

Institute for Local Government Lawyers

Fundamentals of Personnel Law for the Public Employer

by
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FUNDAMENTALS OF PERSONNEL LAW

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Savannah, Georgia
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September 25, 2005

I. STATUTORY PROTECTIONS FOR LOCAL GOVERNMENT EMPLOYEES

A. Title 7, Civil Rights Act of 1964 42 USCA Sec. 2000e et seq.

Your state law on equal employment opportunity

B. Title 6, Civil Rights Act of 1964 42 USCA Sec. 2000d et seq.
(Be sure you know who is responsible for Title 6 reporting.)

C. Americans With Disabilities Act 42 USCA Sec. 12101 et seq.

Your state law on employment rights of people with disabilities

D. Fair Labor Standards Act 29 USCA Sec 201 et seq.
Equal Pay Act 29 USCA Sec. 206 (d) et seq.

Your state laws on minimum wage, overtime, and equal pay

E Family and Medical Leave Act 29 USCA Sec. 2601 et seq.

Your state law on family and medical leave

F Age Discrimination in Employment Act 29 USCA Sec. 621 et seq.

Your state law on age discrimination

Note that in *Smith v City of Jackson*, 125 S. Ct. 1536 (2005) the U.S. Supreme Court decided that disparate impact analysis may be used to decide age discrimination complaints.

G. Hatch Act 5 USCA Sec. 1501 et seq.

Your state law on political participation by local government employees

H. Employee Polygraph Protection Act 29 USCA Sec.2001

Your state law on employers' use of polygraph tests for employees and applicants for employment

I. Privacy Act 5 USCA Sec. 552a et seq.
(Do you know how employees' social security numbers are used by various city agencies?)
Also see 42 USCA Sec. 405©(2)(C)(viii)(I)

State privacy laws. These may also be found in state common law.

J. Fair Credit Reporting Act 15 USCA Sec. 1674 et seq.
See Secs. 1681b and 1681k in particular for procedures required when credit information is used in employment actions. Be careful of conviction information contained in credit reports.

See also your state law on garnishments and your state law on discrimination because of conviction record.

K. Uniform Services Employment and Reemployment Rights Act
38 U.S.C.A. Sec. 3411

Your state law on employment rights of service personnel

L. Federal Wiretapping Act 18 U.S.C.A. Secs. 2510-2522

Your state law on interception of communications

M. Immigration Reform and Control Act 8 USCA Sec. 1324a (a)(4)
Also note 8 USCA Sec. 1324a (a)(4). See Brad Young, "Immigration 101 for Municipal Employers", *Municipal Lawyer*, March/April 2004, page 10. Some have taken the decision in *Hoffman Plastic Compounds, Inc*. v *NLRB,* 535 U.S. 137, 122 S. Ct. 1275, 152 L. Ed. 2d 271 (2002) to mean that undocumented immigrants are not protected by federal and state labor laws. This is debatable. See, e.g., *Rivera et al v Nibco, Inc.*, 364 F. 3d 1057 (9th Cir. 2004) and *Jose Raimundo Madeira* v *Affordable Housing Foundation* et *al*., 315 F. Supp. 2d. 504 (S.D.N.Y. 2004) holding that protective labor laws do apply to undocumented workers. To the contrary, see *Crespo v Evergo Corp,* 366 N.J. Super.391, 841 A. 2s 471 (2002)

N. Other state laws:

1. Open records laws related to personnel documents. See *Cox* v. *Roskelly*, 359 F. 3d 1105 (9th Cir. 2004) where the 9th circuit holds that a public employee's liberty interest in his/her employment, requiring a name-clearing hearing, is triggered when a derogatory document is placed in the personnel file, in states where state law requires such documents to be released to the public. See the dissent for details on a split in the circuits.

2. Workers Compensation

3. Unemployment compensation

4. Occupational Safety and Health

5. Public sector collective bargaining and labor relations

6. Living wage statutes and ordinances

7. Civil service laws

8. Special regulations for protective occupations (police and fire)

9. Ethics for local government officials and employees

10. Law regarding job references. (This might be common law.)

11. Contractor status vs. employee status (This also might be common law.)

12. Whistleblower protection laws. For an example, see New Jersey's Conscientious Employee Protection Act (CEPA) N.J.S.A. 34:19-1 to-8

13. Indemnification of public officials for liability incurred in the scope of employment

14. Domestic Partners

15. Wrongful discharge (common law)

Be aware that federal and state statutes on the same subject are different and your municipality will have to comply with the law that is more generous to the employee. See, for example, 29 USCA Sec. 2651(b), providing specifically that the federal Family and Medical Leave Act does not supersede state laws which give greater family or medical leave rights to employees.

