PERSPECTIVES

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SEPTEMBER 29th IS COMING. . . .ARE YOU READY?

Legislation that affects a public office's rights and responsibilities with respect to public records will be implemented on September 29, 2007. House Bill No. 9 presents challenges that your office should be prepared to handle.

The law firm of Downes, Hurst & Fishel is offering training programs and seminars throughout the state to educate individuals in the public sector regarding changes in this legislation. Certification from the Attorney General's Office has been requested for these training programs in order to meet the requirements set forth in Section 149.43 of the Ohio Revised Code.

Continuing Legal Education "CLE" credits (6 hours) have been requested by the Supreme Court for the Zanesville and Toledo area seminars and has been **APPROVED** for the Gates Mills, and Centerville, Ohio sessions.

August 8, 2007 Gates Mills, Ohio
August 9, 2007 Gates Mills, Ohio
August 29, 2007 Zanesville, Ohio
September 5, 2007 Dayton, Ohio
September 18, 2007 Columbus, Ohio
September 20, 2007 Toledo Area

For registration, please contact Bonni Auteri at bauteri@dhflaw.com or by calling (614) 221-1216.

10 WAYS TO PREPARE FOR THE ADDITIONAL PUBLIC RECORDS REQUIREMENTS OF HOUSE BILL NO. 9

House Bill No. 9 ("H.B. 9") takes effect September 29, 2007, and it creates additional rights and responsibilities for public offices pursuant to R.C. § 149.43 (Public Records Act). H.B. 9 has three major areas of emphasis: (1) codification of existing case law and existing policy into the Public Records Act; (2) creation of a formalistic approach to public records

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CIVIL SERVICE REFORMS TAKE EFFECT

On July 1, 2007, House Bill No. 187 ("H.B. 187") took effect, changing the landscape of civil service law in Ohio (Chapter 124 of the Ohio Revised Code). H.B. 187 is an attempt to place substance over form. Other than for layoffs, H.B. 187 now places the Department of Administrative Services ("DAS") in an advisory role for counties and cities, while retaining ultimate control of State agencies. There are a few highlights that will require

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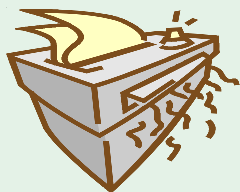
management and disclosure to ensure the public has access to its records; and (3) create strict training and disclosure requirements upon public offices to ensure compliance with the Public Records Act. Many of the requirements of the Public Records Act have not changed. However, there are several procedural and administrative requirements that must be implemented. An assessment of your office's public records landscape will determine the amount of time and effort are required to comply with the public records statute. The top ten areas to review to implement H.B. 9 are as follows:

10. **Create or update public records policy and records commission** – many public offices have record retention schedules that detail how a public office must retain and destroy documents (RC-1s, RC-2s, RC-3s). However, a public records policy is more comprehensive and records management is only a part of the overall policy. These policies should detail how you respond to public records requests, and the procedures followed by your personnel. A public records policy is mandated by H.B. 9, so a public office's first step towards compliance is to determine if they have a policy. Existing policies should be revised to amend with H.B. 9's mandates. If there is no policy, creation of a policy should be your first priority. Your public records policy is your guideline which will set the tone and effectiveness of your public records management;

9. **Revise records retention schedules** – your office should be updating records retention schedules at least annually. Prior to H.B. 9's implementation is a great time to ask your employees what types of records are maintained by your office. An RC-1 (one-time disposal) should be filed for obsolete types of records that will never be used again. Ensure that types of records that will need to be destroyed on a periodic basis are included in your RC-2 (records retention schedule);



8. **Post public records policy in main office** – your policy should be placed in any location the public has access to public records;

7. **Create and post poster to inform public of location of policy and requests** – this poster is another reminder to the public of how your office handles public records requests;

6. **Provide policy to all personnel with responsibility for public records** – your public records policy must be given to your records custodian;

5. **Include records policy in employee manual or handbook** – your employees are responsible for knowing your public records policy;

4. **Have legal counsel/attorney available to assist in responses for "legal authority"** – if your office denies a public records request, the public records requester is entitled to a legal reason for the denial.;

