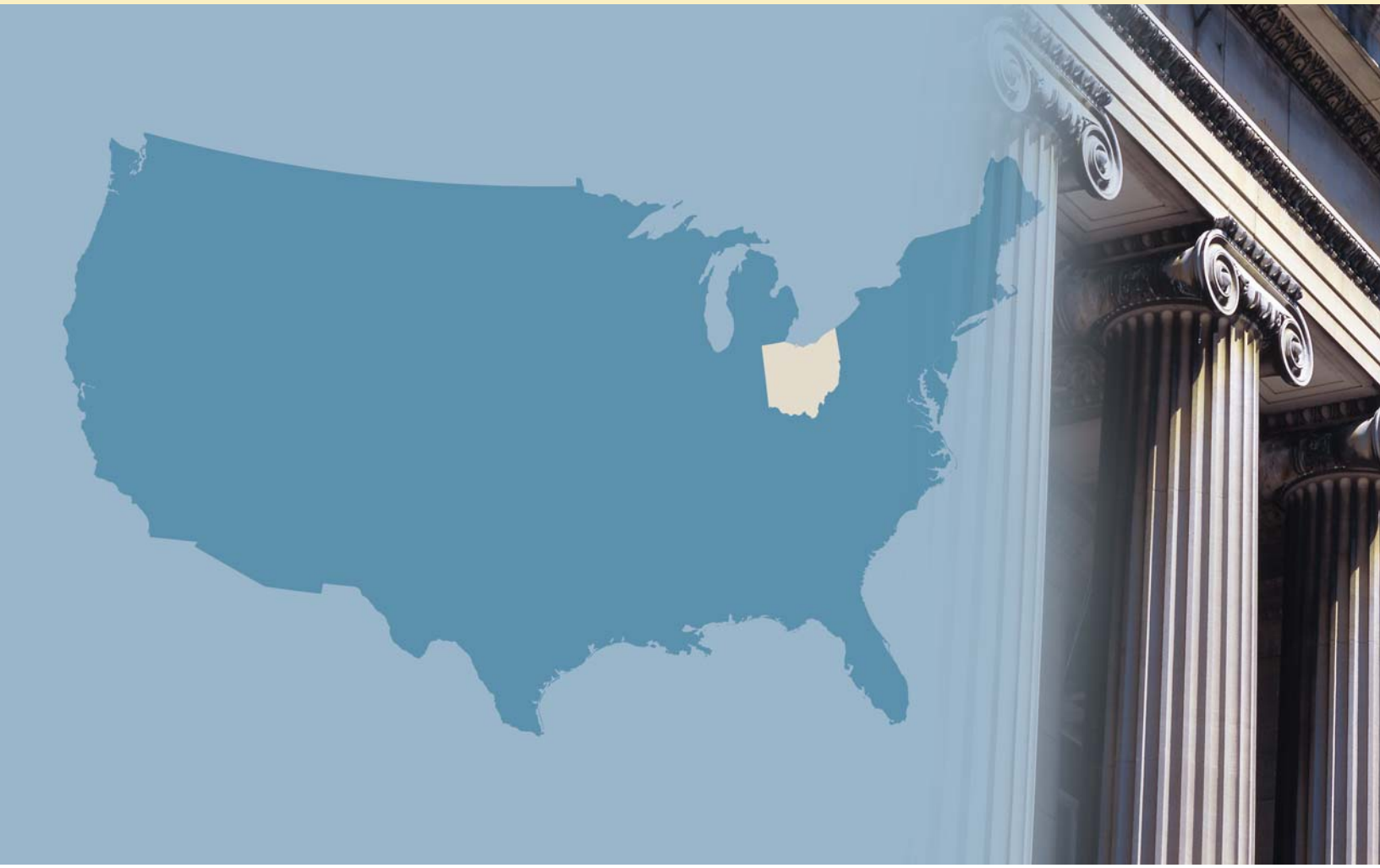
Labor and Employment Laws in the State of Ohio



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LABOR AND EMPLOYMENT LAWS IN THE STATE OF OHIO

I. INTRODUCTION

In recent years, Ohio's checkered legislative history has made it difficult to make general characterizations about whether Ohio law is hospitable or not hospitable to employers. On the plus side, the employment-at-will doctrine is as solid as ever, the Ohio courts favor arbitration agreements in the employment setting, covenants not to compete will generally be enforced, Ohio courts embrace federal court standards in discrimination and harassment cases, the tort of public policy wrongful discharge seems to be in remission after a period of expansion, and the Ohio legislature has enacted tort reform legislation making it more difficult for employees to prove workplace intentional tort claims and imposing damages caps on these and other types of tort actions, including discrimination claims.

But, in certain areas, Ohio law is not so favorable to employers. In Ohio, there is an abundance of cognizable common-law claims in the employment setting, supervisors can be held individually liable for discrimination claims, the standards governing harassment claims are quite liberal, and age discrimination is a bewildering labyrinth of statutory provisions and case law pronouncements.

II. LOCAL PRACTICE

A. Court Organization

In Ohio, the vast majority of state court lawsuits are commenced in the court of common pleas, the general trial courts of the State of Ohio which are located in each county. Some claims seeking limited damages can also be commenced in municipal courts. There are 88 Ohio counties and, therefore, 88 courts of common pleas. These courts have original jurisdiction over most civil claims. Common-pleas courts also have authority to hear appeals from administrative agencies, such as the Ohio Industrial Commission (workers' compensation claims) and the Ohio Unemployment Compensation Review Commission (unemployment compensation claims).

Appeals in Ohio state courts are heard by district courts of appeals. Ohio is divided into twelve appellate districts, each of which covers one or more counties. The number of judges in each district varies from four to twelve, depending on a variety of factors, including the court's caseload and the size of the district. Appeals from common-pleas courts can be taken to the district courts of appeal as a matter of right, and each appeal is decided by a three-judge panel.

The Ohio Supreme Court is the court of last resort in Ohio. In civil cases, appellate review at this level is generally limited to cases involving a "substantial constitutional question," an issue of "public or great general interest," and cases in which there have been conflicting opinions on the same question from two or more courts of appeals. Ohio S.Ct. R. II.

