

Is Your Policy Manual Up-to-Date? Editing and Updating City Personnel Policies

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Introduction

Reviewing and updating city personnel policies is both an art and a science. The final goal is to have policies that are internally consistent, understandable at a fifth grade level, and accurately reflect current law and current city practices. If employees do not understand policies, the policies are useless. If the manual is so lengthy, dense and cumbersome that no one can stand to read through it, it is useless. Consider starting fresh, and not simply perpetuate the way the policies have always looked and felt in the past.

Drafting and Revising Considerations

Form Matters

Pay attention to spelling, grammar and formatting. When defending employment discrimination claims, the employee handbook is often Exhibit A. Consider how a jury or investigatory agency will respond to a termination for carelessness based on a policy that is filled with typos. Take the time to:

- Make font, headings, margins and numbering consistent.
- Pick a style and be consistent throughout. Is your manual in second person (“you”) or third person (“the employee”)? Often, policies are a “cut and paste” of many different styles. This is distracting and messy, and often interferes with editing functions.
- Correct spelling, grammar and outdated references.
- Create coded headings to correspondence with an automatically updated table of contents, to allow for easy updating and renumbering.
- Fix all the formatting problems that make the document cumbersome and hard to edit. Adding a sentence should not change all the tabs on the page.

After all your hard work to update, it would be nice to know that the manual will be kept up-to-date in the future. The better shape the document is in, the easier it will be to keep it current.

Make it Understandable and Concise

The goal of employment policies is to communicate, not to impress. The shorter the better. Take out every word of legalese and unnecessary introductory clauses. “Whereas” “in as much as” and “as previously stated” do not belong in policy manuals. Add periods, bullet points and indented examples to help clarify complex or densely written paragraphs. Change passive to active tense. Take out statutory references.

Change:

All personnel of this City are required under order of the Legislature of the State of Texas and are herein and hereby declared prohibited from refraining from notifying the subordinate of their supervisor's supervisor of malady, when and if same employee of the City should lose his health, less promptly than the dawn proceeding the onset of such malady, or as soon as possible thereafter. Leaving word with an extraneous entity or by miscellaneous methods of technological advancement is frowned upon; rather, the preferred method of notification is to communicate such lack of ability to work directly on such day telephonically.

To:

If you are unable to report to work on time for any reason, you must notify your supervisor as early as possible, before your regular starting time. You should try to speak directly to your supervisor. If you must leave a message, you should make a follow-up call later in the day.

Make sure the manual is understandable and accessible to all employees. If the city has a significant number of employees who do not speak or read English comfortably, consider whether some or all of the policies should be translated for them. If your policy is available only electronically, determine if there are groups of employees who do not use computers regularly on the job.

Move Specially-Applicable Policies to Appendices or Separate Manuals

If a policy does not apply to most employees, then keep it out of the main manual. You can shorten handbooks significantly by not requiring employees to plow through policies that don't apply to them.

For example, special drug testing policies that apply only to DOT-covered positions are often long and technical. Have a concise drug and alcohol free workplace policy in the handbook, and reference the appendix for those employees in DOT-covered positions. Non-police and fire employees don't need to read all about the benefits that they don't get because they are not civil service. Non-HR employees don't need to know detailed hiring policies and procedures. And employees do not need to read long procedures about how supervisors are supposed to manage them. Save long, job-specific operating procedures for separate manuals.

Avoid References that Change Frequently

Although policies should be reviewed and updated frequently, it is best to leave out specifics that regularly change. Rather than include dollar limits in travel policies, instead state "The current per diem rate" or "the current IRS mileage rate." Take out names and phone numbers of individuals that currently hold certain positions, in favor of the position title. For example, state "Refer to the HR Manager for further information," rather than providing the name and contact information for that person. Take out the names of insurance companies or approved

vendors. When referencing other policies, do so by subject matter and not internal page numbers.

Communicating and Distributing Changes

Designate an individual who is responsible for keeping policies updated to reflect both legal and practice changes. This person doesn't need to know every law and the practices of every department, but is tasked with asking the right resources for updates on a regular basis.

When changing policies, provide employees with advance notice, provide updated training where appropriate, and document that employees received the change. The documentation can be a manual execution of a new acknowledgement form, or an electronic acknowledgement of receipt with an agreement to read, abide, and ask questions if something is unclear.

