Top 10 Legal Compliance Issues Municipal Employers Need to Know

June 4, 2018

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What's Different About Municipal Employers?

- Municipal employers, as government entities, are subject to certain laws that private employers are not.
- Conversely, they are exempt from certain laws that apply to private employers.
- Unlike private employers, municipal employers must not deny protections found in the Bill of Rights of the U.S. Constitution.
- The public sector is much more heavily unionized than the private sector, meaning public employers must be aware of union matters. These union matters are governed by state law, while for private employers, they are governed by federal law.

Issue #1: Investigating Employees Without Violating Labor Law or the Constitution

- Connecticut extends *NLRB v. Weingarten* (1975), a U.S. Supreme Court ruling under the National Labor Relations Act, to state labor law.
- "*Weingarten* rights" allow a unionized employee to have a union representative at "investigatory interviews." Violating these rights is an unfair labor practice.
  - The employee must make a clear request for union representation before or during the interview.
  - The employee cannot be punished for making this request.
  - Once an employee makes a request for union representation, the employer must (1) grant the request and delay questioning until the union representative arrives and (prior to the interview continuing) the representative has a chance to consult privately with the employee, (2) deny the request and end the interview immediately, or (3) allow the employee a clear choice to continue the interview without representation or end the interview.
  - The employee is entitled to *a* union representative, not the one of his choice if it will delay the investigatory interview.
  - Simply dispensing discipline is *not* an investigatory interview triggering *Weingarten*.

Constitutional Protection Against Self-Incrimination

- The U.S. Constitution protects an individual from government compulsion to self-incriminate.
- Named for *Garrity v. New Jersey* (1972), a U.S. Supreme Court case, a *Garrity* Warning notifies state or municipal employees that they have the right to refuse to provide information that would incriminate them, but that such refusal could result in discipline.
- Sample: You are being questioned as part of an official investigation by your employer, Town of XXX, concerning your official duties. You will be asked questions, specifically, directly, and narrowly related to performance of your official duties. You are entitled to all the rights and privileges guaranteed by the law and the Constitution of the United States, including the right not to be compelled to incriminate yourself. Further, if you refuse to testify or answer questions relative to the performance of your official duties, you could be subject to discipline up to any including termination. If you are ordered to answer, neither your statement, nor any information or evidence which is gained by reason of such statement, can be used against you in any subsequent criminal proceedings. However, these statements may be used against you in relation to subsequent discipline.

Issue #2: Disciplining or Terminating Employees Without Violating the Constitution

- Public sector employees are entitled to certain protections guaranteed by the state and federal constitutions that private sector employees do not enjoy.
- The Fourteenth Amendment to the U.S. Constitution prohibits the government from denying life, liberty, or property without "due process of law."
- If an employee has a property interest in his continued employment (created by contract, statute, or other basis), the employee cannot be terminated without due process.
- *Loudermill v. Cleveland Board of Education* (1985) is the landmark U.S. Supreme Court case explaining what constitutes due process.

WHAT DOES *LOUDERMILL* REQUIRE?

- *Prior* to depriving employees with a property interest of that property interest, the employer must provide notice and an opportunity to be heard, typically through a hearing.
  - Employers are generally required to provide at least 24 hours' notice (more or less may be acceptable depending on the specific situation).
  - Must provide oral or written notice of the charges against the employee, explanation of the employer's evidence, and an opportunity to respond in person or in writing.
  - Not a full evidentiary hearing. A neutral adjudicator is not required. The more complaint resolution mechanisms available afterward (such as a grievance process), the less onerous the *Loudermill* requirements are.
- *Loudermill* applies to terminations, suspensions without pay or functional equivalents, failures to rehire, demotions with loss of pay, and certain denials of promotions. Abolishing or consolidating positions does not require a *Loudermill* hearing unless requested by the employee. Reputational damage can require a *Loudermill* hearing due to a protected liberty interest in one's reputation.
- Employees can be placed on paid administrative leave pending a *Loudermill* hearing. Placing an employee on *unpaid* leave during an investigation or hearing is generally not recommended.
- Generally, taking action without a *Loudermill* hearing beforehand is not correctable. The action would need to be canceled and a *Loudermill* hearing conducted in order to make the action legal. There are certain emergency exceptions.

Issue #3: The Value of Consistency

- Work rules, policies, and procedures should be applied consistently.
- Risks of inconsistency:
  - Perception of unfairness and resulting poor morale
  - Time wasted addressing internal complaints
  - Avoidable claims of discrimination or retaliation
    - Possibly based on unlawful reasons due to conscious or unconscious biases
  - Unfair labor practice claims based on violating binding past practices
    - Inconsistent actions may *create* or *violate* binding past practices
  - In the unionized setting, typically both the principles of just cause and progressive discipline must be followed.

