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Unique Challenges for Public Employers

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Whistleblower's Act

Employees Whistling While They Work

A Popular Song

- Government entities were target defendants in high verdicts rendered in employment practices cases from 2004 through 2010, according to *Employment Practice Liability: Jury Award Trends and Statistics 2011 Edition.*

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A Costly Tune

- Government entities paid the highest verdicts with the median award being $236,000
- Followed by manufacturing/industrial companies
- Then service/retail entities
- Then transportation companies

Continued

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The Law

- Whistleblowers' Protection Act (WPA):
  - Employer shall not discharge, threaten or otherwise discriminate against an employee.
  - Because employee reports, or is about to report, verbally or in writing, violation or suspected violation of a law or regulation or rule promulgated pursuant to state, local or federal laws
  - To a public body

Continued

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The Law

- Unless employee knows that the report is false
- Or because an employee is requested by a public body to participate in an investigation, hearing or inquiry held by that public body or a court action. MCLA 15.361 *et seq*.

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Elements of WPA Claim

- To establish *prima facie* case under WPA, plaintiff must prove:
  - he was engaged in protected activity as defined by the act;
  - he was subsequently discharged, threatened or otherwise discriminated against; and
  - causal connection existed between protected activity and discharge or adverse employment action.

Continued

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Elements of WPA Claim

- *Heckman v Detroit Chief of Police,* 267 Mich App 480, 705 NW2d 689 (2005); *West v General Motors Corp*., 469 Mich 117, 665 NW2d 468, 471-472 (2003)
- Plaintiff must additionally show that employer had objective notice of protected activity. *Kaufman & Payton, PC v Nikkila*, 200 Mich App 250, 257 (1983); *Roulston v Tendercare* (*Michigan*), *Inc*, 239 Mich App 270, 279; 608 NW2d 525 (2000)

Statute of Limitations

- WPA has 90-day statute of limitations.
  See MCL 15.363 *et seq*.

Continued

Limitations

- WPA is exclusive remedy.
- WPA does not apply to contract employee whose contract has not been renewed.
- WPA only applies to individuals who currently have status of an employee, not prospective employees.
- *Wurtz v Beecher Metro. Dist.*, 495 Mich. 242, (2014)

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Suspected Violation of Law

- Plaintiff must produce evidence of suspected violation of a law or regulation or rule "promulgated" pursuant to laws of state. WPA does not protect employee who reports or is about to report "suspected violation of a suspected law."

Continued

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Public Body Defined

- "Public body" means all of the following:
  - State officer, employee, agency, department, division, bureau, board, commission, council, authority or other body in executive branch of state government.
  - Agency, board, commission, council, member or employee of the legislative branch of state government

Continued

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Public Body Defined

- County, city, township, village, intercounty, intercity or regional governing body, council, school district, special district or municipal corporation, or board, department, commission, council, agency or any member or employee thereof
- Any other body which is created by state or local authority or which is primarily funded by or through state or local authority, or any member or employee of that body

Continued

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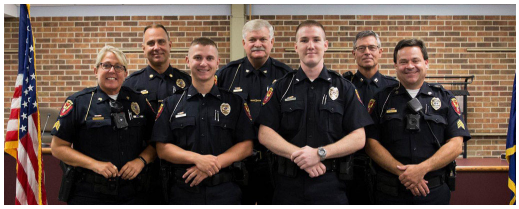
Public Body Defined

- Law enforcement agencies or any members or employees of a law enforcement agencies.
- Judiciary and any member or employee of the judiciary



Brown v Mayor of Detroit

- Language of WPA does not provide that this public body must be an outside agency or higher authority.
- There is no condition in the statute that employee must report wrongdoing to outside agency or higher authority to be protected by WPA.
- It does not matter if public body to which suspected violations were reported was also employee's employer. *Brown v Mayor of Detroit*, 478 Mich 589, 734 NW2d 514 (2007)

Burden Shifts to Employer

- Once *prima facie* case has been established, burden then shifts to employer to present evidence that demonstrates plaintiff's termination was for legitimate non-retaliatory reason.
- If employer states legitimate non-retaliatory reason, employee may still prevail if he or she demonstrates that proffered reason was a mere pretext. *Eckstein v Kuhn*, 160 Mich App 240, 246, 408 NW2d 131 (1997)

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Adverse Employment Action

- Michigan courts look to the law regarding what constitutes an "adverse employment action" in civil rights actions to determine whether plaintiff in WPA claim has satisfied the second element of the *prima facie* case. *See, Heckman v Detroit Chief of Police,* 267 Mich App 480; 705 NW2d 689 (2005) quoting *Pena v Ingham Co Rd Comm*, 255 Mich App 299 (2003).

Continued

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Adverse Employment Action

- "Termination in employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities or other indices that might be unique to a particular situation." *Pena, supra* (quoting *White v Burlington N & Santa Fe Co,* 310 F3d 443, 450 (CA 6, 2002)

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Significant Factor

- To establish causation, plaintiff must show that his participation in protected activity was a "significant factor" in employer's adverse employment action, not just that there was a causal link between the two.

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M Civ JI 107.02

Protected Activity Definition

- Employee's motive does not matter and you should not consider it in determining whether employee engaged in "protected activity."

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MCL 15.362

- If plaintiff did not engage in protected activity, plaintiff may not recover even if defendant mistakenly believed that plaintiff engaged in such activity.