Recent Legal Updates Affecting Policies

Employment law is ever-changing and employers are expected to keep their policies and other information given to employees up-to-date. This section outlines some of the legal or practical changes recommended for personnel policies that have not been updated in the last few years. As we say in personnel policies, this list is not intended to be exhaustive!

Update Definition of "Full-Time" and "Part-Time" for Purposes of Health Insurance Coverage

The health insurance eligibility requirements of the Patient Protection and Affordable Care Act of 2010 define full-time employees as those working 30 or more hours per week. IRS Code § 4980H(c)(4). Many employers' policies define full time as 35 or 40 hours per week. It is still permissible for a city to keep its current definition for purposes other than health insurance eligibility, but update the manual so that it does not incorrectly exclude employees working 30-39 hours from eligibility. Sections to review include those with benefits policies, and descriptions of employee classifications.

Add Break Time for Nursing Mothers Policy

The Affordable Care Act also amends the Fair Labor Standards Act (FLSA), by requiring employers to accommodate employees who are new mothers and who wish to continue to pump breast milk after returning to work.

The Patient Protection and Affordable Care Act of 2010 mandates that employers provide "reasonable break time" to nursing mothers to express, or pump, breast milk for up to one year after the child's birth. FLSA §7(r), 29 U.S.C. 207. The place provided must meet the following requirements:

An employer shall provide . . . a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.

The employer is not required to pay the employee for the time spent pumping milk. The employee may use reasonable break times already provided to pump milk, and employers should generally work to accommodate the pumping. Employers need not have a continually designated place for this purpose, as it is only required when an employee requests it. At a minimum the employer should equip the area with a door lock, and also consider putting a sign on the door that says “private,” “do not disturb,” or words to that effect. Other things the employer should consider providing are a comfortable place to sit with a nearby electrical outlet and refrigeration facilities for the employee to store the breast milk.

All employers covered by the FLSA must comply with this new provision. Employers with fewer than 50 employees can be excluded from following the Act if they can demonstrate that complying would result in an “undue hardship.” However, an undue hardship is difficult to prove and exists only where the employer is caused “significant difficulty or expense when considered in relation to the size, financial resources, nature or structure of the employer’s business.” *Id.*

We recommend that employers update employee handbooks or policy manuals to identify this benefit and train supervisors on the new requirements.

Restrictions on Random or Blanket Drug Testing Apply to Applicants as Well as Current Employees.

As with employees, applicants may be subjected to drug testing only if they are applying for safety-sensitive positions or if other exceptions exist, but they may not be subject to across-the-board testing by a governmental employer. Although this is not brand new law, we have found that many public sector employers conduct required pre-employment screening of all employees. The same rules that restrict random testing for current employees also apply to pre-employment scenarios. Review your hiring and drug testing policies to ensure that you conduct pre-employment screening only for appropriate positions.

It is well established law that when a governmental entity collects blood, breath, or urine for the purpose of drug testing, such collections are considered searches under the Fourth Amendment, and are not allowed without a showing of “special needs” or individualized suspicion.¹ The law generally applies to job applicants as well as current employees. “Special needs” may include testing for positions that are safety-sensitive, high-security, or where there is evidence of high levels of drug use.

¹ *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602, 618 (1989).

Testing job applicants and the *Chandler* Standard

Across-the-board drug testing in a *pre-employment* context may be found unconstitutional when conducted without individualized suspicion or some type of special need. In *Chandler v. Miller*, the U.S. Supreme Court held unconstitutional a Georgia state law requiring candidates for certain elected offices to pass a urinalysis drug test.² The law was not enacted in response to any evidence of a drug problem among the state's elected officials; the officials covered under the law typically did not perform high-risk, safety-sensitive tasks; and candidates were not involved in a specific drug-interdiction effort. The legislature simply meant the law to be a statement that Georgia did not condone drug abuse, and a symbolic statement is insufficient justification for suspicion-less testing.³

Even if the Authority tested all applicants in an attempt to treat all candidates equally and avoid giving special treatment to high-level, executive applicants, such reasoning would be unlikely to survive a court challenge under *Chandler*. The *Chandler* Court held that "setting a good example" is insufficient justification for testing applicants in violation of the Fourth Amendment.⁴ However altruistic the intentions, suspicion-less drug testing in the public sector requires the presence of a "special need."

