Members Brief

An informational brief prepared by the LSC staff for members and staff of the Ohio General Assembly

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FAQ: Employment

Members of the General Assembly and their constituents periodically have questions about employment laws in Ohio. This brief addressed several frequently asked questions about various employment laws.

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Am I required to give my employees breaks?

No. Neither federal nor Ohio law requires employers to give their employees breaks, with exceptions for minors, teachers, and nursing mothers. Collective bargaining agreements and other employment agreements may include breaks, however.

Minors

Ohio's Minor Labor Law[1] prohibits a minor from working more than five consecutive hours without at least a 30-minute break. However, the break does not need to be included in the computation of hours worked by the minor.[2]

[1] R.C. Chapter 4109.

[2] R.C. 4109.07(C).

Teachers

Teachers employed by a school district board of education or an educational service center governing board must be given a lunch break of at least 30 minutes. During the break, the teacher is not required to perform any school activity. However, in a one-teacher school in which enforcement of this requirement may be a hardship, the governing board of the service center in which the one-teacher school is located may require the teacher to remain on duty.[3]

Nursing mothers

The federal Fair Labor Standards Act[4] (FLSA) regulates minimum wage, overtime pay, and child labor laws. An employer that is subject to the FLSA must give a reasonable break time for an employee to express breast milk for the employee's nursing child for one year after the child's birth each time the employee needs to express the milk. The employer must provide the nursing employee a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public. An employer is not required to compensate an employee receiving reasonable break time for any work time spent for this purpose. These requirements do not apply to an employer that employs fewer than 50 employees if the requirements would impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business.[5]

Compensation for breaks

While employers are not required to give breaks, many do. Federal regulations may require employers who provide breaks to compensate employees. Breaks lasting under 20 minutes are counted as work hours and must be compensated. Meal periods, which are usually 30 minutes or longer, are not counted as work hours. They are not compensated unless work is performed during the meal period.[6]

If I fail a drug test (including for marijuana) and lose my job, can I get unemployment benefits?

No. An employee who fails a drug test, including for marijuana, and loses that job as a result of that failure may be ineligible to receive unemployment benefits. One factor that affects eligibility for unemployment benefits is the reason an employee separated from employment. To receive unemployment benefits, an employee's separation from employment must be the result of a non-disqualifying reason. An employee must be terminated from employment through no fault of the employee. Thus, an employee discharged with just cause or who quits without just cause is ineligible for unemployment benefits.[7] If the Director of Job and Family Services, who

[3] R.C. 3319.072.

[4] 29 United States Code (U.S.C.) 201 *et seq*.

[5] 29 U.S.C. 218d.

[6] 29 Code of Federal Regulations 785.18 and 785.19.

[7] R.C. 4141.29; see Ohio Department of Job and Family Services, Worker's Guide to Unemployment Insurance (PDF).

administers and enforces the law, determines an employee was discharged with just cause, the employee cannot obtain unemployment benefits.[8] While Ohio law does not define just cause, courts have examined whether "an ordinarily intelligent person" is justified "for doing or not doing a particular act."[9] An employee is considered to be discharged with just cause if the "employee's actions demonstrate an unreasonable disregard for an employer's best interests."[10]

Specifically with respect to marijuana use, under Ohio law an employer is not required to permit or accommodate an employee's use, possession, or distribution of marijuana (including medical marijuana). An individual who is discharged from employment because of the individual's use of marijuana is considered to have been discharged for just cause if the individual's use of marijuana was in violation of an employer's drug-free workplace policy, zero-tolerance policy, or other formal program or policy regulating the use of marijuana. The individual is ineligible to serve a waiting week or receive benefits.[11]

Although Ohio law does not specifically address other drug or alcohol use, the Ohio Unemployment Compensation Review Commission, the state agency that hears unemployment claim appeals, has held that an employer maintaining a drug-free workplace policy can support a random drug testing policy. If the drug-free workplace policy is written and the employee is given advanced notice, an employee who fails the drug test can be discharged for just cause, even if the employee's work performance was not impaired. If an employer does not have a drug-free workplace policy, a connection must be established between employment and the employee's drug use.[12]

Ohio law does not authorize the Director of Job and Family Services to drug test unemployment applicants.

Can the state prohibit employers from using credit reports in employment decisions?

While a state can prohibit employers from using credit reports in employment decisions, Ohio has not enacted legislation to do so.

A credit report, referred to as a consumer report under federal law, is any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living. It includes personal information such as a person's name, address, birth date, and Social Security number, credit accounts, collection items, and public records, such as bankruptcies. A credit report is used to establish eligibility for credit transactions, underwriting insurance, eligibility for a government license or benefit, or

[8] R.C. 4141.29(D).

[9] *Peyton v. Sun T.V. & Appliances,* 44 Ohio App.2d 10 (1975).

[10] See Unemployment Compensation Review Commission, Separations from Employment (PDF).

