No. 2003-019, at 2-144.
[5] *E. Local Classroom Teachers Assn. v. State Emp. Rels. Bd.*, Pike C.P. No. 2006CIV000149 (2006).
[6] *Harrison Hills Teachers Assn. v. State Emp. Relations Bd.*, 2016-Ohio-4661, 56 N.E.3d 986, ¶ 36 (internal quotations omitted).
[7] *United Elec., Radio & Machine Workers of Am. v. State Emp. Rels. Bd.*, 83 Ohio St.3d 1447, 700 N.E.2d 331 (Ohio 1998).
[8] *Mahoning Edn. Assn. of Dev. Disabilities v. State Emp. Rels. Bd.*, 197 Ohio St.3d 257, 2013-Ohio-4654, 998 N.E.2d 1124, ¶ 17-19.
[9] *Id.* at ¶ 6 (internal quotations omitted).
[10] *Id.* at ¶ 6-7.
[11] *Id.* at ¶ 9.
[12] *Id.* at ¶ 10.
[13] *Id.* at ¶ 11.
[14] *Id.*
[15] *Id.* at ¶ 12.
[16] *Id.* at ¶ 15-16.
[17] *Portage Cty. Educators Assn. for Dev. Disabilities–Unit B, OEA/NEA v. State Emp. Rels. Bd.*, 169 Ohio St.3d 167, 2022-Ohio-3167, 202 N.E.3d 690, ¶ 2-4.
[18] *Id.* at ¶ 4.
[19] *Id.* at ¶ 5.
[20] *Id.* at ¶ 14.
[21] *Id.* at ¶ 12.
[22] *Id.* at ¶ 15.
[23] *Id.*
[24] *Id.* at ¶ 17.
[25] *Id.* at ¶ 18 (internal quotations omitted).
[26] *Id.*
[27] *Id.* at ¶ 19.
[28] *Id.* at ¶ 20.
[29] *Id.* at ¶ 23.
[30] *Id.*, 169 Ohio St.3d 167, 2022-Ohio-3167, 202 N.E.3d 690, at ¶ 24.
[31] *Id.* at ¶ 24-25
[32] *City of Seven Hills v. Aryan Nations*, 76 Ohio St.3d 304, 309, 308-309, 667 N.E.2d 942 (1996).
[33] *Portage Cty. Educators Assn.*, 169 Ohio St.3d 167, 2022-Ohio-3167, 202 N.E.3d 690 at ¶ 25.
[34] *Id.* at ¶ 27.
[35] *Id.*
[36] *Id.*
[37] *Id.* at ¶ 30.
[38] National Labor Relations Act, 29 U.S.C. § 158(b)(4)(ii)(B); *NLRB v. Retail Store Emps. Union, Loc. 1001*, 447 U.S. 607, 614-15, 100 S.Ct. 2372, 65 L.Ed.2d 377 (1980).
[39] *Portage Cty. Educators Assn.*, 169 Ohio St.3d 167, 2022-Ohio-3167, 202 N.E.3d 690 at ¶ 30-31.
[40] *Id.* at ¶ 32.
[41] *Id.* at ¶ 43 (Kennedy, J., concurring) (emphasis in original).
[42] *Id.* at ¶ 48.

In Case You Missed It

By Priscilla Hapner

In case you missed it, these are a few brief summaries of court decisions from the past several months involving employment law.

U.S. Supreme Court

- **Religious Accommodation.** The Court "clarified" the 1977 Hardison "de minimis" standard in religious accommodation cases and, instead, now requires employers to accommodate the religious beliefs and practices of their employees unless it imposes a substantial burden on the business. *Groff v. DeJoy, 600 U.S. 447*.

  In this case, a postal worker requested to not work on Sundays due to his sabbath beliefs. His request was accommodated until Amazon began offering Sunday delivery and the employer determined that it was an undue hardship to require his coworkers to work overtime to cover Sundays. The Court held that "'undue hardship' is shown when a burden is substantial in the overall context of an employer's business." It also discussed the extent to which the impact of the accommodation on coworkers may be considered: "Impacts on coworkers are relevant only to the extent those impacts go on to affect the conduct of the business." Finally, the Court concluded that other options – such as permitting shift swapping – must be considered in evaluating the employer's burden.

- **NLRB/Torts.** The Court held that an employer's intentional tort claims against a union were not preempted by the National Labor Relations Act (NLRA) when the union started a strike after the employer had filled its cement trucks, which caused the employer to lose all of the cement and risk losing many of the trucks if they were not immediately unloaded in a safe location before the cement hardened in them. *Glacier Northwest, Inc. v. Int'l Bhd of Teamsters,* Local 174, 598 U.S. 771.

  The state supreme Court had held that the damage was incidental to the lawful strike and therefore, that the tort claim was preempted. However, the Court's 8-1 majority found that the National Labor Relations Board (NRLB) had long required employees to take "reasonable precautions" to protect an employer's property from foreseeable, aggravated and imminent danger. Because the union had failed to take "reasonable precautions," and actually sought the obtained result, its strike activity was not even arguably protected and could not preempt state tort laws. By reporting for duty and prompting the employer to create a perishable product, the union members created an imminent risk of harm to the trucks and destroyed the concrete by then walking off the job after it was poured. "In this instance, the Union's choice to call a strike after its drivers had loaded a large amount of wet concrete into [the employer's] delivery trucks strongly suggests that it failed to take reasonable precautions to avoid foreseeable, aggravated, and imminent harm to [the employer's] property."