City of Woodburn

Chandler was further bolstered in 2008, when the Ninth Circuit Court of Appeals held it unconstitutional for the City of Woodburn, Oregon to require an applicant for library page to submit to a drug test where a city policy required job candidates selected for hire to submit to a drug test as a condition of employment.⁵ The policy stated:

Drug and Alcohol Tests: As a drug-free workplace . . . The City of Woodburn requires a pre-employment drug and alcohol screen for all prospective applicants. The candidate of choice for a City position must successfully pass the drug and alcohol screen as a condition of the job offer. The confirmed presence of any illegal drug or alcohol in a urine sample will be cause for disqualifying an applicant.⁶

The City of Woodburn argued unsuccessfully that the policy was necessary because (1) drug abuse is one of the most serious problems confronting society today; (2) drug use has an adverse impact on job performance; and (3) children must be protected from those who use drugs or could influence children to use them. None of these generalized concerns was

² *Chandler v. Miller*, 520 U.S. 305 (1997).

³ *Chandler*, 520 U.S. at 307 ("What is left, after close review of Georgia's scheme, is that the State seeks to display its commitment to the struggle against drug abuse . . . The need revealed is symbolic, not 'special.' The Fourth Amendment shields society from state action that diminishes personal privacy for a symbol's sake.").

⁴ *Id.* at 322.

⁵ See *Lanier v. City of Woodburn*, 518 F.3d 1147, 1149 (9th Cir. 2008).

⁶ *Id.*

sufficient to convince the court the city had “special needs” related to the library position that could justify circumventing applicants’ Fourth Amendment rights.⁷

Florida federal court and the 11th Circuit reinforce *Chandler*

In 2012, a federal court in Florida held that an executive order issued by Governor Rick Scott to drug test all applicants to state jobs, and to randomly drug test existing state employees, was unconstitutional.⁸ An employee union sued, alleging the searches violated their Fourth Amendment rights. The Governor listed reasons for the testing that included: improving health and safety in the workplace, promoting productivity, saving taxpayer money, and reducing theft. None of these reasons justified the across-the-board testing, nor did the large amount of data about drug abuse presented by the Governor, which the court found was too generalized to show the government had a specific, special need to test for every position.⁹ An appeals court later agreed with the trial court that the governor’s order to test across-the-board was too broad. However, it also said the trial court’s decision was too broad and should have made clear that the state *can* drug test applicants and employees in safety-sensitive positions, just as *Skinner* allows, as long as it affirmatively proves the testing is justified.¹⁰

Firearms Policies and the “Parking Lot” Amendment

Review the City’s weapons policies, and remove any restrictions about employees keeping legally owned firearms and ammunition secured in their own vehicles, even if the vehicles are parked on city property, and even if the employee uses his or her own vehicle to conduct city business. The city may still restrict weapons from city-owned vehicles, so if there is a concern, employees who insist on keeping firearms in their own car could be issued a city vehicle for a particular trip or job duty.

Senate Bill 321 was passed by the Texas Legislature in 2011 and took effect in September of the same year. The law requires employers to allow employees to keep a firearm or ammunition locked in their privately owned vehicles, when parked in a parking lot, garage, or other employer-provided parking area.¹¹ The law includes limited exceptions; employers retain the ability to ban firearms in vehicles when the employer is a public or private school, is a business that stores hazardous materials, or where the vehicle is owned or leased by the employer.¹² Employers who follow the new law are immune from liability where injury, death, or damage

⁷ *Id.* at 1149.

⁸ *Am. Fed’n of State County & Mun. Employees Council 79 v. Scott*, 857 F. Supp. 2d 1322 (S.D. Fla. 2012).

⁹ *See id.* at 1335 (“Most, if not all of the Governor’s supporting exhibits lack probative value because they operate at such a high level of generality . . . The studies do not describe the risks associated with drug users performing the specific jobs held by the Florida state employees covered by the (executive order).”).

¹⁰ *Am. Fed’n of State County & Mun. Employees Council 79 v. Scott*, No. 12-12908, at 58-59 (11th Cir. 2013) (“ . . . the State must come forward with the requisite special-needs showing for all categories of employees it seeks to test. For some categories, this showing may turn out to be quite simple and may amount simply to describing precisely the nature of the job and the attendant risks.”)

¹¹ Tex. Gov’t Code § 52.061.