II.CONSTITUTIONAL PROTECTIONS FOR LOCAL GOVERNMENT EMPLOYEES

A. Employment discrimination may be held to be a denial of equal protection of the law. Look for this claim when the plaintiff has passed the time limits for the Title 7 complaint procedure, seeks to protect a class not protected by Title 7, or challenges an affirmative action plan. See, for example *Irizarry* v *Board of Education of Chicago*, 251 F. 3d 604 (7th Cir. 2001) and *McNamara* v *City of Chicago*, 138 F. 3d 1219 (7th Cir. 1998).

Grutter v *Bollinger*, 539 U.S. 306, 123 S. Ct. 2325, 156 L. Ed. 2d 304 (2003), the case in which the U.S. Supreme Court ruled on the constitutionality of considering race in college and law school admissions, is being cited occasionally in employment cases. The

Grutter analysis of what makes an illegal quota is cited in *Bullen et al*. v *Chaffinch et al*., 2003 U.S. Dist LEXIS 22419, CA # 02-1315-JJF (D. C. Del. 2003) and in *Petit et* al. v. *City of Chicago*, 352 F. 3d 1111, (7th Cir. 2003), cert. den. 2004 U.S.LEXIS 3872 (2004). Both are police hiring and promotion cases.

The court cited language in Grutter as follows: " . . . skills needed in the global marketplace can only be developed through exposure to widely diverse people, cultures, ideas and viewpoints..." *Peterson* v *Hewlett-Packard*, 358 F. 3d 599, 608 (9th Cir. 2004) HP's discharge of an employee who objected to its "diversity" posters was upheld against a charge of religious discrimination.

B. A local government employee who has a property interest in his/her position may not be deprived of it without due process of law. State and local law determine whether or not there is a property interest. *Cleveland Board of Education* v *Loudermill*, 470 U.S. 532 (1985). An employee who does not have a property interest in the position may still have a liberty interest. If the discipline or discharge affects the employee's opportunity to find other employment, then the employee has a right to a pre-discharge "name-clearing" hearing. *Board of Regents* v *Roth*, 408 U.S. 564 (1972). Also see *Cox*, supra, and *Townsend* v *Vallas*, 256 F. 3d 661 (7th Cir. 2001).

C. Employees have a constitutional right to be free from unreasonable searches. See *Chandler* v *Miller*, 520 U.S. 305, 12 IER Cases 1233 (1997). The Supreme Court has approved random drug testing for some U.S. Customs Service employees. See *Treasury Employees* v *Von Raab*, 489 U.S. 656, 668, 4 IER Cases 246 (1989); and for certain railway employees, Ski*n*ner v *Railway Labor Executives Association*, 489 U.S. 602, 608-613, 4 IER Cases 224 (1989).

Random drug tests are mandatory for employees in "safety-sensitive" positions providing federally assisted transportation services. See 49 USCA Sec. 5331.

If your municipality requires drug tests for applicants or employees, you need to be familiar with this line of cases.

D. Employee speech is protected by the 1st amendment in certain situations. See *Pickering* v *Board of Education*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed.2d 811(1968). Also see *Allen* v *City of Pocahontas, Arkansas*, 340 F. 3d 551 (8th Cir. 2003) and *Konits v Valley Stream Central High School District*, 22 IER Cases 263 (2d Cir. 2005).

Note that in *Rose v Stephens*, 291 F. 3d 917 (6th Cir. 2002), the 6th Circuit held that an employee in a policymaking or confidential position (*Elrod/Branti* rule) may be dismissed based on political affiliation even where the dismissal is based on speech on a matter of public concern. Other circuits are following hesitantly.

Can a hiring or promotion decision be expressive conduct so as to trigger 1st amendment protection for the employee who has hiring or promotion authority? See *Thomas* v *City* of *Beaverton*, 379 F. 3d 802 (9th Cir. 2004).

There is a very large amount of litigation in this area. You will need to be familiar with cases on employees' protected speech in your federal circuit.

III. WHAT CAN THE CITY ATTORNEY DO TO PREVENT EMPLOYEE COMPLAINTS AND CLAIMS?

A. Advise top policymakers to demonstrate leadership on compliance issues. The ideal is to have a culture of compliance. "People don't listen to anyone but the boss". says Thomas Friedman in *The Lexus and the Olive Tree*; *Understanding* Globalization, Anchor Books, April, 2000.

B. Help to provide training and retraining for managers in compliance requirements.

1. New managers should receive the training as soon as possible, so that they become familiar with the ˙culture of compliance".

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2. If the municipality has human resources staff, they can be responsible for training, but the city attorney should review training concepts and materials.

3.Training for managers should include

a. How to carry out recruitment and selection, including interviewing and checking references
b. How to handle union grievances
c. How to investigate allegations of employee misconduct
d. Prevention of workplace harassment
e. Reasonable accommodation of disabilities
f. Preventing workplace violence
g. How to handle workers compensation claims

4.Should training be provided by contractors or by city staff? A mixture is probably best. Using city staff is cheaper and the trainer is more familiar with real life situations in the workplace. On the other hand, an outside perspective can be helpful.