3. **Develop guidelines for processing and responding to public records requests** – your employees should know how to handle initial public records requests, as well as, how to provide prompt inspection of public records and provide copies of these records in a reasonable amount of time;

2. **Determine and designate key personnel who will be responsible for public records training and act as designees for elected officials** – these key personnel are responsible for training employees and enforcing your public records policy; and

1. **TRAIN - TRAIN - TRAIN all staff on the records retention policy and procedure** – routine training will (1) help you become a well informed public office with the ability to respond properly to public records requests; (2) create a

consistent approach to records management and public records disclosure; (3) ensure that everyone understands the importance of your public records policy and their role in public records compliance. H.B. 9 mandates every public official or his/her designee attend three hours of approved (by the Ohio Attorney General) public records training per term in office.

H.B. 9 presents manageable challenges. If you start preparing now for its changes, only minor adjustments will be required post September 29.

Cont'd ....Civil Service Reform

revisions to existing civil service rules and policies. Some of these revisions include:

1. "Service of the state" or "civil service of the State" – H.B. 187 creates a formal distinction between "civil service for the state", and "civil service" for any other political subdivision.

2. <u>In re Piper</u> overruled in part – an employee of an appointing authority who appears only as a witness in an employment interview, investigation or proceeding conducted by or for the appointing authority, is not entitled to have an attorney present during the interview, but an employee who is the subject of an investigation retains the right to have an attorney present when being interviewed with respect to the investigation.

3. Provisional employees eliminated – the two (2) main status categories for civil service employees are probationary and permanent. Provisional employee status no longer exists in R.C. § 124.

4. Limited filing of layoffs with DAS – counties are no longer required to file a statement of rationale with DAS for job abolishments. However, counties must still file a statement of rationale for layoffs due to lack of funds or lack of work.

5. Displacement rights modified – employees may displace within their own classification, within the classification series, or the classification held immediately prior to the classification from which the employee was laid off if held within three years prior to date of layoff. The language of "same or similar" classification has been removed.

6. Paper Layoffs – counties may now use paper layoffs to notify all potentially affected employees to determine who wants to "bump", figure it all out, and then issue layoff notices.

7. Additional exemptions to classified status – the heads of all departments appointed by a Board of County Commissioners are now unclassified. In addition, each elected official may now claim four (4) administrative and clerical support exemptions, and County Commissioners may also add one unclassified employee per official. Before reclassifying an employee's civil service status, you should contact legal counsel to ensure you have the authority to make such changes. For the creation of new unclassified positions, or the filling of newly created unclassified positions, the appointing authority has the autonomy to designate the position's civil service status in conformity with Chapter 124 of the Revised Code.

8. Designating Unclassified Employees – on the day an appointing authority appoints someone to an unclassified position in the state service (including counties and general health districts) the appointing authority must provide with written information describing the nature of unclassified service. The appointing authority must also provide that employee with a description of their duties within 30 days of appointment. DAS must be notified within 90 days after appointing someone to an unclassified position.

9. Actual duties more important than title designation – regardless of the labeling of a position, the actual duties performed by the employee will determine his/her classified status. The State Personnel Board of Review must look at the duties of the position for two (2) years prior to the date of the action.

These are just a few examples of the Legislature's emphasis on decentralized control, granting counties and cities more autonomy in the hiring and firing of their employees.

United States Supreme Court Limits Untimely Filed Discrimination Lawsuits

The United States Supreme Court recently issued a ruling limiting the ability of employees to file untimely pay discrimination lawsuits against their employers. *Ledbetter v. Goodyear Tire & Rubber Co., Inc.* held that a former employee of Goodyear could not collect back pay for years of discriminatory pay raises because she was barred by the statute of limitations.

Ledbetter was a supervisor at a Goodyear plant in Alabama. She initially had the same salary as her male counterparts, but over time she received smaller pay increases. Ledbetter filed suit after discovering that she received a substantially lower salary than her 16 male co-workers, including those she had more seniority than. She sought compensation for her entire career at the company. At trial, the jury awarded Ledbetter $224,000 in back pay and $3.28 million in punitive damages. The judge reduced the award to $360,000.