Establishing Consistency

- Certain decisions should be reserved for highest levels of authority. Consider the implications of allowing low-level managers to fire employees.
- Train supervisors on policies and procedures and hold them accountable for consistent application. Deviations for legitimate reasons should require higher approval and, in some cases, discussion with legal counsel. Those reasons should be documented.
- Do not tolerate situations where one supervisor follows the rules while another does not. Create rules when needed to establish consistent standards.
- Be on the lookout for emotional reactions, positive and negative. Your favorite employee and your least favorite employee should get the same response to most situations. A leave request for alcohol treatment and a leave request for chemotherapy should be treated the same.

Issue #4: The Union Contract Is Not (Entirely) On Paper

- A written collective bargaining agreement is only part of the union contract. Employers are required to follow binding past practices, as well. When a binding past practice is established, it is of equal weight to contractual requirements.
- To establish a binding past practice, the action must be fixed and known. One incident does not create a binding past practice.
- Binding past practices can be eliminated:
  - If there is clear and unequivocal contract language and the past practice deviates from the contract language, upon notification to the union, by reverting to the contract terms OR
  - Through the collective bargaining process.
- Unions can file grievances based on binding past practice.
- It is an unfair labor practice to refuse to bargain with the union over material terms. Failing to follow a binding past practice may also be treated as a refusal to bargain when there is a material impact as a result.
- Be aware of memoranda of agreement/understanding which may not be attached to the collective bargaining agreement.

Issue #5: Privatizing/Subcontracting Union Work

- One of the most fundamental principles of labor law is that the union "owns" the work performed by its members. Assignment of any material aspect of that work to an employee who is not in the union or a third party, such as a private contractor, is a violation of labor law.
- To be actionable, it must be work that is not also performed by people or entities outside the union.
  - Exceptions include:
    - Clear contract language permitting the subcontracting/privatization and
    - Binding past practice
- Assuming none of the exceptions apply, the employer is required to provide prior notice. If the union fails to demand to bargain, the employer is free to proceed with the subcontracting.

Issue #6: Written Employee Policies: Why, What, and How

- Why have employee policies?
  - Legal compliance
  - Set uniform expectations
  - Promote uniformity in decision making
  - Address issues not covered by collective bargaining agreements
- What policies are the most important?
  - Discrimination/harassment/reasonable accommodation/affirmative action (if applicable)
  - Complaint mechanisms for various issues (discrimination, harassment, pay issues, anything else) with anti-retaliation provisions
  - Employment at-will, to the extent applicable/statement that policies or a handbook do not constitute a contract
  - FMLA and other leave
  - Benefits (paid time off, statutory leaves such as crime victim/military/organ donation, insurance, retirement, etc.)
  - Attendance, drug & alcohol, and other conduct issues
  - Acknowledgement of receipt
- How should a handbook or collection of personnel policies be drafted?
  - Avoid making promises – use flexible language with regard to employer's obligations.
  - Include provisions like "except as required by law" to keep the handbook compliant with changes in the law
  - Make sure the policies realistically reflect what actually happens in the workplace. Purchasing an off-the-shelf handbook with no relationship to your operations creates confusion and results in the handbook being ignored.
  - Have the handbook/policies reviewed by (or better, drafted by) legal counsel. It is a legal document with legal implications even if it is not a contract.

Issue #7: Making Reasonable Accommodations For Employee Needs

- Employers may need to make a "reasonable accommodation" for employees based on religion, disability, or pregnancy (defined to include related conditions, such as childbirth and lactation).
- Policies referencing reasonable accommodations should refer to all of these bases.
- A reasonable accommodation may be a minor change. Some of the more significant "reasonable accommodations" include unpaid leaves of absence (beyond FMLA requirements) and reassignment to a vacant position for which the employee is qualified.
- The employer may choose among *effective* reasonable accommodations.

The Interactive Process

- Generally, the employee makes a request for a reasonable accommodation.
  - The request does not need to be in writing and does not need to reference the "ADA" or "reasonable accommodations," etc.
- The employer and employee should engage in an informal process to clarify what the individual needs and identify the appropriate reasonable accommodation. This is known as the "interactive process."
- In some cases, little discussion will be needed. In others, it may be necessary to learn more about the nature of the disability/pregnancy-related issue/religious matter and the individual's functional limitations in order to identify an effective accommodation.
- Suggestions from the employee (or treatment provider) may assist the employer in determining the type of reasonable accommodation to provide.

The Interactive Process (continued)

- Deciding that no reasonable accommodation is available or that the only accommodations would pose an undue hardship can be risky – consult an attorney before doing this!
- An employer should initiate the interactive process without being asked if the employer:
  (1) knows that the employee has a disability;
  (2) knows, or has reason to know, that the employee is experiencing workplace problems because of the disability; and
  (3) knows, or has reason to know, that the disability prevents the employee from requesting a reasonable accommodation.
- If the individual states that a reasonable accommodation is not needed, the employer will have fulfilled its obligation.

What Medical Questions Can You Ask?