Federal courts in Ohio are organized under a Northern District (with judges in Cleveland, Toledo, Akron and Youngstown) and a Southern District (with judges in Columbus, Cincinnati

and Dayton). Ohio is part of the Sixth Circuit Court of Appeals, to which appeals from Ohio's two federal district courts are taken.

B. Venue and Jury Venire

Venue in Ohio is governed by Rule 3 of the Ohio Rules of Civil Procedure. Generally, a civil claim based on an employment-related dispute can be commenced in the county where the defendant resides, where the defendant has its principal place of business, where the defendant conducted activity that gave rise to the claim for relief, where all or part of the claim arose, or the county where the plaintiff resides (if the defendant is a citizen of another state). Ohio Civ. R. 3(B)(1), (2), (3), (6), (7).

There are no particular counties where juries can clearly be deemed either pro-employee or pro-employer. Generally, however, the more highly populated the county – *e.g.*, Cuyahoga (Cleveland), Franklin (Columbus), Lucas (Toledo), Summit (Akron), and Montgomery (Dayton) – the more likely the parties are to draw a "blue collar" jury that may be more sympathetic to employees than to employers.

Ohio's civil rules prescribe a jury of no greater than eight citizens (or less if the parties so stipulate), and a verdict in a civil action must be support by at least three-fourths of the jurors (unless the jury is comprised of less than four members, in which case the verdict must be unanimous). In contrast, in federal courts, the jury must be comprised of no less then six and no greater than twelve members, and a verdict must be supported by the unanimous consent of all the jurors. Thus, at least with regard to this latter factor, Ohio employers are better off in federal court.

III. PERSONNEL FILES, EMPLOYEE INFORMATION AND REFERENCES (OHIO REV. CODE §4113)

A. Personnel Files and Employee Information

An employee has the right to inspect his or her medical records generated in relation to the employment relationship. Additionally, an amendment to the Ohio Constitution (Article II, §34a) requires employers to provide information about employees (including names, addresses, occupations, pay rates, and hours worked) to an employee or a person acting on behalf of an employee, upon request and at no charge.

B. Employee References

Ohio's job-reference-immunity statute immunizes employers from liability for damages resulting from the employer's disclosure of information pertaining to an employee's job performance made to a prospective employer. But an employer is not protected where the plaintiff proves that the employer disclosed particular information with the knowledge that it was false, with the deliberate intent to mislead the prospective employer or another person, in bad faith, or with malicious purpose, or that the disclosure of particular information by the employer constitutes an unlawful discriminatory practice.

IV. OHIO FAIR EMPLOYMENT PRACTICES LAWS (OHIO REV. CODE CHAPTER 4112)

A. Overview of Discrimination Law in Ohio: The Ohio Civil Rights Act

Ohio's Civil Rights Act prohibits employers from discriminating against individuals on the basis of race, color, religion, national origin, disability, age, ancestry, military status (defined as "service in the uniformed service" which includes voluntary or involuntary service in the U.S. armed forces, National Guard, or Ohio Organized Militia), or sex (which encompasses pregnancy and any illness arising out of and occurring during the course of pregnancy, childbirth or a related medical condition).

Federal case law construing Title VII of the Civil Rights Act of 1963 is generally applicable to cases involving alleged violations of the Ohio Civil Rights Act. *Plumbers & Steamfitters Joint Apprenticeship Committee v. Ohio Civil Rights Commission*, 66 Ohio St.2d 192, 421 N.E.2d 128 (1981).

A major difference between the Ohio Civil Rights Act and Title VII, however, is the definition of an "employer." Under Title VII, "employer" is defined as any person employing 15 or more individuals, while under the Ohio statute an employer includes any entity employing four or more persons within Ohio. Additionally, unlike Title VII, the Ohio Act's definition of "employer" has been construed by the Ohio Supreme Court to include supervisors, who can be held individually liable for acts of discrimination. *Genaro v. Central Transport, Inc.*, 84 Ohio St.3d 293, 703 N.E.2d 782 (1999).

The Ohio Civil Rights Commission (OCRC) is charged with enforcing the Civil Rights Act. Employees who believe that they have been subjected to unlawful discrimination can file a charge with one of the OCRC's regional offices. Due to a worksharing arrangement between the OCRC and the U.S. Equal Employment Opportunity Commission, charges filed with either agency are usually deemed to be duly filed, and some charges are investigated by the EEOC while others are investigated by the OCRC.

An OCRC charge must be filed within six months after the alleged discriminatory practice was committed. The OCRC tries to resolve the charge by conference, conciliation, and persuasion, but if that fails, the charge is investigated and, if probable cause is found, a complaint is issued by the Ohio Attorney General's office on behalf of the OCRC. At this stage, the case is litigated before a hearing examiner, and if a violation of the Act is found, the OCRC has authority to order affirmative relief in the form of hiring, reinstatement, and back pay. Judicial review of an OCRC order may be sought in the court of common pleas of the county where the violation occurred, but such review is limited to whether the OCRC's determination is supported by reliable, probative, and substantial evidence.

Filing a charge with the OCRC is not a prerequisite to a lawsuit. Ohio law provides a private right of action to sue for violations of the Act without having to exhaust administrative remedies. *Elek v. Huntington National Bank*, 60 Ohio St.3d 135, 573 N.E.2d 1056 (1991). With the exception of age discrimination claims, discussed below, the statute of limitations applicable to discrimination claims asserting violations of §4112 is the six-year period codified in Ohio

Rev. Code §2305.07. *Cosgrove v. Williamsburg of Cincinnati Management Co.*, 70 Ohio St.3d 281, 638 N.E.2d 991 (1994).

A successful plaintiff may recover not only equitable remedies, but also compensatory and punitive damages. *Rice v. CertainTeed Corp.*, 84 Ohio St.3d 417, 704 N.E.2d 1217 (1999). However, on account of Ohio's recent tort reform legislation, which has been held to apply to claims under Ohio Rev. Code Ch. 4112 (*Luri v. Republic* Services, 193 Ohio App.3d 682, 953 N.E.2d 859 (Cuyahoga Cty. 2001), noneconomic damages, such as pain and suffering, mental anguish, etc. are capped at the greatest of $250,000 per plaintiff, three times economic loss up to $350,000 per plaintiff, or $500,000 per occurrence. "Occurrence" means all claims arising from any one person's bodily injury. Ohio Rev. Code §2315.18(B)(2). Punitive damages are capped at the lowest of two times compensatory damages, 10% of the employer's net worth, or $350,000. Ohio Rev. Code §2315.21. There is no cap on economic damages (*i.e.*, lost compensation, medical expenses, etc.). Ohio Rev. Code §2315.18(B)(1).