On appeal, Goodyear maintained that Ledbetter's claim was barred by the statute of limitations. Title VII of the Civil Rights Act says an employee must file a charge with the EEOC within 180 days "after the alleged unlawful employment practice occurred." The Eleventh Circuit agreed with Goodyear. In a 5-4 decision the U.S Supreme Court agreed with Goodyear and the Eleventh Circuit.

The Court explained that employees must file a complaint with the EEOC within 180 days after the initial discrete act of pay discrimination. That meant that the clock started running for Ledbetter as soon as she received her first paycheck affected by discrimination. Because Ledbetter did not file a complaint until nearly 19 years after the initial instance of discriminatory pay the Court concluded she was barred. The 180 day timeline applies even though Ledbetter may not have been aware that the pay was discriminatory within that window.

Ledbetter argued every paycheck she received up to her last contained the adverse effects of the past discrimination. The Court disagreed. A new violation does not occur merely because an act contains effects from past discrimination. The violation is triggered only by the original "discrete act of discrimination." Any discrimination that Ledbetter incurred happened when she received the initial discriminatory paycheck. Because she failed to file a complaint within 180 days of any discriminatory pay raise, The Supreme Court determined that Ledbetter's claim should have been dismissed.

Employees Who Accept Voluntary Separation Plan Eligible for Unemployment

Verizon Employees Win!

The Third Appellate District Court of Appeals for Ohio recently issued a decision indicating that employees who quit as part of an employer program to reduce their workforce remain eligible for unemployment benefits even though they quit voluntarily. *Verizon North v. Ohio Dept. of Job and Family Services,* 170 Ohio App. 3d 42 (2007). The court held that employees who quit voluntarily without just cause remain eligible for unemployment benefits provided that they quit "pursuant to an established employer plan, program, or policy, which permits the employee, because of lack of work, to accept a separation from employment." Ohio Revised Code 4141.29(D)(2)(a)(ii). Significantly in this case Verizon maintained that its voluntary separation program was not aimed at reducing workforce and thus did not fall within the exception. The Court of Appeals found otherwise.

In the fall of 2003, Verizon implemented a nationwide Management Voluntary Separation Plan (MVSP). The plan called for cash payments and enhanced pension benefits for management level employees willing to leave. 163 Ohio employees volunteered to leave under the plan. The employees subsequently sought unemployment compensation benefits. The Director of Ohio Department of Job and Family Services determined that, because the employees had left as part of a plan to reduce workforce, they were eligible for unemployment compensation benefits, even though they left voluntarily and without good cause. Verizon appealed the decision to the Unemployment Compensation Review Commission ("Commission") and ultimately through the courts.

Verizon maintained that the MVSP plan was implemented as part of a company reorganization and was not aimed primarily at reducing the workforce. Verizon submitted a number of documents and transcripts of broadcasts in which they explained to employees the reasons for the implementation of the MVSP. In particular Verizon determined that allowing workers to voluntarily leave before there was a need to layoff workers would be better for morale. The Commission reviewed the evidence and concluded that the documents submitted by Verizon indicated that the MVSP was implemented, at least in part if not primarily, to reduce the number of employees at Verizon. Thus the workers who quit per the plan were eligible for unemployment benefits. The Court of Appeals agreed that the Commission had a valid basis for making its determination and upheld the decision.

Ohio Supreme Court Adopts 7-Part "Daugherty Test" to Determine Whether Good Cause has been Established in Labor Disputes

Recently the Supreme Court of Ohio heard a case regarding the extent to which an arbitrator can define a term left undefined by a collective bargaining agreement. The specific issue in question was whether the arbitrator acted properly in adopting a seven part test to define the phrase "good cause." The Supreme Court unanimously concluded that the arbitrator was acting within his discretion using the seven part test, known as the Daugherty test, to establish "good cause." *Summit County Children Services Board v. Communication Workers of America*, 113 Ohio St. 3d 291 (2007).