- **SOX Whistleblowing.** The Court unanimously found that proof of retaliatory intent is not necessary to prevail on a claim for wrongful discharge brought under §1514A(a) of the Sarbanes-Oxley Act of 2002 and the

employee must prove that the protected activity was merely a contributing factor to his or her employment termination. *Murray v. UBS Securities, LLC*, No. 22-660 (U.S. 2-8-24).

"Under the whistleblower-protection provision of the Sarbanes-Oxley Act of 2002, no covered employer [publicly-traded companies] may 'discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of' protected whistleblowing activity. 18 U. S. C. §1514A(a)." The protected activity includes reports by employees regarding "what they reasonably believe to be instances of criminal fraud or securities law violations." "When a whistleblower invokes this provision, he bears the initial burden of showing that his protected activity 'was a contributing factor in the unfavorable personnel action alleged in the complaint.' 49 U. S. C. §42121(b)(2)(B)(iii). The burden then shifts to the employer to show that it 'would have taken the same unfavorable personnel action in the absence of ' the protected activity. §42121(b)(2)(B)(iv)." The statutory language prohibiting discrimination against the whistleblower does not require proof of retaliatory intent.

6th Circuit

- **Honest Belief.** The Court unanimously reversed an employer's summary judgment on an Ohio disability discrimination claim and rejected its honest belief defense on the grounds that the employer did not make a reasonably informed and considered decision. *Fisher v. Airgas USA LLC*, 2024 U.S. App. LEXIS 2258 (6th Cir. 1/31/24).

  The plaintiff had been taking legal hemp to help with pain and nausea from his cancer treatment. However, although he told his employer that this might have caused a false positive test for marijuana (and there was evidence that he tested positive for THCA and not THC), it did not investigate or discuss this with the testing laboratory until after it fired him. Because it did not investigate the matter or tell the lab about his hemp use until after his termination, it did not make a reasonably informed and considered decision, which is necessary to rely on the honest belief doctrine. Further, because it did not even discuss the issue with the lab until after his termination, they could not rely on that conversation to support their honest belief defense.

- **Contract/Arbitration.** The Court reversed an order to compel an employee's Fair Labor Standards Act (FLSA) claim to arbitration on the grounds that there was a factual dispute as to whether the plaintiff employee had actually seen, and thus agreed to, the arbitration agreement. *Bazemore v. Papa John's USA, Inc.*, 74 F.4th 795 (6th Cir. 2023).

  The employer utilized e-forms and electronic signatures during employee orientation. The Court found that the plaintiff's sworn denial of having ever seen the agreement was sufficient to require a trial on the issue of whether he had ever agreed to it even if he continued to work after being presented with the agreement. While "[a] n electronic signature can show a party's assent," such "signature is legally valid only when "made by the action of the person the signature purports to represent" – which is itself a question of fact."

- **Pleading.** The Court affirmed the dismissal of a racial discrimination, harassment and retaliation claim against a university for insufficient pleading. *Ogbonna-McGruder v. Austin Peay State University*, 91 F.4th 833 (6th Cir. 2024).

  First, the Court found that discrete acts of discrimination rarely constitute a hostile work environment claim. Second, it found that four acts over more than 30 months were not sufficiently severe or pervasive enough to constitute harassment. Third, her retaliatory harassment claims failed for the same reasons, even if the burden of proving retaliation is lower than discrimination. "[O]ur circuit has repeatedly held that a retaliatory hostile work environment claim must include evidence that the harassment was severe or pervasive." Fourth, her discrimination claims failed because she failed to allege that they were motivated by her race or that she was treated differently than anyone who was similarly situated from her.

- **FLSA Retaliation.** The Court reversed an employer's summary judgment on a FLSA retaliation claim. *Caudle v. Hard Drive Express, Inc.*, 91 F.4th 1233 (6th Cir. 2024).

  The plaintiff trucker had complained repeatedly during his employment that the employer failed to pay him for minor repairs that he made on the truck or for time driving it to an authorized repair shop. On his last day of work, they argued over that and whether he was eligible for PTO before he was fired. The Court found that there was a dispute over material facts which a jury must resolve about the reason he was fired when he had threatened to go to "the labor board" after the employer referred to uncompensated repairs that the employee had made. While the employer had argued and the trial court had found that the plaintiff's threat related to unprotected complaints about the PTO policy, the Court found that the trucker's numerous prior complaints about the uncompensated time and repair issue could also have been sufficient to put the employer on notice that he was engaging in conducted protected under the FLSA.

- **FLSA/Collective Actions.** The Court addressed the proper standard for determining what "other employees" are "similarly situated" and should be notified of a FLSA collective action and given the opportunity to join the lawsuits as plaintiffs. *Clark v. A&L Homecare and Training Center, LLC*, 68 F.4th 1003 (6th Cir. 2023).