Despite the Ohio Civil Rights Act's requirement that it be construed liberally, Ohio courts have in recent years tended to construe it in a manner favorable to employers as to some issues. For instance, although a plaintiff can establish a *prima facie* case of discrimination with direct evidence (as opposed to the standard four-pronged *prima facie* test), Ohio courts adhere to the "stray remarks" doctrine under which discriminatory statements are not probative of discrimination if they do not have a direct nexus to the subject adverse employment decision. *Byrnes v. LCI Communication Holdings Co.*, 77 Ohio St.3d 125, 672 N.E.2d 145 (1996).

Further, under the "same actor" inference, where the same person makes the hiring and firing decision, especially within a short time period, "a court may strongly infer a nondiscriminatory motivation in the later action." *Pirsil v. International Steel Group*, 2005 Ohio App. LEXIS 2815 (Cuyahoga Cty. 2005).

B. Harassment

Ohio law recognizes two types of harassment under the Ohio Civil Rights Act: *quid pro quo* harassment (harassment directly linked to the grant or denial of a tangible economic benefit), and hostile work environment harassment (harassment that, while not affecting economic benefits, has the purpose or effect of creating a hostile or abusive work environment). *Hampel v. Food Ingredients Specialties, Inc.*, 89 Ohio St.3d 169, 729 N.E.2d 726 (2000).

Quid pro quo sex harassment requires proof of the following elements: 1) the employee was subjected to unwelcome sexual harassment in the form of sexual advances or requests for sexual favors; 2) the harassment was based on sex; and 3) the employee's submission to the unwelcome advances was an express or implied condition of receiving job benefits or the employee's refusal to sexual demands resulted in a tangible job detriment. *Doe v. Marker*, 2003 Ohio App. LEXIS 5584 (Trumbull Cty. 2003).

A claim of hostile work environment harassment can be based on any protected class. *Courie v. Alcoa*, 162 Ohio App.3d 133, 832 N.E.2d 1230 (Cuyahoga Cty. 2005) (race harassment). To establish a hostile work environment claim, the employee must prove that: 1) the harassment was unwelcome; 2) the harassment was based on a protected class; 3) the

harassing conduct was sufficiently severe or pervasive to affect the terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment; and 4) the harassment was either committed by a supervisor, or the employer, through its agents or supervisory personnel, knew or should have known of the harassment and failed to take immediate and appropriate corrective action. *Persichillo v. Motor Carrier Service, Inc.*, 156 Ohio App.3d 383, 806 N.E.2d 181 (Wood Cty. 2004).

Since *Hampel*, Ohio courts have construed harassment claims consistent with the U.S. Supreme Court's pronouncements in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries,Inc. v. Ellerth*, 524 U.S. 742 (1998). Thus, where the harassment is perpetrated by a supervisor and results in a tangible job detriment (*e.g.* discharge, demotion, pay cut), the employer will be held strictly liable and there is no affirmative defense. *Harmon v. GZK, Inc.*, 2002 Ohio App. LEXIS 480 (Montgomery Cty. 2002); *Brentlinger v. Highlights For Children*, 142 Ohio App.3d 25, 753 N.E.2d 937 (Franklin Cty. 2001).

Where the harassment perpetrated by a supervisor does not culminate in a tangible job detriment, however, the employer can escape liability if it proves that 1) it exercised reasonable care to prevent and promptly correct the harassing behavior, and 2) the employee unreasonably failed to take advantage of preventive or corrective opportunities or to otherwise avoid the harm. *Jackson v. Saturn of Chapel Hill, Inc.*, 2005-Ohio-5302 (Stark Cty. 2005); *Harmon*; *Brentlinger*. This affirmative defense is not available to supervisors who are individually sued for harassment. *Harmon, supra*.

Strict liability is not applied in coworker harassment cases. Rather, an employer can be held liable only for its own negligence – *i.e.*, it knew or should have known of the harassment and failed to take prompt corrective action. *Payton v. Receivables Outsourcing, Inc.*, 2005 Ohio App. LEXIS 4515 (Cuyahoga Cty. 2005).

The Ohio Supreme Court has recognized the viability of same-sex harassment claims. *Hampel, supra*. Moreover, harassing conduct can constitute actionable sex harassment even if it does not contain sexual elements, so long as it is undertaken because of the victim's sex. *Hampel*. Ohio courts have not yet recognized claims for harassment based on one's sexual orientation. *Tenney v. General Electric Co.*, 2002 Ohio App. LEXIS 2960 (Trumbull Cty. 2002).

The Ohio Supreme Court has recognized a common-law claim for sexual harassment, premised on an employer's negligence in maintaining a safe workplace free from sexual harassment. *Kerans v. Porter Paint Co.*, 61 Ohio St.3d 486, 575 N.E.2d 428 (1991). This type of claim requires proof of the same elements that are required to establish a statutory sex harassment claim. *Bell v. Cuyahoga Community College*, 129 Ohio App.3d 461, 717 N.E.2d 1189 (Cuyahoga Cty. 1998). A *Kerans* claim is available only for harassment based on sex, not any other protected classes. *Griswold v. Fresenius USA*, 978 F.Supp. 718 (N.D. Ohio 1998).

C. Disability Discrimination

The definition of a disability under the Civil Rights Act, parallels the definition that was contained in the federal Americans With Disabilities Act, 42 U.S.C. §12101 *et seq.*, before that Act was recently amended by the Americans With Disabilities Act Amendments Act. Thus, for

the most part, Ohio courts construe the disability discrimination provisions of the Ohio Civil Rights Act consistent with the manner in which the federal courts have construed the Americans With Disabilities Act. *City of Columbus Civil Service Commission v. McGlone*, 82 Ohio St.3d 569, 697 N.E.2d 204 (1998). Additionally, Ohio has adopted the ADA standard governing the illegal use of drugs and its "safe harbor" rehabilitation provision.