Summit County Children's Service Board employee, Renee Scott, was in a workgroup covered by a collective bargaining agreement (CBA) between the Children Services Board and the Communication Workers of America, Local 4546. The CBA stipulated that the Board would not reduce pay, suspend, or discharge and employee covered by the agreement except for "good cause." No further indication was given regarding what constituted "good cause." The CBA also mandated that the employer engage in progressive discipline for employees.

Scott, a receptionist, was accused of leaving the office without permission on a number of occasions and of falsifying time cards and personnel records. A neutral administrator heard the complaint against Scott and concluded that she had violated the rules as alleged. The administrator recommended a seven-day suspension. The Board instead fired her.

Scott filed a grievance in response, which proceeded to arbitration. The primary issue before the arbitrator was whether Scott was terminated for "good cause." The arbitrator ruled that Scott should not have been punished for leaving work without permission for falsifying personnel records because the rules had lapsed by virtue of non-enforcement. The arbitrator did however conclude that Scott was subject to discipline for violating the time card rules. Nevertheless, the arbitrator determined that this was not a serious enough infraction to warrant termination.

The arbitrator's decision was based on an analysis of whether the one remaining violation was serious enough to warrant "good cause" as mandated by the CBA. The arbitrator applied a seven-part test originally used by federal arbitrator Carroll Daugherty in 1972 that has since been widely utilized in employment-related arbitration cases. One of the factors of the test necessitates that punishment for a rule violation must be proportionate to the offense in light of a worker's past service record and other mitigating factors. The arbitrator concluded that the Board failed to meet that standard. Scott was suspended 7 days without pay and ordered reinstated to her job.

The Children's Services Board appealed the decision to the Court of Common Pleas, which has the authority to review arbitrator's decisions only to determine if the arbitrator exceeded the scope of his authority. The court concluded that the arbitrator had exceeded his authority by using the Daugherty test to define "good cause" rather

than the standard dictionary meaning of the term. The Union appealed the decision to the Ninth District Court of Appeals, which affirmed the trial court's holding and then appealed that decision to the Ohio Supreme Court.

The Ohio Supreme Court reasoned that because the CBA did not define "good cause," and because it was necessary to do so, the arbitrator had to define the term. The definition found in Black's Law Dictionary was too vague to be of any use in a labor dispute. The Court further found that the Daugherty test is widely used in defining "good cause" in the context of labor disputes and should have come as no surprise to either party. Since the consideration of proportionality and mitigating circumstances is directly incorporated into the Daugherty test the arbitrator was right to consider those factors in reducing Scott's penalty. The Ohio Supreme Court overturned the lower courts decisions and reinstated the arbitrator's findings.

One of the most important implications of this ruling is that the Ohio Supreme Court of Ohio has now endorsed the use of the seven-part Daugherty test for "good cause" in the context of labor disputes. The likely outcome is an increased reliance on this test by arbitrators in resolving disputes. Employers should familiarize themselves with the test.

Forewarning?
Performance?
Reasonable Rule?
Violation?
Proof?
Discrimination?
Fair Discipline?

The seven factors of the Daugherty test are, 1) Did the company give the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's misconduct? 2) Was the company's rule or managerial order reasonably related to: (a) the orderly, efficient, and safe operation of the company's business, and (b) the performance the company might properly expect of the employee? 3) Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of the management? 4) Was the company's investigation conducted fairly and objectively? 5) At the investigation did the judge obtain substantial evidence or proof that the employee was guilty as charged? 6) Has the company applied its rules, orders, and penalties evenhandedly and without discrimination to all employees? 7) Was the degree of discipline administered by the company in a particular case reasonably related to: (a) the seriousness of the employee's proven offense, and (b) the record of the employee in his service with the company?

IRS Clarifies Health Savings Account Comparability Issues

On May 15 the IRS issued two new proposed rules addressing health savings account (HSA) comparable contribution situations that had previously been unresolved. These new rules take effect immediately. The first issue concerns comparable contributions to HSAs of employees who have not established an HSA by December 31 of a calendar year or who have established an HSA but not informed the employer. The second rule addresses the acceleration of employer contributions for the calendar year for employees who have incurred qualified medical expenses exceeding the employer's cumulative HSA contributions to that point.