¹² *Id.* at 52.062.

results from the use of a firearm stored in a vehicle.¹³ When the law was introduced, proponents told the Legislature it would allow employees to protect themselves while traveling in their own vehicles, as they commuted to and from work.¹⁴ Opponents, including business groups, said the law did not go far enough in protecting employers from liability in cases where the weapon was not stored specifically as required by the law, locked in a vehicle.¹⁵

Gender Discrimination and Caregivers

Update policies to give equal opportunities to men and women to care for aging parents, bond with new babies, and take time off to stay home with a sick child. Train supervisors not to treat men and women who take time off for caregiving differently. Although women who give birth may be treated more favorable under an employer's paid sick leave policy for the disability portion of the leave, policies addressing time spent "baby bonding" outside of the period of physical disability should not treat men differently, nor should adoptive mothers who do not give birth be treated more favorably than fathers.

The EEOC has focused in the past several years, and has pledged to continue focusing, on caregiver discrimination.¹⁶ A caregiver is anyone who cares for another person, and could include a parent with children under his or her care, or an adult who cares for an aged parent. Caregivers are not specifically protected under Title VII, but discriminating against caregivers may constitute illegal discrimination on the basis of sex, disability, or other protected traits.¹⁷ For example, if an employer is reticent to hire a woman because of assumptions or stereotypes that she will spend more time away from work due to caregiver responsibilities, then the employer risks a gender-based discrimination claim based on caregiver discrimination. Likewise, if a male employee is ridiculed or treated adversely in the workplace for taking time off against stereotypes for caregiver duties, he may also be protected from discrimination.

Employers can prevent discriminating against caregivers by: (1) training managers on the legal obligations involving treatment of caregivers; (2) developing and disseminating a strong EEO policy that explains the type of conduct that could constitute caregiver discrimination in

¹³ *Id.* at 52.063.

¹⁴ Texas Senate Committee on Criminal Justice hearing, March 1, 2011, *available at* <http://www.senate.state.tx.us/avarchive/?mo=03&yr=2011&lim=100>.

¹⁵ *See id.*

¹⁶ Employer Defense Law Blog, "Why Companies Need to Care about Caregivers: The EEOC's Focus on Caregiver Discrimination," <http://www.employerdefenselaw.com/eec/why-companies-need-to-care-about-caregivers-the-eecs-focus-on-caregiver-discrimination/>

¹⁷ U.S. Equal Employment Opportunity Commission, *Employer Best Practices for Workers with Caregiving Responsibilities*. (Footnote 1 explains possible discrimination against caregivers. "Title VII of the Civil Rights Act of 1964 prohibits, inter alia, discrimination based on sex. 42 U.S.C. § 2000e-2 (2009). The Americans with Disabilities Act of 1990 prohibits discrimination based on a worker's association with an individual with a disability. 42 U.S.C. § 12112(b)(4) (2009). Section 501 of the Rehabilitation Act provides the same protection to federal workers. 29 U.S.C. § 791(g) (2009) (incorporating ADA standards). Neither the 2007 Guidance nor this document create a new prohibited basis for discrimination. Rather, these documents illustrate circumstances in which stereotyping or other forms of discrimination may violate Title VII or the Americans with Disabilities Act.").

violation of federal law; (3) ensuring that all managers are aware of and comply with the business' work-life policies; (4) responding to complaints of caregiver discrimination efficiently and effectively; and (5) providing clear assurances that no retaliation will be tolerated against anyone who complains of caregiver discrimination. *Id.*

Update Dress Codes

First, make a decision whether you want your dress code to be vague (“dress professionally as suited to your position and level of public contact”) or more specific. Many employers start with a more general dress code, but have found in recent years that the variety of attire employees believe is suitable for work is expanding, and that generational differences in views regarding appropriateness are growing. As a result, dress codes are trending back to more specific.

Moreover, as styles change, a dress code policy needs updating. Employees will not take any of it seriously if it discusses culottes, or if it contains requirements that haven't been enforced in years, such as pantyhose. Finally, from a recruiting standpoint, employers have been easing up on requirements that make it harder to hire young people, such as “no visible tattoos;” rather such employers are attempting to define “appropriate” tattoos.

Legal issues surrounding dress codes concern sexual discrimination, sexual identity, religious garb, and disability and pregnancy accommodation. Reasonableness and flexibility are the keys to defending such claims. Make sure that dress requirements have a reasonable relationship to legitimate business needs, and avoid unnecessary gender differences. Be ready to be flexible if an employee needs an exception to the dress code for legitimate religious reasons or to accommodate a temporary or permanent health issue. For example, an employee whose foot is swelling may need to wear athletic shoes for a while.