The Court's majority rejected both the prevailing standard first utilized in New Jersey and the 5th Circuit's recent preponderance of the evidence standard. Instead, the Court determined that "for a district court to facilitate notice of an FLSA suit to other employees, the plaintiffs must show a 'strong likelihood' that those employees are similarly situated to the plaintiffs themselves." This is similar to the standard already used in preliminary injunction hearings, which is less than a preponderance of the evidence standard, but higher than a summary judgment standard. The plaintiffs will bear the burden of proving similar situatedness. The Court also rejected the employer's arguments that individualized defenses – such as the existence of arbitration agreements or expired limitations period – of "other employees" would necessarily prevent them from being similarly situated and exclude them from notification, but those defenses should be considered when evaluating whether they are similarly situated.

- **ADA/Essential Function/Reasonable Accommodation.** The unanimous Court affirmed an employer's summary judgment on claims for disability discrimination and failure to accommodate when, after several options failed, it transferred the plaintiff delivery driver to an open overnight warehouse non-customer-facing position after receiving repeated complaints about the plaintiff's profane and racists outbursts caused by his disability. *Cooper v. Dolgencorp, LLC*, 93 F.4th 360 (6th Cir. 2024).

  The Court found that excellent customer service was an essential job function and noted that the plaintiff's own physician indicated that he required an accommodation (i.e., a constant co-worker to handle the customer serving functions on his route). The Court noted that "the ADA does not require an employer to tolerate an employee's repeated inadequate job performance for a certain amount of time before it acts." Further, the plaintiff could not identify any open delivery positions which did not require excellent customer service. Finally, the Court rejected his constructive discharge claim because the employer tried most of his accommodation requests, including medical leave, and a seasonal driver-helper, and was not deliberately indifferent. "Although "a complete failure to accommodate, in the face of repeated requests, might suffice as evidence to show the deliberateness necessary for constructive discharge ... that is not the case here."

- **NLRB/Contempt.** The Court found an employer in contempt for violating preliminary restraining orders to provide a verified list of all of its assets and asset sales which was entered after it repeatedly failed to pay backpay to two reinstated employees following unfair practice litigation. *NLRB v. Bannum, Inc.*, 93 F.4th 973 (6th Cir. 2024).

  The employer provided only an unverified list of the sale of some real estate and did not even provide a list of its

banks, let alone bank account numbers. It waited two months before offering to make boxes of documents available for inspection. However, the Court rejected the NLRB's motion for sanctions for spoliation because it could not yet prove that the offered boxes of documents failed to contain the requested information.

Ohio Courts

- **Handbooks/Contracts/Arbitration.** The Court reversed an employer's successful motion to dismiss and compel arbitration because the arbitration "clause" was contained in an employee handbook, which specifically said that it was not a binding contract and was illusory since the employer could change the terms at any time without the employee's assent. *Bauer v. River City Mtge., LLC*, 2023-Ohio-3443.

  "Because the acknowledgement form disavowed any binding force and provided [the employer] with the authority to amend the employee manual at any time without notice to [the employee], we hold there was no meeting of the minds here. And absent mutual assent, the employee handbook was merely a unilateral statement of rules and policies which did not create any contractual obligation and rights."

- **Contracts/Arbitration.** The Court affirmed the denial of a motion to compel arbitration and held that the trial court was not required to hold a jury trial on the enforceability of the clause. *Costin v. Midwest Vision Partners LLC*, 2024-Ohio-463.

  The parties amended the plaintiff's employment agreement upon his termination and specified which clauses of his former agreement would survive termination of his employment. The arbitration clause was not one of the provisions that the amended agreement listed as surviving his employment termination. Accordingly, the trial court could grant summary judgment on that issue.

- **Arbitration Clause/Loser Pays/Unconscionability.** The Court reversed and remanded a case where the plaintiff's age discrimination claim had been stayed pending arbitration because the trial court had failed to consider the plaintiff's argument that the loser pay provision of the arbitration clause was unconscionable, contrary to public policy and unenforceable. *Grimm v. Professional Dental Alliance, LLC*, 2024-Ohio-637.

- **Contracts/Bonus.** The Court affirmed an employer's summary judgment on claims of "breach of contract, detrimental reliance, unjust enrichment, and fraud" arising out of the refusal of employer to pay out a $50K incentive bonus earned in the prior year because the plaintiff was not still employed at the time the bonus was payable. *Rusu v. Carter-Jones Lumber Co.*, 2023-Ohio-2927.

  The Court agreed that the parties' contract provided that the employee was not entitled to the incentive bonus unless he was still employed at the time the bonuses were paid out every year in March. In short, the employee did not earn the bonus unless all of the conditions of the agreement were satisfied: certain profit targets were achieved in the calendar year AND he was still employed at the time the bonus was paid every March.

- **Contracts/Non-Compete.** The Court reversed a trial court decision denying judgment to an employer who sued a former employee and her new employer for violating her non-competition and non-solicitation agreement even after the new employer put her on a paid leave of absence during the non-compete period. *Total Quality Logistics, LLC v. Leonard*, 2023-Ohio-2271.