D. Age Discrimination

The Ohio statutory scheme regarding age discrimination deserves special mention because it is unique in several ways as compared to the other protected classes. First, the Ohio Civil Rights Act contains three separate provisions authorizing employees to commence a court action to redress age discrimination:

- §4112.99 (the general remedial statute authorizing civil actions for violations of §4112.02(A));

- §4112.02(N) (authorizing civil actions for age discrimination prohibited by §4112.02(A), to be commenced within 180 days of the alleged violation); and

- §4112.14 (containing an age discrimination prohibition separate from the one in §4112.02(A), and authorizing civil actions to redress this independent prohibition).

Second, the statute of limitations applicable to §4112.99 age discrimination claims is the 180-day period codified in §4112.02(N), rather than the six-year statute of limitations that applies to §4112.99 claims based on the other protected classes. *Ziegler v. IBP Hog Market, Inc.*, 249 F.3d 509 (6th Cir. 2001). However, claims premised on §4112.14 (which contains no express statute of limitations), are governed by the six-year statute of limitations. *Morris v. Kaiser Engineers, Inc.*, 14 Ohio St.3d 45, 471 N.E.2d 471 (1984).

Third, with the exception of §4112.99, age discrimination claims are subject to an election of remedies requirement. A plaintiff must elect between an OCRC charge of age discrimination (§4112.05), a §4112.02(N) lawsuit, or a §4112.14 lawsuit; the pursuit of one of these remedies bars pursuit of any of the others. Ohio Rev. Code §4112.08. §4112.02(N); §4112.14(B). Although §4112.99 is silent on this issue, the Ohio Supreme Court has held that §4112.99 "is not subject to the election of remedies." *Lieninger v. Pioneer National Latex*, 115 Ohio St.3d 311, 875 N.E.2d 36 (2007).

Fourth, the different age discrimination statutes have different remedial provisions. Compensatory and punitive damages are available for age discrimination claims asserted under §4112.02(N) and §4112.99, but not under §4112.14, which only allows recovery of equitable relief (back pay, reinstatement) and therefore does not entitle one to a jury trial. *Hoops v. United Telephone Company of Ohio*, 50 Ohio St. 3d 97, 553 N.E.2d 252 (1990). However, recovery of attorneys' fees is authorized under §4112.14, but not under §4112.02(N) or §4112.99.

E. Family/Medical Leave

Ohio does not have a statute similar to the Family and Medical Leave Act of 1993. However, an administrative regulation enacted pursuant to the Ohio Civil Rights Act requires employers to provide reasonable maternity leaves of absence for childbearing and in the event a pregnant employee becomes temporarily disabled as a result of the pregnancy.

The Ohio Supreme Court has construed this regulation to mean that a pregnant employee must be treated the same as non-pregnant employees, but not better than them, under the employer's leave policies; thus, if a pregnant employee is not eligible for leave time under the employer's general policy, and the policy is uniformly applied, the employer need not grant leave time to the pregnant employee. *McAfee v. Nursing Care Management of America, Inc.*, 2010 Ohio 2744 (2010).

Where the employer has no leave policy, a reasonable leave of absence for childbearing must be granted to a pregnant employee. This regulation does not define what is a "reasonable" leave of absence, but one Ohio court has held that the regulation could obligate an employer, depending on the circumstances, to provide a longer leave of absence than the twelve weeks permitted under the federal Family and Medical Leave Act. *McConaughy v. Boswell Oil Co.*, 126 Ohio App.3d 820, 711 N.E.2d 719 (Hamilton Cty. 1998).

The Ohio Military Family Leave Act (Ohio Rev. Code Ch. 5906), which covers employers with at least 50 employees, gives employees the right to take the lesser of 10 work days or 80 hours of unpaid leave once per calendar year if they are the spouse, parent or legal custodian of a member of the uniformed services who is a) called to active duty for more than 30 days, or b) injured, wounded or hospitalized while serving on active duty in the uniformed services. As is the case under the federal Family and Medical Leave Act, an employee must be employed for at least 12 months and must have worked at least 1250 hours during the 12 months preceding the leave, in order to be eligible to take time off under the Military Family Leave Act.

F. Whistleblower Protection Act (Ohio Rev. Code §4113.52)

Ohio's Whistleblower Protection Act protects employees from retaliation for reporting certain suspected criminal violations of state or federal statutes, or ordinances or regulations of a political subdivision, to the employer or to appropriate governmental authorities.

In order to gain the protection of this statute, the employee must strictly comply with its requirements, which include verbal and oral notification to the employer in certain instances and a reasonable belief that the suspected violation is in fact a criminal violation that rises to a certain level. *Contreras v. Ferro Corp.*, 73 Ohio St.3d 244, 652 N.E.2d 940 (1995). An aggrieved employee may commence a civil action within 180 days to recover reinstatement, back pay and attorneys' fees.

G. Workers' Compensation Retaliation (Ohio Rev. Code §4123.90)

Ohio law prohibits employers from discharging, demoting, reassigning, or taking any punitive action against an employee because he or she has filed a claim or instituted, pursued, or

testified in any proceedings under the Workers' Compensation Act for a work-related injury or occupational disease. The employee must first provide written notice of the claimed violation to the employer, and then must commence the action within 180 days of the adverse employment action.

A successful plaintiff can recover reinstatement, back pay, and attorneys' fees. *Id.* Ohio courts apply a burden-shifting proof scheme to these claims, similar to the one applied in discrimination actions. *Markham v. Earle M. Jorgenson Co.*, 138 Ohio App.3d 484, 741 N.E.2d 618 (Cuyahoga Cty. 2000).

V. OHIO WAGE AND HOUR LAWS

A. Ohio's Minimum Wage and Overtime Law (Ohio Rev. Code § 4111.03 et. seq.)

Ohio's minimum wage in 2012 is $7.70 per hour. This minimum wage rate is to be increased every year by the rate of inflation for the previous year according to the consumer price index. Smaller businesses (*i.e.*, those with annual gross receipts of $250,000 or less) are governed by the federal minimum wage. Ohio's overtime law is a corollary to the Fair Labor Standards Act overtime provisions, and expressly incorporates those provisions by reference. This law also contains an anti-retaliation provision.