Religious discrimination charges are on the rise, more than doubling in the past 17 years. The Equal Employment Opportunity Commission, the federal agency charged with enforcing workplace discrimination laws, issued new guidance in March 2014 to help employers better understand when and how they are required to accommodate religion.

The law says employers may not discriminate on the basis of any sincerely held religious belief, and must provide reasonable accommodations for sincerely held religious practices, unless the accommodation would cause an undue hardship for the employer. The employee is responsible for telling the employer that the requested deviation from policy is for religious accommodation before the employer is required to consider the request, unless the employer already understands the religious nature of the practice.

Religious Discrimination and Dress Codes: the Headscarf Cases

The EEOC has cracked down on employers who use dress codes to discriminate illegally. The most glaring examples are a series of cases against retailer Abercrombie & Fitch, which has

been the focus of several enforcement actions in recent years. See Press Release, U.S. Equal Employment Opportunity Commission, Abercrombie & Fitch Sued for Religious Discrimination (June 27, 2011). In July 2011, a federal court in Oklahoma awarded \$20,000 to a Muslim woman who was passed over for a job at an Abercrombie Kids store in Tulsa, Oklahoma, after wearing the headscarf to the interview.

In June 2011, the EEOC filed another lawsuit against Abercrombie & Fitch alleging religious discrimination against Umme-Hani Khan, a 19-year-old Muslim woman who worked primarily in the stockroom of a California store for more than four months. Khan at all times coordinated her hijab, or religious headscarf to ensure it was consistent with the store's brand image. When a visiting manager determined that wearing the headscarf was a violation of Abercrombie's "Look Policy," she was told to remove it. She refused and was fired.

Prior to that, in 2010, the EEOC sued the same retailer for refusing to hire an applicant at the Milpitas, Calif., Abercrombie Kids store because she wore a headscarf. *Id.* Previously, in 2005, Abercrombie & Fitch's "All-American Look" policy was the focus of a six-year, \$40 million consent decree in which the retailer paid money to African Americans, Latinos, and women who were excluded from hire or promotion. *Id.*

The headscarf cases are not exclusive to Abercrombie & Fitch. In August 2012, a Maryland assisted living center was fined \$25,000 after the EEOC alleged it illegally discriminated against a Muslim job applicant who refused to remove her hijab. See Press Release, U.S. Equal Employment Opportunity Commission, Morningside House of Ellicott City to Pay \$25,000 for Religious Discrimination (Aug. 6, 2012). Khadijah Salim was interviewing for a position as a certified nursing assistant at Morningside House in Maryland when the director of health and wellness asked if she would be willing to remove her hijab. The director expressed concern that she may not be able to perform her job while wearing the hijab. Ms. Salim responded that she had worn it throughout nursing training and it had never posed a problem, even when she worked in an operating room. Morningside House never contacted her or hired her. The EEOC said the employer discriminated, and would have suffered no undue hardship by allowing Ms. Salim to wear the headscarf while tending to residents. *Id.*

Also in August 2012, a former hotel restaurant hostess sued Walt Disney Co. for religious discrimination, saying she was told to remove her hijab. The case involved Imane Boudlal, a 28-year-old naturalized citizen, originally from Morocco. When she refused, she was told she could either be stationed in the rear of the restaurant where she would have no contact with customers, or she could cover the hijab by wearing a large hat. *Boudlal v. Walt Disney Corp.*, No. SACV12-1306-DOCLAHX (C.D. Cal. filed Aug. 10, 2012). Ms. Boudlal's lawsuit alleges, among other claims, that Disney discriminated on the basis of religion, national origin, color, and that it failed to prevent harassment from other employees after she reported it to management. *Id.* By contrast, home furnishings retailer IKEA has been praised among Muslim groups for its handling of the hijab issue at work. The retailer approved an hijab with its logo embroidered on the back for use by Muslim employees who wish to practice their faith but are required to wear

the uniform. Press Release, The Hijab Shop, IKEA Launches Own-Brand Hijab for Muslim Staff (Aug. 2005).