C. Line managers should be responsible for discipline and discharge decisions.

D. Somebody has to keep track of the numbers.

1. This could be done by human resources staff or affirmative action staff, or some other agency. There need to be up-to-date applicant flow statistics for every hiring process, as well as representation data for gender and for defined minority groups.

2. If there is a particular step in the hiring process, or a job requirement that has a substantial adverse effect on one or more protected groups, management needs to know that. Then it can analyze the job-relatedness of the test or requirement.

E. Legal staff should review the wording of personnel rules.

F. Headline! *National Enquirer*! Rosie's Secret E-mails! The City Attorney should try to impress on all staff the fact that there is no such thing as a secret e-mail. The municipality should have a comprehensive written computer use policy and every new employee should be required to read it and acknowledge it before being allowed to touch any piece of computer equipment.

IV. ISSUES ON THE HORIZON

A. Changes to 29 CFR Part 541, regarding exemptions to overtime pay requirements took effect on August 23 of this year. They will affect almost every municipality and they are not as clear as the DOL promised. See Raymond L. Hogge, Jr., "Local Governments Beware! Non-exemption of Public Safety Employees Under the New Fair Labor Standards Act Regulations," *Municipal Lawyer*, July/August 2004, page 18.

B. Does a municipal employee or applicant have a right to sue for employment discrimination under Title II of ADA? This usually happens when the Title I complaint deadlines are missed or when the plaintiff has some other problem that makes Title I unavailable. The circuits are split. *Bledsoe* v *Palm Beach County Soil and Water Conservation District*, 133 F. 3d 816, 820-822 (11th Cir. 1998) holds that Title II also covers employment discrimination by a public entity. *Zimmerman* v *Oregon Dept. of Justice*, 170 F. 3d 1169, 1173-1174 (9th Cir. 1999) *cert den*. 531 U.S. 1189 (2001) holds that employment discrimination is not cognizable under Title II. The other circuits seem to be steering clear of the issue and the district courts are going both ways.

C. Is *Garcia* v *Metropolitan Transit Authority of San Antonio*, 27 WH Cases 65 (1985) still good law? Maybe after U.S. v *Lopez*, 514 U.S. 549 (1995) and *Printz* v *United States*, 521 U.S. 898 (1997) it is not. In *Singer* v *Waco*, 324 F. 3d 813, 8 WH Cases 2d 993 (5th Cir. 2003), the City of Waco made a very good argument for that point, but the Court of Appeals is bound by *Garcia* until it is overruled. Look for the right case to bring this issue to our U.S. Supreme Court.

D. Is there a constitutional right to be a volunteer? In Hyland v *Wonder*, 972 F. 2d 1129 (9th Cir. 1992), *cert. den*. 508 U.S. 908 (1993), the court held that a volunteer position is a governmental benefit, like welfare or utility service. The volunteer's 1st amendment rights were violated when he was fired for his public complaints about jail conditions. This case has been followed in the 3rd, 7th, 8th and 10th federal circuits, but not in the 1st circuit. The 2d and 6th are maybes. The analysis has been applied to unpaid public officials as well as volunteer workers. You will want to watch for developments in this area.

If the *Hyland* v *Wonder* analysis prevails, isn't the opportunity to serve as a volunteer a "service, program, or activity" under Title II of ADA? Keep an eye on this issue.0.

IV. PERSONNEL INFORMATION RESOURCES

Treatises

1.McQuillin, *Municip*al *Corporations*
2.Aitchison, *The Rights of Law Enforcement Officers*, and
3.Aitchison, *The Rights* of *Firefighters* (Labor Relations Information System)
4.Lindemann, Grossman, *Employment Discrimination Law,* ABA Section of Labor & Employment Law. There is a cumulative Supplement dated 2002. See the foreword to the 2d edition, by Norbert Schlei, for the spine-tingling history of the 1964 civil rights legislation.

Loose Leaf Services

BNA Labor Relations Reporter. This includes the Fair Employment Practices Manual and cases, the Wage and Hour Manual and cases It also includes FMLA cases, ADA cases, Individual Employment Rights Cases, and other labor law materials.

CCH Labor Law Reporter

Employers Guide to the Fair Labor Standards Act, Thompson Publishing Group.

Municipal Litigation Reporter

Ordinances: IMLA Model Ordinance Service (Chapter 14 Personnel)

Web sites:

1. www.imla.org

2. http://www.garlands-digest.com Current developments in employment discrimination. Garland charges a subscription fee, but provides a free 30-day trial subscription.

3. EEOC web site: www.eeoc.gov The site contains laws, regulations, and policy guidance

4. US Department of Labor web site: www.dol.gov

5.www.findlaw.comThis site is free and it has a number of services, including a weekly labor law reporter