  The Court found that the agreement was not merely to protect the unfair poaching of its customers, but also to prevent the poaching of its employees after a significant investment in training them. By putting the employee on a paid leave of absence, the new employer created an incentive for the employee to leave the plaintiff employer and deprive the plaintiff employer of its investment. "Allowing a competitor to circumvent a noncompete agreement by simply hiring an employee and placing the employee on paid administrative leave for the duration of the noncompete agreement would defeat the purpose of noncompete agreements, reward former employees and the competitors hiring them, and ignore the employer's legitimate business interests."

- **Public Policy Discharge.** The Court affirmed the dismissal of the retaliation complaint of a discharged employee who had reported alleged illegal bribery of a government official by the employer's manager. The statutes which were allegedly violated contained sufficient criminal penalties, making it unnecessary to create or recognize a new common law wrongful discharge or retaliation claim in order to protect enforcement of the public policy. *Werkowski v. EDP Renewables N. Am., LLC*, 2023-Ohio-4178.

- **Public Policy Discharge.** The Court affirmed an employer's summary judgment on the public policy claim because the plaintiff had not been employed at will and could only be terminated for cause or at the expiration of this contractual term. Further, the plaintiff's alleged report of scrap metal theft lacked merit when there was evidence that he had failed to follow up with the police when so directed and eventually retracted his allegation. Finally, his claim failed because there were sufficient criminal and statutory penalties in place to deter theft without creating or recognizing a new common law claim for unlawful retaliatory discharge. *Underwood v. Cuyahoga Community College*, 2023-Ohio-4180.

- **Limitations Period/Discrimination.** The Court reversed the dismissal of a complaint of pregnancy discrimination

and retaliation under ORC 4112 which had been filed in December 2021 more than two years after the claims accrued, but were based on claims that accrued prior to the April 15, 2021 effective date of the Employment Law Uniformity Act (ELUA). *Burch v. Ohio Farmers Ins. Co.*, 2023-Ohio-912.

The ELUA had shortened Ohio's limitations period for ORC 4112 claims to two years and eliminated individual supervisory liability. The unanimous court found that the EULA was not retroactive and therefore the claims were governed by the prior legal standards, which permitted claims to be filed within six years of when they accrued and permitted claims against individual supervisors. Accordingly, ORC 4112 claims which accrued prior to April 2021 may be brought in Ohio courts until April 14, 2027.

- **Privilege/Waiver.** The Court held it was not an abuse of discretion for the trial court to permit the employer to waive attorney-client privilege over a workplace investigation report long after discovery had closed and only a few months before trial when it notified the plaintiff months before trial and offered to bear the additional expense of new discovery on the issue and the plaintiff failed to file any objections, motions in limine or to compel discovery prior to trial. *Fiani v. Worldpay, LLC*, 2024-Ohio-304.

  At the time the employer first asserted the privilege, it was also contending that the discovery related to matters that were barred by the limitations period. After its summary judgment motion was denied, it realized that the plaintiff intended to argue that the employer was hiding evidence of guilt and changed its mind about asserting privilege. Further, the additional discovery which the plaintiff belatedly sought about the investigation had already been addressed prior to trial. Finally, the jury ruled in the employer's favor at trial.

- **Unemployment Compensation.** The Court affirmed the denial of compensation because the claimant had improperly restricted her job search to work-from-home positions, thus making herself unavailable for suitable work, including from employers who might have accommodated her temporary impairment. *Hines v. Dir., Ohio Dept. of Job & Family Servs.*, 2023-Ohio-4066.

- **Unemployment/COVID.** The Court affirmed the denial of Pandemic Unemployment Assistance benefits, which had been previously approved, based on a warehouse worker's fear of contracting COVID. *King v. Dir., Ohio Dept. of Job & Family Servs.*, 2023-Ohio-1724.

  The claimant had resigned his position in May 2020 out of fear of contracting COVID. He was initially awarded and collected approximately $10k in pandemic unemployment benefits over the next year. However, his benefits were later disallowed and he was ordered to repay the benefits. His appeal was denied, but the commission granted his request to waive the overpayment collection. "Here, the evidence before the commission demonstrated, after the COVID-19 public health emergency began, [the claimant] left his employment as an Amazon warehouse worker due to his fear of contracting this disease. But an individual's general fear of exposure to COVID-19 at the workplace is not one of the listed qualifying conditions set forth in 15 U.S.C. 9021(a)(3)(A)(aa) through (kk)."

About the Author

When she is not reading and summarizing court decisions, Priscilla Hapner advises employers and employees in Central Ohio.

Getting Into the Weeds: How the Legalization of Recreational Cannabis May Impact Ohio Employers

By Katie McLaughlin

On Nov. 7, 2023, an overwhelming majority of Ohioans voted to legalize adult-use cannabis. Subject to forthcoming regulations, Ohioans over the age of 21 can now buy and sell, possess and grow cannabis – and importantly for employers, use it recreationally.