Comparable Contributions for Late Enrollees

Under the United States Tax Code §4980G(a), an employer that fails to make comparable contributions to the HSA of an eligible employee for a calendar year must pay a 35% excise tax on the aggregate amount of its contributions. If an employee has not established an HSA at the time the employer begins funding its employees' HSAs, the employer must contribute comparable amounts plus reasonable interest to the employee HSA when the employee does establish an HSA (accounting for each previous month the employee was a comparable participating employee). Previously it was unclear what happened if the employee did not open an account by December 31 of the calendar year or if the employee failed to notify the employer that he or she had opened an HSA during the calendar year.

The recent rules update gives guidance for how to address a scenario like this. The new rule allows the employer to satisfy the comparability requirement for employees who have not established an HSA by the end of the calendar year or who have not notified the employer. The employer must comply with both a notice and a contribution requirement.

The notice requirement specifies that by January 15 of the following calendar year, written notice must be supplied to all eligible employees that all eligible employees who both establish an HSA and notify the employer that they have established an HSA by the last day of February will receive a comparable contribution from the employer.

Additionally, the employer must make a comparable contribution to each employee who complies with the terms specified by April 15. A comparable contribution accounts for all months the employee was eligible and the employer made contributions to employees with established HSAs, plus reasonable interest.

Acceleration of Employer Contributions

The second issue proposed by the IRS addresses accelerated contributions by employers. For any calendar year an employer may accelerate all or part of its contribution payments for the entire year to the HSA of an employee who has incurred, during the calendar year, qualified medical expenses exceeding the employer's cumulative HSA contributions at that time. If the employer does choose to accelerate contributions during a calendar year, accelerated contributions must be available to all eligible employees on an equal and uniform basis for that calendar year and must establish uniform requirements and methods for acceleration of contributions and determination of medical expenses. If the employer chooses to provide accelerated contributions there is no obligation to provide reasonable interest.

The rules became effective June 1, 2007. For further information go to http://www.access.gpo.gov/su_docs/fedreg.frcont07.html.

Downes, Hurst & Fishel is proud to announce that Marc Fishel and Brad Bennett recently won a Federal Jury Trial in the Federal District Court in the Southern District of Ohio related to the Family and Medical Leave Act ("FMLA")

The employee, who was under a Last Chance Agreement ("LCA") after years of progressive discipline, was in the process of being provided with a pre-disciplinary notice for violating the employer's directives on the use of flex-time. However, while the pre-disciplinary notice was being drafted, the employee called-off sick, not providing an estimated return to work date. The employer designated the employee's absence as FMLA qualifying pending certification of his need for FMLA leave. Under the terms of the Collective Bargaining Agreement ("CBA"), since the employee did not know when he was returning to work, he was required to call-in his absence on a daily basis in order to receive paid sick leave benefits. The employee failed to call-in in his absence under the CBA prior to providing the FMLA certification or a return to work date. As a result, the employer added this failure to call-in to the employee's pre-disciplinary notice. After a pre-disciplinary hearing, the employee was terminated for violating the LCA. The employee filed a complaint against the employer for FMLA interference.

Prior to trial, the court found that the employer had violated the FMLA by requiring the employee to call-in his absence daily until he supplied a specific return to work date. The court, however, proceeded to trial on the issue of damages. During the trial, Marc and Brad were able to successfully argue that the employee was not entitled to relief for the FMLA violation because the employer would have fired the employee under the LCA based upon the improper use of flex-time alone, regardless of the FMLA violation. The jury returned a verdict in favor of the employer based upon this "same decision anyway" defense. As a result, no damages were awarded. While no damages were awarded, the court is still deciding the issue of whether the employee's counsel is entitled to attorneys fees for proving a violation without damages.

While the employer won at trial, the Court's holding that an employer unlawfully interferes with the FMLA by requiring an employee to call-in daily in order to receive paid sick leave benefits when no return to work date has been provided remains the law within the Court's jurisdiction. Employers should review their CBAs and sick-leave policies to ensure that they comply with this FMLA requirement.