The Ohio Director of Commerce is given authority to investigate potential violations of Ohio's wage and hour laws, in coordination with the U.S. Department of Labor investigating violations of the companion federal laws. Additionally, an aggrieved employee may commence his or her own civil action to redress violations of Ohio's wage and hour laws, and may recover the difference between what was paid and what should have been paid, plus attorneys' fees.

B. Payment of Wages and Fringe Benefits; Deductions (Ohio Rev. Code § 4113.15 et. seq.)

Wages must be paid at least semi-monthly, with wages earned in the first half of the month paid by the first day of the following month and wages earned in the second half by the 15th day of the following month. A longer pay period is permitted where customary or when established by written contract or law. *Id.* Where wages remain unpaid for 30 days beyond the regularly scheduled payday, the employer is liable for 6% of the unpaid wages or $200, whichever is greater (in addition to the unpaid wages themselves).

An Ohio employer must pay agreed "fringe benefits" to employees, which are defined to include health and welfare benefits, retirement benefits, vacation pay, holiday pay, and separation pay.

Ohio Rev. Code §1335.11 provides a remedy for a company's failure to pay commissions to a terminated sales representative, defined as one who contracts with a principal to solicit orders for the sale of products or services and who is compensated in whole or part by commissions. However, employees are excluded from the definition of "sales representative." Thus, this statute only pertains to independent contractors.

Agreements between employers and employees whereby the employer is exempted from the wage/benefit obligations of state law are void. In addition, deductions from employee wages are unlawful unless the employee has authorized the deduction in writing, which authorization is revocable by the employee at any time, or unless the deduction is for court-ordered alimony or child support. Ohio Rev. Code §1321.31, §1321.32.

C. Child Labor (Ohio Rev. Code Chap. 4109)

Ohio Rev. Code Chapter 4109 governs the employment of minors in Ohio and requires the creation and maintenance of work permits for minors, wage agreements indicating the agreed remuneration, a list of all minors employed posted in a conspicuous location, and time records detailing starting time, stopping time, and rest/meal periods. This statute also imposes many restrictions on the employment of minors, including hours of work when school is in session, required breaks when working a certain amount of hours, and the type of work that may and may not be performed by minors based upon the age of the minor and the hazardous and injurious nature of the work involved.

D. Equal Pay (Ohio Rev. Code § 4111.7)

Ohio law prohibits discrimination based on sex, race, color, religion, national origin, age, or ancestry by paying wages to an employee at a rate less than the rate paid to others for equal work. This statute authorizes a civil action and contains a one-year statute of limitations. An aggrieved employee can recover two times the proven wage differential, plus attorneys' fees. Employers are also prohibited from retaliating against employees who complain about unlawful wage differentials or who institute or testify in an equal pay proceeding.

VI. COMMON LAW THEORIES

A. Contract/Estoppel Claims

The employment-at-will doctrine is a "bedrock of Ohio law." *Reasoner v. Bill Woeste Chevrolet, Inc.*, 134 Ohio App.3d 196, 730 N.E.2d 992 (Hamilton Cty. 1999). Thus, in the absence of a recognized exception to the employment-at-will doctrine, an Ohio employee can be discharged at any time, with or without cause. *Wright v. Honda of America Mfg., Inc.*, 73 Ohio St.3d 571, 574, 653 N.E.2d 381 (1995).

In fact, in the employment setting, there is a "strong presumption" that the employment is terminable at will, and this presumption cannot be overcome unless the circumstances "clearly manifest" the parties' intention to bind each other to something other than an at-will arrangement. *Henkel v. Educ. Research Council*, 45 Ohio St.2d 249, 344 N.E.2d 118 (1976). An employee seeking to overcome the at-will presumption therefore bears a "heavy burden." *Daup v. Tower Cellular, Inc.*, 136 Ohio App.3d 555, 737 N.E.2d 128 (Franklin Cty. 2000); *Hill v. Christ Hosp.*, 131 Ohio App.3d 660, 723 N.E.2d 581 (Hamilton Cty. 1998), *app. denied*, 85 Ohio St.3d 1446 (1999).

The employment-at-will presumption can be overcome with proof of an express or implied contract of employment for a specific duration or with a "just cause" termination provision. However, given the at-will legal presumption, such contract terms must be clearly stated (either verbally or in writing). Thus, employee handbooks outlining an employer's policies are usually insufficient, by themselves, to constitute a contract of employment. *Rigby, supra*; *Trader v. People Working Cooperatively, Inc.*, 104 Ohio App.3d 690, 663 N.E.2d 335 (Hamilton Cty. 1994), *app. dismissed*, 74 Ohio St.3d 1286 (1996).

Likewise, disciplinary policies, job performance praise, positive comments about an employee's future with the company, and promises of "permanent" or "life" employment generally do not rise to the level of an employment contract sufficient to overcome the at-will presumption. *Helmick v. Cincinnati Word Processing, Inc.* (1988), 45 Ohio St.3d 131, 543 N.E.2d 1212; *Sagonowski v. The Andersons, Inc.*, 2005 Ohio App. LEXIS 294 (Lucas Cty. 2005), *app. denied*, 106 Ohio St.3d 1414 (2005). *But see Mercurio v. Therm-O-Disc, Inc.*, 92 Ohio App.3d 131, 634 N.E.2d 633 (Richland Cty. 1993), *app. dismissed*, 68 Ohio St.3d 1410 (1993) (disciplinary procedure can overcome the at-will presumption).

Ohio plaintiffs also attempt to defeat the at-will presumption with promissory estoppel claims, which require proof of a clear, unambiguous, specific promise of job security, reasonable and foreseeable reliance on the promise, and injury caused by the reliance. *Saganowski, supra*; *Rigby v. Fallsway Equipment Co., Inc.*, 150 Ohio App.3d 155, 779 N.E.2d 1056 (Summit Cty. 2002); *Daup, supra*; *Reasoner, supra*; *Hill, supra*; *Trader, supra*; *Condon, supra*.