But will the legalization of adult-use cannabis force Ohio employers to change how they make decisions regarding cannabis in their workplaces? Arguably, no. Consistent with Ohio's medical marijuana statute (which became effective in 2016), the statutory language in the adult-use cannabis statute is clear.[1] Employers are NOT:

1. Required to "permit or accommodate an employee's use, possession, or distribution of adult use cannabis."

2. Prohibited from "refusing to hire, discharging, disciplining, or otherwise taking an adverse employment action against an individual … because of that individual's use, possession, or distribution of cannabis."[2]

In other words, under the statute, employers can still prohibit employees from using or possessing cannabis while at work and/or on the employer's premises.[3] And employers can continue to refuse to hire, discipline or discharge an employee if the employee tests positive for cannabis – even if the positive test was the result of lawful, off-duty use.[4] Ohio employers subject to federal Department of Transportation requirements and parties to federal government contracts will also continue to be permitted to drug test employees pursuant to those federal requirements.[5] And Ohio employers can maintain voluntary Drug-Free Safety programs through the Ohio Bureau of Workers' Compensation.[6]

Employers in other states with legalized recreational marijuana use are sometimes significantly more restricted in what actions that they can and cannot take as the result of an employee's positive drug test. In California and New York, for example, employers can generally only take action against employees if they have psychoactive cannabis metabolites in their system such that they are impaired at work.[7] These standards are particularly onerous for employers because science and research have, to date, yielded few (if any) approved, available drug tests that are capable of detecting current cannabis impairment that would be analogous to BAC results that test for alcohol impairment.

Further complicating the analysis in these other states is the different impact on impairment caused by the method of cannabis consumption. Fortunately for Ohio employers, Ohio's adult-use cannabis statute contains no such requirements or standards. Employers can still refuse to hire, discipline or discharge employees based on a positive drug test – regardless of current impairment.[8]

While the statutory language in Ohio's adult-use cannabis statute is relatively simple – its impact will be far from it. How will this affect hiring practices – especially in the midst of a labor shortage? How should employers adapt if their already small pool of job applicants now has legal access to cannabis? Some employers have chosen to cease pre-employment drug testing altogether – quietly. These employers don't advertise the fact that they do not drug test applicants, but have nonetheless chosen to stop in order to remain competitive in the labor market. Some of these employers worry that, if not, they may lose an otherwise qualified candidate to a competitor that does not require pre-employment drug testing. However, employers should also weigh this change in hiring practices against potential liability for negligent hiring, retention and/or supervision claims.

Of course, all employers do not have the choice to stop pre-employment drug testing. Cannabis is still illegal under federal law. Therefore, employers in industries subject to federal regulations or who employ individuals in safety-sensitive positions such as trucking, health care and construction are required by federal law to engage in pre-employment drug testing. Additionally, employers participating in Ohio's Drug Free Safety Program who stop drug testing can lose the premium rebate on their workers' compensation insurance.[9]

Yet another complicating factor is the patchwork of state laws regulating cannabis use. Approximately half of all states have fully legalized cannabis, with more states joining the ranks every year.[10] What does this mean for nationwide employers that have employees in some states where cannabis is fully legal, some states where it is illegal, some states where only medical use is legal, and every state in between? Is it easier to implement a one-size-fits-all drug policy or state-specific policies? The answer is every lawyer's favorite: It depends! Employers will need to evaluate their operations, employee population, risk tolerance and several other factors to decide which approach is best for their business.

To put it bluntly, employers will be forced to grapple with the balance between remaining competitive in the labor market, mitigating risk and determining what is best for their operations. No matter how they decide, employers should ensure their drug policies are consistent with state and federal law, communicate the policies to employees and apply them consistently.

About the Author
Katie McLaughlin is an associate attorney at Frantz Ward LLP in Cleveland where she represents employers in all aspects of labor and employment law. She aids in the defense of employers in state and federal courts and before administrative agencies in a wide range of matters, including employment discrimination, retaliation, harassment and affirmative action compliance. She also provides day-to-day employer counseling and prepares policies, handbooks, and employment agreements. Katie is a member of the Ohio State Bar Association, Ohio Women's Bar Association, Cleveland Metropolitan Bar Association and Cleveland Employment American Inn of Court.

Endnotes
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[3] R.C. 3780.35(A)(1).
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[5] R.C. 3780.35(A)(4).
[6] R.C. 3780.35(A)(6).
[7] See NY CLS Labor § 201-d(4-a)(ii); Cal Gov Code § 12954(a).
[8] R.C. 3780.35(A)(1) – (2).
[9] Ohio Adm.Code 123:1-76-01 et seq.
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Breaking Down Barriers

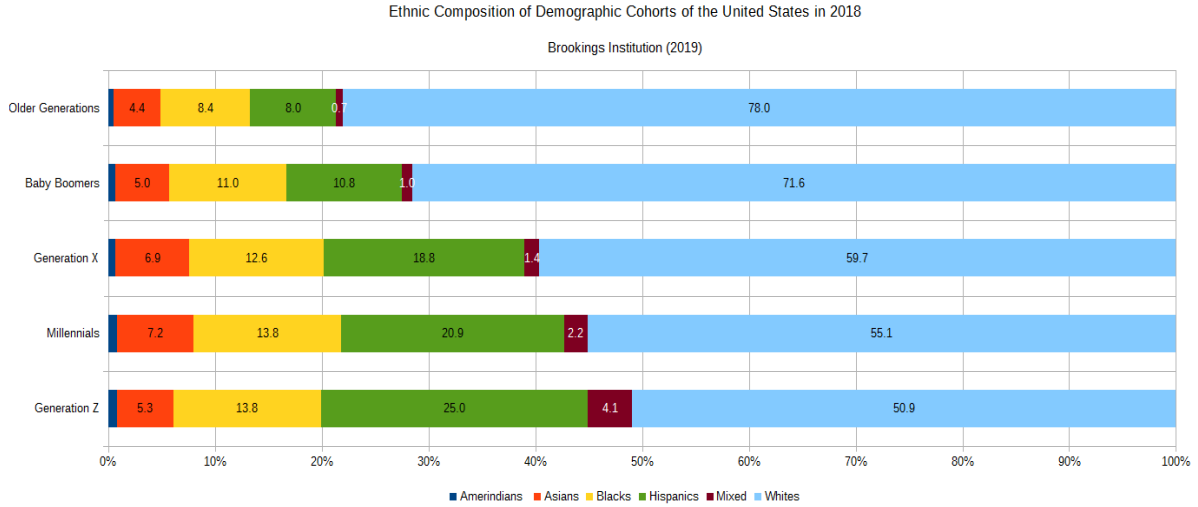
How Employment Law Attorneys Can Help Dismantle Systemic Oppression