- Pre-hire phase: Confirm that the applicant can perform the essential job functions with or without accommodations – can ask how applicant would do so, even if the employer doesn't ask others, when the disability is known (obvious or disclosed)
  - Once a conditional job offer is made, the employer may ask disability-related questions and require medical examinations as long as this is done for all entering employees in that job category.
- Once employed: Job-related and consistent with business necessity questions/exam
  - Standard met when an employer has a reasonable belief, based on objective evidence, that an employee's ability to perform essential job functions will be impaired by a medical condition or an employee will pose a direct threat due to a medical condition
- When a reasonable accommodation is requested: Confirm legal obligations
  - Confirm that the employee has a covered disability (not allowed if disability is obvious) that requires a reasonable accommodation
  - Can ask about functional limitations and options for accommodation
  - Can choose health care professional for exam if employee provides insufficient information

Issue #8: Employee "Privacy" and FOIA

- Public agencies are subject to the state Freedom of Information Act ("FOIA") which governs open meeting rules and access to public records.
- Employees have very little privacy under FOIA. Most employees' residential addresses can be obtained through FOIA requests. Limited groups of employees, such as police officers and judges, may request that their residential addresses be kept private.
- Teacher evaluations are confidential, but other public employees' performance evaluations are not.
- Medical and personnel records of employees and former employees are protected from disclosure *only* when the public agency reasonably believes that disclosure would legally constitute an invasion of privacy.
  - Must be information that does not pertain to a matter of public concern *and* the disclosure of which would be highly offensive to a reasonable person.
  - Special procedure must be followed to notify the employee (and collective bargaining agent, if any) prior to releasing such information.

Discussion of Employee Matters at Meetings

- An executive session may be convened for discussion concerning the appointment, employment, performance, evaluation, health or dismissal of a public officer or employee, provided that such individual may require that discussion be held at an open meeting.
- Individual must be notified in advance that his or her performance, job status, etc. will be discussed at the executive session and be told that he or she may require the discussion be held in public.
- The individual does not have the right to demand that the matter be discussed in an executive session or that he or she be present in the executive session.

Issue #9: Employee Free Speech Rights

- Public employees have free speech rights under the U.S. Constitution, the Connecticut Constitution, and state statutes providing for free speech and protecting whistleblowers.
- Public employees are free to speak as a citizen on matters of public concern unless doing so may unreasonably disrupt the efficient conduct of government operations.
- Public employees are not protected when they are speaking pursuant to their official duties unless it is on a matter of public concern and involves the employer's official dishonesty, other serious wrongdoing, or threats to health and safety.
- Additional rights exist under whistleblower statutes or statutes protecting employees' rights to make certain kinds of complaints (e.g. discrimination) without fear of retaliation.

Issue #10: Thorny Compensation Matters

- Exempt/non-exempt
  - Employers must properly classify employees as either "exempt" or "non-exempt" from minimum wage and overtime requirements. Paying a salary does not mean the employee is properly exempt! Exempt employees must meet both salary tests (except for doctors, lawyers, and teachers) and duties tests.
  - Non-exempt employees must be paid overtime when working more than 40 hours in a workweek.
- Employees working multiple jobs
  - Is it really multiple jobs or different portions of the same job? If it's really one job, make sure any non-exempt functions do not destroy an exemption. An exempt employee should be performing "exempt" functions 80% of the time under state standards.
  - Normally, when an employee works two or more jobs or types of work for different rates of pay, a "blended rate" is established for overtime purposes and the hours must be combined. There are two major exceptions:
    - It must be for two different kinds of work in order to use the two different rates. Also, the employee must agree in advance (preferably in writing) to the arrangement. The rates must be bona fide rates, meaning it is the rate paid for that kind of work, even when there is no overtime.
    - Where municipal employees, *solely at their option*, work *occasionally or sporadically* on a *part-time basis* for the same public agency in a different capacity from their regular employment, the hours worked in the different jobs shall not be combined for the purpose of determining overtime liability.
  - Multiple jobs worked for the same municipality must be combined for purposes of paying overtime to non-exempt employees working in excess of 40 hours per week.

Volunteer or Employee?

- An individual who performs hours of service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered, is considered to be a volunteer during such hours. The service must be offered freely, without coercion or pressure, direct or implied, from an employer.
- An individual shall not be considered a volunteer if the individual is otherwise employed by the same public agency to perform the same type of services as those for which the individual proposes to volunteer.
- There are no limitations or restrictions imposed by the FLSA on the types of services which private individuals may volunteer to perform for public agencies.
- Volunteers can be shared through mutual aid agreements.
- Volunteers can be reimbursed for expenses and paid nominal fees (such as per call fees for volunteer firefighters), but should not be paid stipends or other wages.
- Failing to treat volunteers as volunteers (e.g. by paying wages) converts them into employees, which has significant implications.

Questions?

THANK YOU