Religious Discrimination and Dress Codes: Burger King Black Pants

In early 2013, a Burger King franchisee in Texas paid \$25,000 to settle an EEOC claim that it discriminated against an employee based on her religion. EEOC filed a lawsuit on behalf of Ashanti McShan, a member of the Christian Pentecostal Church, who was required to wear skirts or dresses as part of her religion. When Ms. McShan interviewed for the cashier position at a Grand Prairie Burger King, the shift manager told her she could wear a skirt, even though the uniform required black pants. However, when she reported for work, store management would not grant her the religious accommodation and fired her for refusing to wear pants. The case underscores the importance, for employers, to make reasonable exceptions to their dress codes when employees ask for them based on religious beliefs. See Press Release, U.S. Equal Employment Opportunity Commission, Burger King Franchisee Settles EEOC Discrimination Lawsuit (Jan. 23, 2013).

Red Robin Tattoo Case

In *EEOC v. Red Robin Gourmet Burgers, Inc.*, an employee wore tattoos that demonstrated his belief in Kemeticism, an ancient Egyptian religion with very few members. 2005 WL 2090677 (W.D. Wash.) (unpublished). The employee was fired because he refused to cover the tattoos while at work, in violation of a company policy against visible tattoos. The court refused to grant summary judgment, stating that the employer could not prove that it had properly considered all possible reasonable accommodations. The case eventually settled for \$150,000.

Social Media Policies: Concerns for Employers in the Public Sector

Governmental employers, unlike those in the private sector, must be careful not to violate the free speech provisions of the First Amendment. In general, a public-sector employer has more leeway to enforce policies against certain social media activity than does a private-sector employer, but there are still important limits.

Governmental employers are not subject to the National Labor Relations Act, so are not affected by the many recent, well-publicized opinions of the National Labor Relations Board finding that private employers cannot prohibit employer disparagement in social media. Rather, public employers must simply make sure that their social media policies, and enforcement of those policies, do not abridge the free speech rights of employees under the First Amendment of the Constitution. This is not a high bar for employers to meet.

Courts have developed a three-part balancing test to determine if public employees' speech is protected under the law. An explanation of the test follows.

- First, is the employee speaking as a citizen or in his or her role as a public employee? Employees speaking in the scope of their job duties do not have free speech protection, based on the principle that an employer can regulate speech it has “paid for.” For example, a spokesperson for a governmental agency is not engaged in protected speech in that role.
- Second, is the speech a matter of public concern? If the employee is speaking about issues that concern only his, or a small group’s, private interests, then the speech is not protected, and is subject to employer regulation. For example, when your employee complains about hating her boss, she is not protected, because the speech involves only her personal employment concerns. However, when she complains that her agency is squandering taxpayer funds, her speech may be protected, because it involves an issue of public concern. If an employee stated that she hates her boss because he systematically discriminates against women in the workplace, such comment could transform her personal complaint into a matter of public concern. Statements about political beliefs and supporting particular candidates are almost always considered matters of public concern. Many free speech cases have come from school-teacher firings and have made clear, for example, that a teacher writing a Facebook post calling her first-graders “future criminals” are not matters of public concern. *See In Re O’Brien*, N.J. Super. Ct. App. Division, No. A-2452-11T4 (Jan. 11, 2013).
- Third, assuming that the speech is made as a private citizen, and that it involves a matter of public concern, the employer still may take action against the employee if the speech is overly disruptive to the employer’s operations. This is a difficult balancing test: Does the employer’s interest in maintaining an efficient and effective workplace outweigh the employee’s interest in free speech? This test requires looking at the cause and effect of each case. For example, a deputy sheriff’s political support of his boss’s opponent will surely cause some disruption at work, but probably not enough to outweigh the significant public interest in allowing citizens to support their chosen candidates in elections. On the other hand, that same deputy’s public support of white supremacist causes may be a matter of public concern, but its disruptive effect on public confidence in nondiscriminatory law enforcement would render the sheriff’s department ineffective and would outweigh the employee’s interest in free speech.

Social media sites are now generally accepted as forums for free speech, just as printed articles and public lectures have been viewed in the past. In September 2013, the Fourth Circuit Court of Appeals overturned a Virginia federal court and held that a deputy pressing the “Like” button on a sheriff candidate’s Facebook page is, by itself, protected free speech. The lower court had held that “liking’ a Facebook page is insufficient speech to merit constitutional protection,” *Bland v. Roberts*, 857 F.Supp.2d 599 (E.D. Va. 2012). In its amicus brief to the court, Facebook called the Like button a “21st century equivalent of a front-yard campaign sign,” which courts have previously held to be protected speech. The Fourth Circuit agreed. *Bland v. Roberts*, 2013 WL 5228033 (4th Cir. 2013).