Job performance praise and promises of future benefits or opportunities are insufficient to constitute the requisite specific promise of job security that is necessary to sustain a promissory estoppel claim. *Wing v. Anchor Media, Ltd.*, 59 Ohio St.3d 108, 570 N.E.2d 1095 (1991); *Snyder v. AG Trucking, Inc.*, 57 F.3d 484 (6th Cir. 1995).

Ohio employers can strengthen the at-will presumption and defeat breach of contract or promissory estoppel claims by means of at-will disclaimers contained in employee handbooks or other documentation provided to the employee during the employment relationship. Absent fraud in the inducement, an at-will disclaimer precludes an employee from claiming the employment relationship was other than at-will. *Wing, supra*; *Karnes v. Doctors Hosp.*, 51 Ohio St.3d 139, 555 N.E.2d 280 (1990).

B. Public Policy Wrongful Discharge

Another exception to the employment-at-will doctrine is the tort of public policy wrongful discharge, first recognized by the Ohio Supreme Court in *Greeley v. Miami Valley Maintenance Contractors, Inc.*, 49 Ohio St.3d 228, 551 N.E.2d 981 (1990). There, the Supreme Court held that an employee can maintain a civil action against an employer for compensatory and punitive damages when the employee is discharged for a reason which is prohibited by statute (regardless of whether or not the statute provides a right of action). This tort was later expanded to recognize not only statutes, but state and federal constitutions, administrative regulations, and the common law as sources upon which such a claim can be based. *Collins v. Rizkana*, 73 Ohio St.3d 65, 652 N.E.2d 653 (1995).

Four elements must be proven to sustain a *Greeley* claim for public policy wrongful discharge: 1) a clear public policy exists and is manifested in a state or federal constitution, statute or administrative regulation, or the common law (the "clarity" element); 2) dismissal of employees in circumstances like those involved in the plaintiff's dismissal would jeopardize that public policy (the "jeopardy" element); 3) plaintiff's dismissal was motivated by conduct related to the public policy (the "causation" element); and 4) the employer lacked overriding legitimate business reasons for the discharge (the "overriding justification" element).

The "jeopardy" element presents the issue of whether a *Greeley* claim is available when the underlying source of public policy provides the employee with a remedial scheme to vindicate his or her rights. In *Wiles v. Medina Auto Parts*, 96 Ohio St.3d 240, 773 N.E.2d 526 (2002), the Ohio Supreme Court answered this question in the negative with regard to a *Greeley* claim premised on the FMLA. Likewise, in *Leininger v. Pioneer National Latex*, 115 Ohio S.3d 311, 875 N.E.2d 36 (2007), the Ohio Supreme Court held that a *Greeley* claim cannot be premised on Ohio Rev. Code Ch. 4112.

Of course, courts will recognize a *Greeley* claim where the underlying source of public policy does not provide any mechanism for the employee to seek redress, such as, where an employer discharges an employee for serving on a jury, for providing truthful testimony that was unfavorable to the employer, or for speaking with an attorney. *Sabo v. Schott*, 70 Ohio St. 3d 527, 639 N.E.2d 783 (1994).

A public policy wrongful discharge claim is subject to a four-year statute of limitations, at least insofar as it is premised on a statute, rule or law that does not contain its own statute of limitations. *Pytlinski v. Brocar Products, Inc.*, 94 Ohio St.3d 77, 760 N.E.2d 385 (2002). After *Pytlinski*, whether the employee pursuing a *Greeley* claim must comply with a shorter statute of limitations that is contained in the underlying statute is unclear.

C. Invasion of Privacy

Two types of invasion of privacy claims have been recognized in the employment context. The first has been characterized as the wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities. *Seta v. Reading Rock, Inc.*, 100 Ohio App.3d 731, 654 N.E.2d 1061 (Butler Cty. 1995), *app. denied*, 73 Ohio St.3d 1413 (1995). The second is the publication of private affairs of an employee with which the public has no legitimate interest. *Wright v. Schwebel Baking Co.*, 2005 Ohio App. LEXIS 4041 (Mahoning Cty. 2005).

In Ohio, attempts to challenge drug and alcohol testing in the guise of an invasion of privacy claim have failed. *Bellinger v. Weight Watchers Gourmet Food co.*, 142 Ohio App.3d 708, 756 N.E.2d 1251 (Stark Cty. 2001). However, employer searches can constitute an actionable invasion of privacy, if the employee can establish that he or she had a reasonable expectation of privacy in the property that was searched. *Branan v. Mac Tools*, 2004 Ohio App. LEXIS 5011 (Franklin Cty. 2004). Employer policies alerting employees that their work areas and property they bring to work can be searched by the employer can serve to defeat employee invasion of privacy claims premised on such searches, because such policies tend to eliminate any reasonable expectation of privacy the employees may otherwise have.

D. Negligent Hiring/Retention/Supervision

Many employees in Ohio have attempted to recover from their employer for injuries inflicted by co-workers based upon negligent hiring, negligent retention, or negligent supervision theories. Negligent hiring and negligent retention claims are comprised of the following elements: 1) the existence of an employment relationship between the employer and a co-worker of the plaintiff; 2) the co-worker's incompetence; 3) the employer's actual or constructive knowledge of such incompetence; 4) the co-worker's act or omission causing the plaintiff's injuries; and 5) the employer's negligence in hiring or retaining the co-worker as the proximate cause of the plaintiff's injuries. *Steppe v. Kmart Stores*, 136 Ohio App.3d 454, 737 N.E.2d 58 (Cuyahoga Cty. 1999), *app. denied*, 88 Ohio St.3d 1448 (2000).

To establish negligent supervision, the employee must prove 1) the perpetrator is guilty of a tort or wrong against the plaintiff employee for which the perpetrator could be held individually liable, and 2) the employer breached a duty to act reasonably and prudently in supervising the tortfeasor. *Strock v. Presnell*, 38 Ohio St.3d 207, 527 N.E.2d 1235 (1988).