[11] R.C. 3796.28.

[12] See Separations from Employment (PDF).

employment purposes such as hiring, promoting, reassignment, or retention as an employee.[13] Criminal records checks are a type of credit report.

While using credit reports for employment decisions is permitted in Ohio, individuals are protected by the federal Fair Credit Reporting Act[14] (FCRA). The FCRA regulates information collected by consumer reporting agencies and promotes the accuracy, fairness, and privacy of the information collected. Additionally, the FCRA requires employers who use credit reports in employment decisions to follow certain practices. Before obtaining a credit report, an employer must disclose in writing before the report is procured that a credit report may be obtained for employment purposes. An individual must provide written authorization for the procurement of a credit report. Before an employer takes adverse action, such as denying employment or a promotion, based in whole or in part on the credit report, the employer must give the individual a copy of the report. The employer must also give the individual a written description of the individual's rights under the FCRA.[15] Additionally, an individual can dispute the accuracy of the information in a credit report. If an individual disputes, the credit reporting agency must investigate to determine whether the disputed information is inaccurate. If the agency finds the information is inaccurate, it must delete or modify that information and notify the individual that the information has been deleted or modified.[16]

Can private sector employees receive comp time instead of overtime pay?

Private sector employees cannot receive compensatory time, commonly referred to as "comp time," instead of overtime pay. The FLSA and Ohio's Overtime Law[17] require an employer to compensate an employee for hours worked in excess of 40 hours in one workweek. Overtime pay must be paid at a rate of at least one and one-half times the employee's wage rate.[18] Overtime pay is required for "nonexempt" employees (those subject to the law).

Under the FLSA, employees of a public agency may receive compensatory time. The FLSA defines a public agency as a state, political subdivision of a state, or an interstate governmental agency. Compensatory time is earned at a rate at least one and one-half hours for each hour of employment for which overtime compensation is required. The FLSA specifies other requirements for compensatory time to be awarded in lieu of overtime pay.[19] Neither the FLSA nor Ohio law contain a provision allowing a private sector employer to award compensatory time in lieu of paying overtime. If Ohio law were to allow a private sector employer to award compensatory time, it does not appear that, if the employer or employee is covered under the FLSA, the employer's award would satisfy the FLSA requirement to pay overtime pay.

[13] 15 U.S.C. 1681a and 1681b and see Consumer Financial Protection Bureau, What is a credit report.

[14] 15 U.S.C. 1681 *et seq*.

[15] 15 U.S.C. 1681b.

[16] 15 U.S.C. 1681i.

[17] R.C. 4111.03.

[18] 29 U.S.C. 207 and R.C. 4111.03.

[19] 29 U.S.C. 207(o).

What is right to work? What is its current status?

Private sector employees

Right to work refers to the right of an employee to not join or financially support a union as a condition of employment.[20] Right to work is not the same as at-will employment, which means an employer or employee can terminate employment for any legal reason at any time. Ohio is not a right to work state. This means that, as explained below, a private sector employee may be required to join or financially support a union as a condition of employment.

The National Labor Relations Act[21] (NLRA) regulates the relations between private sector employers and unions. The NLRA also regulates union security agreements, which require an employee to join and financially support a union as a condition of employment.[22] Under the NLRA, an employer may require an employee to join a union on or after 30 days of employment as a condition of employment.[23] This type of union security agreement is called a union shop. A union shop requires an employee to join the union after a specified period of time. Another type of union security agreement is an agency shop. In an agency shop, an employee is not required to join a union. If an employee does not join the union, they must pay union dues.[24] However, the NLRA allows states to prohibit union security agreements requiring union membership as a condition of employment.[25] States that prohibit these union security agreements are called right to work states. There is no federal right to work law. Currently, 26 states have enacted right to work legislation.[26]

Public sector employees

In Ohio, the relationship between public employees and unions is regulated by the Public Employees' Collective Bargaining Law[27] (PECBL). While a provision exists in the PECBL to allow employees who are not union members to be required to pay an agency fee as a condition of employment, a U.S. Supreme Court case declared public sector agency share fees to be unconstitutional. In *Janus v. AFSCME*, the Supreme Court ruled that unions collecting agency fees from nonconsenting public employees is a violation of the First Amendment. Thus, the PECBL provision does not apply.[28] For more information on *Janus*, see the LSC *Members Brief* Effect of Janus on Agency Fees and other Collective Bargaining Matters (PDF).

[20] See National Conference of State Legislatures, Right-To-Work-Resources.

[21] 29 U.S.C. 151-169.

[22] See the National Labor Relations Board, Union dues.

[23] 29 U.S.C. 158(a)(3).

[24] See Union dues.

[25] 29 U.S.C. 164(b).

[26] See Right-To-Work-Resources.

[27] R.C. Chapter 4117.

[28] R.C. 4117.09(C) and see *Janus v. AFSCME,* Council 31, 138 S. Ct. 2448 (2018).