By Bethany Studenic

Important Context and Landscape

America's workforce is more diverse than ever and is rapidly diversifying with each passing year. These demographic changes have driven an ongoing and increasingly urgent discussion on the ways in which systems must shift to accommodate this rapid transition.

As a lawyer and diversity, equity and inclusion (DEI) expert, I am often asked "when will this DEI conversation slow down? When will we return to normalcy?" My answer is simple: When you look at the shifting demographics of upcoming generations, it is clear that this conversation is only the beginning. Each successive generation is rapidly diversifying in terms of race, gender, LGBTQIA+ status and disability. As traditionally marginalized groups have gained more agency in the workforce, we have seen this push increase and we can expect this trend to continue.



For the Baby Boomer Generation (born between 1946 and 1964), the racial makeup was 71% white.[1] In the 1970-1980s, during the prime working years for this generation, women were barred from holding a bank account, socially restricted from high paying careers and positions, and faced a pay gap of .65 cents on the dollar in comparison to their male counterparts.[2]

Just 2.6% of the Baby Boomer generation identified as LGBTQIA+.[3] Legal protections for LGBTQIA+ were not in place. In fact, protection from employment discrimination on the basis of gender identity was only very recently confirmed by the Supreme Court in 2020.[4]

The Americans With Disabilities Act, signed in 1990, provided some of the most solid protections for people with disabilities in the workplace. For disabled people in the Baby Boomer generation, many were relegated to poverty and intentionally barred from employment with little to no recourse to challenge this outcome.

Contrasting the experiences of Baby Boomers to Generation Z, the generation just now entering the workforce, we see that legal protections are much broader, and the population itself is more diverse than ever before.

Gen Z is 48% racially/ethnically diverse. Women have surpassed men in college graduation rates and comprise 46% of the workforce. Women's business ownership has increased by 114% and 20% of the Gen Z generation identify as LGBTQIA+. This generation is more likely to seek physical and mental accommodations at work for disability and neurodivergence and submit requests for accommodation that previous generations did not have a basis for. Today, 21% of people with disabilities are employed, the highest percentage ever recorded since tracking began in 2008.[5]

The reality is that the American workforce and consumer base is quickly becoming majority minority. This means that those who were historically oppressed, barred from success both legally and practically, are quickly becoming the core economic engine of America.

Equitable Systems = Competitive Advantage

A recent McKinsey report details the competitive advantage that diverse companies have over their counterparts. In fact, since McKinsey began these analyses, the case for inclusion has gotten stronger with each subsequent report. As this most recent report details:

A strong business case for ethnic diversity is also consistent over time, with a 39 percent increased likelihood of outperformance for those in the top quartile of ethnic representation versus the bottom quartile … The penalties for low diversity on executive teams are also intensifying. Companies with representation of women exceeding 30 percent (and thus in the top quartile) are significantly more likely to financially outperform those with 30 percent or fewer. Similarly, companies in our top quartile for ethnic diversity show an average 27 percent financial advantage over others."[6]

In my discussions with many executives across our region, I have been told that DEI is seen as an "additive" or a "nice to have." Many members of the C-suite fail to see the change happening around them, or the fact that their own systems are being eroded by inaction. Many leaders fail to see how equitable systems not only help with competition, but reduce exposure to lawsuits and liability. This is a dangerous position to take, as organizations with low diversity will find it increasingly hard to contend with diverse, fully-resourced competitors.

Rules of Professional Conduct

As the legal profession continues to diversify, it is imperative that we uphold our commitment to unbiased legal services. Ohio requires lawyers to provide legal services that are free of discrimination. Rule 8.4(g) of the Rules of Professional Conduct states:

It is professional misconduct for a lawyer to:

(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

A thorough review of attorney misconduct and discrimination was recently published by the National Lawyers Guild.[7] That review included several cases in which attorneys have been held

accountable by courts for discriminatory practices that impact the administration of justice. In other words, the attorneys' competence was questioned when they engaged in discriminatory speech or practices.