Foreseeability of injury is the linchpin of this tort. However, the mere fact that injurious behavior might be foreseen is not enough to impose liability; rather, foreseeability is determined by the totality of the circumstances, and it is only when the totality of circumstances are "somewhat overwhelming" that the employer will be held liable for negligent hiring, negligent retention, or negligent supervision. *Evans v. Ohio State University*, 112 Ohio App.3d 724, 680 N.E.2d 161 (Franklin Cty. 1996), *app. denied*, 77 Ohio St.3d 1494 (1996).

Nonetheless, one Ohio court has held that an employer can be liable for negligent hiring if a background check would have revealed the employee's criminal or tortious propensities and would have prevented his hiring. *Stephens v. A-Able Rents Co.*, 101 Ohio App.3d 20, 654 N.E.2d 1315 (Cuyahoga Cty. 1995). The *Stephens* decision illustrates why it is a good idea for Ohio employers to conduct background checks before hiring employees. Fortunately, an employer's failure to conduct a background check on an existing employee cannot subject the employer to liability under a negligent hiring or negligent retention theory. *Johnson v. Cavin*, 1991 Ohio App. LEXIS 923 (Lawrence Cty. 1991).

E. Infliction of Emotional Distress

Ohio courts recognize intentional infliction of emotional distress as a viable cause of action in the employment context. However, it is very difficult for an employee to establish such a claim. The employer's conduct must be "extreme and outrageous," meaning worse than malicious conduct justifying an award of punitive damages, and the employee's injury must be so severe and debilitating that no reasonable person could be expected to endure it. *Yeager v. Local Union 20*, 6 Ohio St.3d 369, 453 N.E.2d 666 (1983).

Nonetheless, despite the high threshold for stating a claim for intentional infliction of emotional distress, it is not uncommon for courts to allow such claims to proceed. *Tenney v. General Electric Co.*, 2002 Ohio App. LEXIS 2960 (Trumbull Cty. 2002).

Claims for negligent infliction of emotional distress are limited to situations where the plaintiff is a bystander to an accident and has suffered a severe and debilitating emotional injury from witnessing it. *Bunger v. Lawson Co.*, 82 Ohio St.3d 463, 696 N.E.2d 1029 (1998). Unless this limited fact situation exists, Ohio courts do not recognize the tort of negligent infliction of emotional distress in the employment context. *Powers v. Pinkerton, Inc.*, 2001 Ohio App. LEXIS 138 (Cuyahoga Cty. 2001), *app. dismissed*, 91 Ohio St.3d 1525 (2001).

F. Intentional Tort

Generally, an employee's exclusive remedy for a work-related injury or occupational disease is the Ohio Workers' Compensation Act, Ohio Rev. Code Ch. 4123, under which complying employers are immune from suit seeking recovery for injuries incurred during the performance of one's job duties. However, Ohio recognizes a limited exception to this immunity by permitting employees to sue for workplace intentional torts.

For claims arising prior to April 7, 2005, the plaintiff must prove three elements to prevail on an intentional tort claim: 1) knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within its business operation; 2) knowledge by the employer that if the employee is subjected by his employment to such dangerous process, procedure, instrumentality or condition, then harm to the employee will be a substantial certainty; and 3) the employer, under such circumstances, and with such knowledge, required the employee to continue to perform the dangerous task. *Fyffe v. Jeno's, Inc.*, 59 Ohio St.3d 115, 118, 570 N.E.2d 1108 (1991). Proof beyond that required to prove gross negligence or recklessness must be established.

On April 7, 2005, the Ohio legislature made it even harder for plaintiffs to establish intentional tort claims by enacting a new statutory standard for intentional torts, codified at Ohio Rev. Code §2745.01. This statute provides that "the employer shall not be liable unless the plaintiff proves that the employer committed the tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur." Ohio Rev. Code §2745.01(A).

According to this statute, "'substantially certain' means that an employer acts with a deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death." Ohio Rev. Code §2745.01(B). Thus, the statute imposes a higher standard – deliberate intent – than the *Fyffe* standard. The Ohio Supreme Court has upheld Ohio Rev. Code §2745.01 as constitutional. *Stetter v. Corman Derailment Services, LLC*, 125 Ohio St.3d 280, 927 N.E.2d 1092 (2010).

G. Arbitration Agreements (Ohio Rev. Code § 2711.01 et. Seq.)

The Ohio Arbitration Act provides that arbitration agreements are "valid, irrevocable, and enforceable, except on grounds that exist at law or in equity for the revocation of any contract." When a party to an arbitration agreement files a lawsuit in court and the other party moves to stay the proceedings and/or moves to compel arbitration, and the trial court determines the claims are arbitrable and the agreement is enforceable, the trial court shall stay the action and/or compel arbitration. *Smith v. Whitlach & Co.*, 137 Ohio App.3d 682, 685, 739 N.E.2d 857 (Portage Cty. 2000).

The Ohio Arbitration Act evinces Ohio's public policy encouraging arbitration as a method to settle disputes. *Eagle v. Fred Martin Motor Co.*, 157 Ohio App.3d 150, 158, 809 N.E.2d 1161 (Summit Cty. 2004). An arbitration agreement gives rise to a presumption of arbitrability, meaning that doubts as to whether an issue is arbitrable should be resolved in favor of coverage. *Council of Smaller Enterprises v. Gates, McDonald & Co.*, 80 Ohio St.3d 661, 666, 687 N.E.2d 1352 (1998).

An arbitration agreement entered into with an existing employee is supported by sufficient consideration in the form of continued employment or the employer's agreement to arbitrate (or both). *Robbins v. Country Club Retirement Center IV, Inc.*, 2005 Ohio App. LEXIS 1290, *11 (Belmont Cty. 2005).

An employee can escape an arbitration agreement proving that the agreement is both substantively unconscionable (*i.e.* the provisions are so one-sided as to oppress or unfairly surprise the employee) and procedurally unconscionable (*i.e.*, there was no voluntary meeting of the minds under the particular circumstances at issue). *Vanyo v. Clear Channel Worldwide*, 156 Ohio App.3d 706, 808 N.E.2d 482 (Cuyahoga Cty. 2004). Courts have rejected procedural unconscionability challenges based on the fact that the employer conditioned continued employment on an employee's execution of an arbitration agreement, where the employer took steps to ensure that the employee understood the policy.