Bottom line: a public employer may have a policy prohibiting disruptive social media posts, and may enforce that policy. However, the employer must take care not to punish employees for

statements made in their roles as private citizens on matters of public concern, unless such speech is overly disruptive to the organization's goal of an efficient and effective workplace.

Attendance Policies That Violate the ADA

The EEOC is currently targeting employers who have no-fault attendance policies, which provide for automatic termination of an employee who misses a particular number of days or weeks of work. Under the ADA-AA, an employer must engage in an interactive process with a disabled employee in order to determine how the employer can make accommodations, before automatically terminating the employee. 29 C.F.R. § 1630.2(o)(3) (2011) ("To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the disabled individual in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations."). In some cases, the accommodations might include allowing a disabled employee additional time off, beyond the days allowed under the attendance policy.

In 2011, a case involving the no-fault attendance policy of telecommunications giant Verizon Communications resulted in the largest disability settlement in EEOC history. *See* Press Release, U.S. Equal Employment Opportunity Commission, Verizon to Pay \$20 Million to Settle Nationwide EEOC Disability Suit (July 6, 2011). Verizon violated the ADAAA by refusing to make exceptions to its "no-fault" attendance policy and therefore failing to accommodate disabled employees. *Id.* Under the attendance policy, Verizon employees who accumulated a certain number of chargeable absences were placed on a disciplinary step that could ultimately lead to termination. *Id.* The EEOC took the position that Verizon should have made accommodations for people whose chargeable absences were caused by their disabilities, rather than disciplining or terminating them. *Id.* Offering paid or unpaid leave to an employee with a disability is a reasonable accommodation unless doing so would cause the employer significant difficulty or expense. *Id.*

The Verizon settlement underscores the importance for employers of reviewing attendance policies that fail to have reasonable flexibility when providing leave as an accommodation. No-fault attendance policies are still legal, but employers must be prepared to show they are willing to be flexible on a case-by-case basis, where additional absences may be considered a reasonable accommodation. Additional absence may not be a reasonable accommodation when the extra leave is for an unspecified, non-definite amount of time. We recommend adding language to the end of a leave limits that states the employer will comply with the ADA when additional, limited time off 1) is necessary to accommodate an employee's disability; 2) such leave is for a specified time period; 3) the leave can be granted without undue hardship to the employer; and 4) the employee is otherwise qualified for the position.

New Military Regulations under the Family and Medical Leave Act (FMLA)

In March 2013, revisions to the FMLA officially went into effect. Many employers had long since implemented most of the changes, which Congress first passed in 2010. The new regulations include but are not limited to the following changes:

- “Covered military member” was replaced with “military member” and the definition now includes members of the National Guard and Reserves, as well as the regular Armed Forces;
- “Active duty” now requires deployment to a foreign country;
- The definition of serious injury or illness for a current servicemember is expanded to include injuries or illnesses that existed before active duty and were aggravated by active duty;
- Changes in definitions of covered injury and illness for veterans; and
- Expansion from five to 15 days of qualifying exigency leave.

A complete listing of the changes found in the 2013 regulations can be found at www.dol.gov.

Drug and Alcohol-Free Workplace Policy

Remove long and complex DOT policies from the basic drug-free workplace policy, and move them to an appendix. Reference the DOT policy in the main policy, and state that employees in DOT-covered positions are bound by both policies.

Update references in the drug policy if it requires reporting of prescription drugs that “may” have an effect on safety or performance. The EEOC’s current position on mandatory reporting of prescription drugs allows the employer the right to know only if there is an actual effect on safety, not simply that there may be such an effect. *See, press release, <http://www.eeoc.gov/eeoc/newsroom/release/9-1-09a.cfm>, “EEOC Sues Product Fabricators, Inc. For Disability Discrimination: Agency Says Pine City Company Fired Employee for Taking Legally Prescribed Medication; Other Employees Subjected to Illegal Inquiries About Medication Use”* The EEOC stated in its press release: “Requiring all employees to report their legal use of prescription drugs – and even over-the-counter medication – amounts to an unreasonable invasion of privacy, whether an employee is disabled or not. The purpose of the ADA is to extinguish the stereo-types and biases that prevent people from obtaining or maintaining employment. Compulsory but irrelevant and unnecessary inquiries, like the drug policy in place at Product Fabricators, serve no legitimate employer purpose but provide fertile ground for the development of unfounded stereotypes and irrational assumptions about an employee’s ability.”