Even beyond Rule 8.4, attorneys can be held accountable for discriminatory practices. For example, Rule 1.3 of the Rules of Professional Conduct can be used to hold attorneys accountable for discrimination via a lack of diligence on a case. Rule 1.3 states:

A lawyer shall act with reasonable diligence and promptness in representing a client. A lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer. A lawyer also must act with commitment and dedication to the interests of the client.

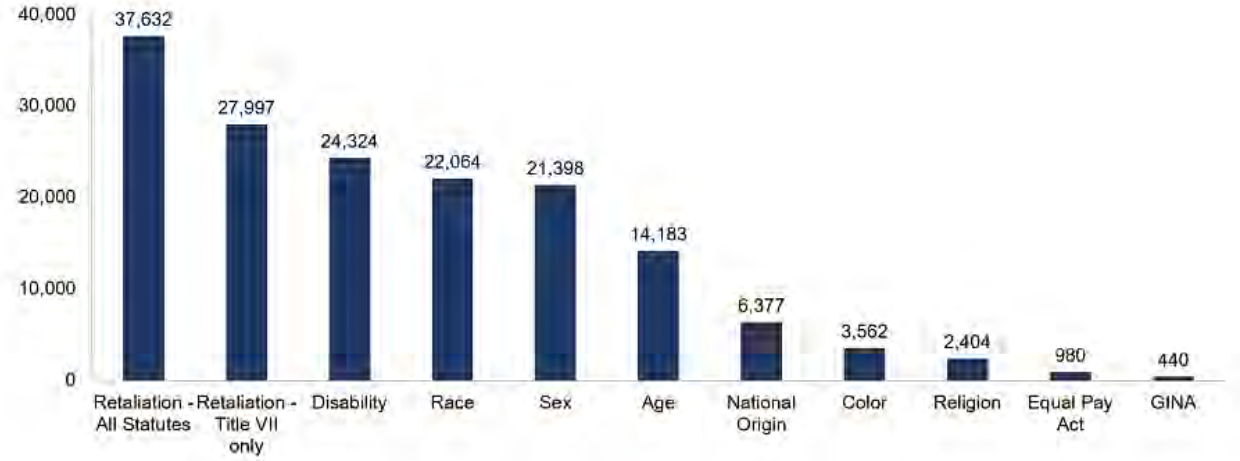
According to the National Lawyers Guild, failure to properly prioritize cases from marginalized groups can be classified as a lack of diligence and other violations of the ABA Model Rules.[8]

Unnecessary Legal Exposure

In 2020, Cleveland, OH was ranked one of the "Worst Places in America for Black Women."[9] This study, completed by the University of Pittsburgh, looked at quantitative metrics from across the country including median pay, voter representation, child care, health insurance, etc. What this research did not do was talk directly to Black women about what they are experiencing on the ground to produce these stark inequalities. In response to these findings, my organization, Enlightened Solutions, conducted a survey titled Project Noir, which surveyed the lived experiences of over 450 Black women in Northeast Ohio to better understand the challenges they face at work. In this survey, we found that Black women who reported racism and sexism were more likely to be terminated than the person they reported. Indicating a culture of defensiveness and commitment to exclusion.

In addition, our survey found that:

- 54% of our participants were retaliated against when they objected to inappropriate comments.
- 65% of respondents have been excluded from important meetings relevant to their jobs.
- 77% were subjected to inappropriate comments about their features including hair/face/etc.
- 74% of respondents said they felt they had been passed over for a job or promotion for which they were qualified.
- 76% have been paid less than coworkers in a similar position.



Black women reported active sabotage of their work, exclusion from relevant meetings, large pay gaps, inappropriate comments about their hair and other features and many other problematic tactics that when reported, resulted in retaliation and termination from higher-ups, setting the stage for strong retaliation claims that could and should have been avoided.

According to the Equal Employment Opportunity Commission (EEOC), the most common workplace charge filed is retaliation.[10] A recent study from the University of Massachusetts shines light on the reason why retaliation claims are so common. In a review of over 46,210 sexual harassment claims at the EEOC, they found:

> Most employers react punitively toward people who file formal sexual harassment charges. 68% of sexual harassment charges include an allegation of employer retaliation, this rate is highest for Black women.[11]

These statistics should be very concerning to employers' counsel. Retaliation is fully preventable with proper policies and practical measures, however it is still the leading cause of liability for employers.

Practice Tips

Employers' Counsel
There are several common landmines that employer-side attorneys should understand and seek to avoid. One of the most common pitfalls I see is that many employers, HR staff and lawyers do not take reports seriously. Often, the knee-jerk reaction is to reject reports of harassment and discrimination outright.

In addition, many organizations often side with an aggressor and place a microscope on the victim, combing through the complainant's records and history. This is where the employer begins to cross the line from unbiased investigation to retaliation. I have come across cases where employees of many years with stellar records are suddenly micromanaged, nitpicked and micro-aggressed in response to their complaint. Often, this pattern ends with termination, setting the stage for a strong retaliation case.

There are many practical steps attorneys and employers can take to protect from potential retaliation suits, and to avoid legal exposure.

- **Separate the Parties.** Upon receiving a complaint, employers should take steps to separate the complainant from the potential offender. This step prevents escalation and retaliation that is almost certain to occur without intervention.