VII. PROTECTING INTELLECTUAL PROPERTY

A. Covenants Not to Compete

A covenant restraining an employee from competing with her former employer will be enforced if it 1) is no greater than is required for the protection of the employer's legitimate business interests, 2) imposes no undue hardship on the employee, and 3) is not injurious to the public. *Rogers v. Runfola & Associates, Inc.*, 57 Ohio St. 3d 5, 565 N.E.2d 540 (1991). An employer seeking to enforce a restrictive covenant by means of an injunction must establish these factors by clear and convincing evidence, as well as proof of actual irreparable harm or the existence of a threat of irreparable harm. *H.R. Graphics v. Lake-Perry*, 1997 Ohio App. LEXIS 324 (Cuyahoga Cty. 1997). Continued at-will employment constitutes sufficient consideration for a covenant not to compete. *Lake Land Employment Group of Akron, LLC v. Columber*, 101 Ohio St.3d 242, 804 N.E.2d 27 (2002).

Because covenants not to compete can be used only to restrict unfair competition, as opposed to ordinary competition, the employer must, as a threshold matter, prove that enforcing the covenant will protect a legitimate business interest. *HCCT, Inc. v. Walters*, 99 Ohio App.3d 472, 651 N.E.2d 25 (Lucas Cty. 1994). Generally, Ohio courts recognize two types of protectable business interests in this context – trade secrets and other types of confidential business information, and the good will of the employer in the form of customer relationships and customer information. *Briggs v. Butler*, 140 Ohio St. 499, 45 N.E.2d 757 (1942).

Of course, even where there is a legitimate business interest, a noncompete covenant can be enforced only to the extent it is necessary to protect that interest. In this regard, Ohio courts

will review the temporal and geographic scope of noncompete covenants. If the court finds a restrictive covenant to be unreasonable in temporal or geographic scope, the court has the discretion to either modify it to make it reasonable, or to declare it unenforceable in its entirety. *LCP Holdings Co. v. Taylor*, 158 Ohio App.3d 546, 817 N.E.2d 439 (Portage Cty. 2004).

While there is no established uniform standard and each case is addressed on its own facts, three to five year temporal restrictions have generally been upheld as reasonable. *Parma International Inc. v. Herman*, 1989 Ohio App. LEXIS 539 (Cuyahoga Cty. 1989). A noncompete covenant's geographic scope will generally be limited to the area where the employer actually does business, which could be worldwide depending on the circumstances. However, a covenant prohibiting solicitation of customers – as opposed to one prohibiting working for a competitor – need not be tied to any particular geographic area. *Extine v. Williamson*, 176 Ohio St. 403, 200 N.E.2d 297 (1964).

With regard to the requirement that there be irreparable harm before a noncompete covenant will be enforced by means of an injunction, Ohio courts have embraced the "inevitable disclosure" doctrine, under which a threat of irreparable harm warranting injunctive relief exists where the former employee has knowledge of the employer's trade secrets or confidential business information and has commenced employment with a competitor in a position that is substantially similar to the position held during the former employment. *AK Steel Corp. v. Morris*, 2001 Ohio App. LEXIS 89 (Butler Cty. 2001).

B. Trade Secrets and Confidential Information (Ohio Rev. Code § 1333.61 et. seq.)

Ohio has adopted the Uniform Trade Secrets Act, which makes it unlawful for one to misappropriate another's trade secrets. A trade secret is defined as business information that derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Generally, to constitute a trade secret, information must be both unique and competitively advantageous. *Dexxon Digital Storage, Inc. v. Haenszel*, 161 Ohio App.3d 747, 832 N.E.2d 62 (Delaware Cty. 2005). However, the information need not be tangible – a trade secret misappropriation claim can be premised on information stored in the former employee's memory. *Al Minor & Associates, Inc. v. Martin*, 117 Ohio St.3d 58, 881 N.E.2d 850 (2008). The Trade Secrets Act allows one to sue for injunctive relief as well as damages, specifically stating that "[a]ctual or threatened misappropriation may be enjoined."

In addition to the Trade Secrets Act, Ohio employees are statutorily prohibited from disclosing to third parties confidential information obtained during their employment that may not necessarily rise to the level of a trade secret. This statute has been held to provide a basis for a tort action against an employee who violates it. *Guardian Pest Control, Inc. v. Mulholland*, 1993 Ohio App. LEXIS 2943 (Cuyahoga Cty. 1993). "Confidential information" within the meaning of this statute has been defined as business information that is "known only to a limited

few, not publicly disseminated." *Proctor & Gamble*, *supra* (quoting Webster's Third New International Dictionary).

Ohio courts have adopted the inevitable disclosure doctrine in the context of actions seeking to enjoin the use and disclosure of trade secrets and confidential information. Thus, in order to establish threatened irreparable harm warranting injunctive relief under the Trade Secrets Act, it is enough to show that the former employee has knowledge of the employer's trade secrets or confidential information and has commenced employment with a competitor in a position that is substantially similar to the position held during the former employment. *Dexxon*, *supra*; *Proctor & Gamble Co.*, *supra*.

VIII. OHIO LABOR RELATIONS LAWS (OHIO REV. CODE § 4117)

A. Right to Organize

Ohio recognizes a worker's right to organize, prohibiting agreements between employees and employers whereby the employee promises not to become or remain a member of a labor organization. Ohio does not have a "right to work" statute prohibiting membership in a labor organization as a condition of employment.

B. Collective Bargaining

The Ohio Public Employees' Collective Bargaining Act, governs the labor relations between public employers in Ohio and labor organizations. This legislation, patterned after the National Labor Relations Act, does not apply to private employers.

IX. CONCLUSION

Employers in Ohio are subject to numerous state and federal laws regulating nearly every area of labor and employee relations. This booklet may be used to help develop policies and procedures that allow employers to avoid lawsuits or to make informed decisions so that when lawsuits do arise they will be in a stronger legal position from which to defend. Our hope is that by providing this summary we will give employers a useful reference to help them quickly answer some of the common, everyday employment questions that can and do arise.

Employers with questions or problems related to any of the material covered in this book are urged to contact the Ohio office of Fisher & Phillips LLP at 440.838.8800, or visit our website at www.laborlawyers.com.