

Rapid Fire Update I, #5:

PUBLIC SECTOR

Public employers face some different challenges that their private counterparts

Constitutional Issues

Freedom of speech

- Disciplining employees for things they say is more complicated because First Amendment rights are not checked at the door
 - For something an employee says to be actionable, it must be made pursuant to the employee's duties or regarding some matter that is not a matter of public concern
 - If it is a matter of public concern and not pursuant to job, then it is protected speech

Freedom from unreasonable search and seizure

- Privacy issues – is there a reasonable expectation of privacy? See Rapid Fire II, #2

Equal protection

- Must treat similarly situated employees the same

Property interest in employment after completion of probationary period

- Probationary period:
 - Probationary period for corrections officials: 1 year. 30-A MRSA § 501
 - Police: one year after graduation from the Maine Criminal Justice Academy or the date the board waives the basic training requirement
 - General: Periods of probation may not exceed 6 calendar months or the length of time in effect in a municipality on January 1, 1984, whichever is greater,
- Discipline only for just cause and with due process, including notice and opportunity to be heard
- Internal or CBA grievance procedures – essentially routes of appeal
- It's all about the process

Statutory Issues

Federal FMLA:

- All public agencies are covered by the FMLA regardless of the number of employees
- However, an employee must still meet the eligibility requirements to take FMLA leave:
 - 50 employees at the worksite or within 75 miles, and
 - employed 12 months and 1,250 hours of service during previous 12 months

State FMLA:

- Covered if have 25 or more employees instead of the 15 at one location for private sector

Freedom of Access

- Must know what is confidential and what is not – see 30-A MRSA § 2702 or § 503:
 - applications, resumes and letters and notes of reference, other than those letters and notes of reference expressly submitted in confidence, pertaining to the applicant hired are public records after the applicant is hired
- Telephone numbers that are not designated as “unlisted” or “unpublished” in an application, resume or letter or note of reference are public
- Final disciplinary action is public
 - If discipline remains confidential pending grievance
 - If an arbitrator completely overturns or removes disciplinary action from an employee personnel file, the final written decision is public except that the employee's name must be deleted
 - If an arbitrator upholds the disciplinary action, the arbitration decision is public
- A statutory amendment this year designates age, ancestry, marital status, mental or physical disabilities, employment choices regarding payroll deductions, religion, sex/gender/identity/orientation, and social security number are confidential

Wage and Hour

- Unlike the private sector, public employers may compensate employees with comp time in lieu of overtime pay
- There must be an agreement before it takes effect
 - Can be either collective bargaining agreement or personnel policy

- Rate:
 - Overtime comp time rate for non-exempt employees must be paid at time and a half
 - If a public sector employee has exempt employees and still allows comp time, it can be one-for-one
- Amount:
 - Public safety may accrue up to 480 hours
 - Others are limited to 240 hours
 - Employer may be policy or contract reduce these cap
 - Once cap reached, over time must be paid
- Use:
 - employee may use comp time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency
- Upon separation, accrued comp time must be paid
 - Either at the average rate over the last three years, or
 - Final rate of pay
 - Whichever is higher

Labor Unions

- Public employees can organize into Unions just like the private sector, but public employees are regulated by the Municipal Public Employees Labor Relations Law rather than the National Labor Relations Act
- Pretty similar except that public employees are not allowed to engage in work stoppage, slowdown, or strike
- Access to employees. (26 MRSA § 975)
 - Public employer is required to provide bargaining access to unit members
 - Union has right to:
 - meet with employees during work day to discuss grievances and workplace issues
 - conduct workplace meetings during lunches and breaks
 - meet with newly hired employees for 30 paid minutes
 - right to use employer email system
 - right to a spreadsheet of employee information such as name, job title, workplace location, home address, work telephone number, home and cell number, personal email address, date of hire - these items are explicitly exempted from the Freedom of Access Act confidentiality