- **Remind Parties of Their Responsibility.** After receiving a complaint, parties should be reminded of the harassment and discrimination policy and should be explicitly warned against retaliation in any form. While most employers have written policies around these issues, many employees never read them, and even when they do, are confused at the technical jargon. Providing clear guidance on expectations for behavior will help protect the organization from escalating behavior.

- **Communicate Timelines.** It is imperative to set and provide timelines to all parties. Many organizations leave these issues without intervention for days, weeks or months. This allows a long period of time where additional issues can and likely will arise. Having set expectations will help all parties prepare and will encourage them to remain engaged in the process.

- **Understand Common Abusive Tactics.** Investigators should be well versed in understanding microaggressions, abusive tactics and coded language. Being literate in these areas is imperative to understanding the complaint, the potential liability and the likely arguments of opposing counsel. Investigators who do not understand the social context around oppression are likely to miss how certain behaviors can be interpreted. This can lead to liability because important information was not properly evaluated within the framework of racism, sexism or other bias. This becomes a serious problem when presented to a diverse jury who understand these nuances from personal experience and will not look favorably on employers who refuse to acknowledge or even understand problematic behavior.

- **Hold Bad Actors Accountable.** It is too rare that I come across an employer who in practice, actually corrects bigotry. While much lip service is given to being "equitable," when it comes to actual behavior, most employers side with aggressors and increase their own liability in the process. The law is designed to encourage employers to appropriately address bad actors, and

"bad enough" for intervention embolden bad actors and create an environment where hate and exclusion thrives. This culture attracts and retains problematic people, and sets the stage for escalating issues.

Plantiffs' Counsel

Bias manifests itself on both sides of the negotiation table. For example, there is a serious gap in legal representation for employment litigants based on race. A 2012 study found that 21% of Black litigants in employment cases were pro se, compared with just 8% for white litigants.[12]

In Ohio, the legal profession is 64% male and 91% white.[13] Therefore, many plaintiffs' attorneys are not members of a historically marginalized group plus, legal education often provides very limited training into the social context of bias and hate. Many attorneys simply do not have the personal or practical experience to understand why something is racist, sexist or otherwise problematic. Therefore, education is the number one step lawyers can take to understand their plaintiffs' perspectives.

Plaintiffs' attorneys should also understand that most abusive situations escalate. So, while a case may not be ripe at a given moment, provide your client with perspective on when to call you back, what next steps to take, what facts would change your mind on filing or what your client should be looking for. These educational steps can preserve your relationship so that if and when things reach a point of legal intervention, you are a client's first call.

Conclusion

The case for inclusion has never been stronger and the fight for equal rights is not going anywhere. Attorneys, employers and systems who continue to resist the existing law, demographic shifts and professional conduct requirements open themselves up to direct action against their license to practice, expose their clients to liability that is entirely avoidable and are less competitive in today's economic climate.

When clients invest in DEI early, we are able to help them utilize this investment as a competitive advantage. The reality is that our world is rapidly changing.

For legal practitioners, integrating this information will help protect your clients and yourself, open new doors and opportunities, and build structures that can stand the test of time and contend in an increasingly competitive market. Building inclusive structures benefits everyone, increases revenue and avoids legal exposure.

I urge you to utilize your legal expertise to build justice in your community. Whether it is advising your client to avoid legal consequences by taking complaints seriously, educating yourself on exclusionary tactics, or hearing out a community member who is struggling to tell their story, there are limitless opportunities, every day in our practice, to either expand justice, or gatekeep access to it.

Our future clients, employers, judges and juries will grow increasingly diverse every year. Attorneys and organizations that invest now are more likely to outperform in the future. The case couldn't be clearer. The future is diverse. Are we truly committed to justice for all?

About the Author

Bethany Studenic is the co-founder and managing director of Enlightened Solutions, a civil rights advocacy group, and serves as of counsel at Sobel, Wade, and Mapley.

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A Message from the Chair

This edition of the newsletter continues one of this section's strong traditions of providing quality resources to practitioners around the state and beyond. I hope you enjoy it. Thanks to our Publications Committee and all of the authors for giving their time for our collective benefit. Please contact Robert Fekete if you would like to write for the newsletter or otherwise be involved with it.

The section is very active as always, perhaps most notably with its strong slate of CLE programs. In my first year as chair, I am trying to also focus on getting more members involved in the section. Please reach out if you have untapped energy we have not taken advantage of yet! I would love to talk to you about your interests and ideas.

Bill Nolan
Chair, Ohio Bar Labor and Employment Law Section

About *Labor and Employment News*

Labor and Employment News is produced by the Ohio State Bar Association Labor and Employment Section. The OSBA publishes three committee and section newsletters.

For more information about *Labor and Employment News*, contact editors Robert Fekete, State Employment Relations Board (Columbus), at robert.fekete@serb.ohio.gov and Daniel Sabol, State Employment Relations Board (Columbus), at daniel.sabol@serb.ohio.gov.

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Designed by Cristi Lemaster.

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Editors' Note—Guest Columns

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Articles should not have appeared in other publications, but works appearing only on your employer's website or client newsletter will be considered with the employer's approval.

Articles will typically range between 1 to 10 pages but works outside of those limitations will be considered. The editors reserve the right to select articles for publication, to decline to publish any article and to require the editing of an article to make it appropriate for publication.