  Chandler v Dowell Schlumberger, Inc, 456 Mich 395; 572 NW2d 210 (1998)

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Jury Instructions

- **M CIV JI 107.03 – CAUSATION** states as follows:
  - When I use term 'because of' I mean that protected activity must be one of the motives or reasons defendant [discharged / or / threatened / or / discriminated against] the plaintiff. Protected activity does not have to be the only reason, or even main reason, but it does have to be one of the reasons **that made a difference** in defendant's decision to [discharged / or / threatened / or / discriminated against] the plaintiff. (Emphasis added).

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Good Faith Belief

- **M Civ JI 107.04 Whistleblowers' Protection Act: Good Faith Belief**
  - Plaintiff must reasonably believe that a violation of law or a regulation has occurred. It is not necessary that an actual violation of law or a regulation has occurred, but the employee cannot have a reasonable belief if [he / she] knows [his / her] report is false.

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Attorney Fees Add Up

- Prevailing plaintiffs in WPA claim are entitled to costs and an award of reasonable attorney fees.
- Attorney fees can end up higher than jury award.

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Possession of Guns in Municipal Buildings & by Municipal Employees

General Rules

- City, village, township or county may not enact or enforce any **ordinance** that regulates the ownership, registration, purchase, sale, transportation or possession of a firearm.
- By state statute on "concealed" carry, and because of the absence of a statute on "open" possession of a firearm, a firearm may be carried anywhere in the state with certain premises excepted, not including municipal buildings, with particular rules for concealed versus open carry of a firearm.

Continued

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General Rules

- Municipality may adopt a **policy**, not an ordinance, that prohibits possession of weapons by municipal employees "in the course of their employment."

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Concealed Carry

- Person with a concealed pistol license (CPL) may carry a **concealed** pistol anywhere in this state except on certain premises.
- List of premises where a **concealed** pistol may not be carried includes day care centers, schools, taverns, places of religious worship, sports arenas and others.
- Because that list of premises does not include municipal buildings, a member of the public with a CPL may carry a **concealed** pistol in any municipal building. MCL 28.425c(3)(a) &(b)

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Open Carry

- There is no statute that addresses "open" possession of a gun. Therefore, a person, with or without a CPL, may **open** carry in a public place as long as the person is carrying with a lawful intent and the firearm is not concealed, except on certain premises.

Continued

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Open Carry

- Because the open carry list of excepted premises does not include municipal buildings (except for courts), a member of the public, with or without a CPL, may open carry in any municipal building. MCL 750.226 (lawful intent); MCL 28.425c(3)(a) & (b) (concealed carry anywhere, except on certain premises); and MCL 750.234d, the Penal Code section that provides it is a crime to possess a weapon on the premises of: a bank or credit union, a church or other place of worship, a court, a theater, a sports arena, a day care center, a hospital, or an establishment licensed by the LCC.

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Municipal Building – Municipal Employees

- Any employer, may prohibit employees from carrying a **concealed** pistol "in the course of his or her employment with that employer."
- City, village, township or county may prohibit "the transportation, carrying or possession of firearms by its employees "in the course of their employment with that local unit of government."
- Like members of the public, judicial employees may not possess a weapon, open or concealed, in any courtroom or other space used for official court business unless permitted by the chief judge under a written policy of the court. MCL 28.245n(2)

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Failure to Train

- To establish that a municipality failed to properly train and supervise an employee, plaintiff must show that the alleged failure evidences a "deliberate indifference" to the rights of its inhabitants. *City of Canton*, 489 U.S. at 388-389; *Berry v. City of Detroit*, 25 F.3d 1342 (6th Cir. 1994)

Continued

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Failure to Train

- Only where a failure to train reflects a "deliberate" or "conscious" choice by the municipality can the failure be properly thought of as an actionable city "policy." Monell will not be satisfied by a mere allegation that a training program represents a policy for which the city is responsible. Rather, the focus must be on whether the program is adequate to the tasks the particular employees must perform, and if it is not, on whether such inadequate training can justifiably be said to represent "city policy."

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Canton's Famous Footnote

- "For example, city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force, . . . can be said to be 'so obvious,' that failure to do so could properly be characterized as 'deliberate indifference' to constitutional rights."
- *Canton v Harris*

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Potential Pitfalls in Allowing Guns in the Workplace

- **Scenario #1 -** City animal control officer requests permission to carry a handgun because of dangerous animals. While trying to recover a stray cat in a trap, he shoots the homeowner's Labradoodle, which is yapping and running about the yard near the trap.

Continued

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Potential Pitfalls in Allowing Guns in the Workplace

- **Scenario #2 -** Male city manager carries concealed pistol to work every day. Female subordinate is reluctant to bring him work issues and is intimidated because he regularly rests his forearm on the gun when he speaks to her or gives direction.

Continued

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Potential Pitfalls in Allowing Guns in the Workplace

- **Scenario #3 -** Male dispatcher is allowed to carry concealed pistol. Chief's female secretary has CPL, but he refuses her request.

Continued

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Potential Pitfalls in Allowing Guns in the Workplace

- **Scenario #4** - Building inspector carries concealed weapon. Stops at city hall for bathroom break. Accidently shoots self pulling pants up.

Continued

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Potential Pitfalls in Allowing Guns in the Workplace

- **Scenario #5** - DPW employee carrying pistol seeks to enter a business or citizen's home to read meter. Owner refuses entry with a gun.

Continued

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Potential Pitfalls in Allowing Guns in the Workplace

- **Scenario #6 -** Firefighter carries gun on run. Places gun on seat of fire truck while fighting fire. It's missing.

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Potential Considerations

- Who will be allowed to carry a gun?
- Is the gun part of the employee's scope of employment?
- What existing policies affect the employee's possession or use of a gun in the workplace?
- How will the employer know whether the employee is complying with the law and regulations?
- What is the employer's expectation/authorization for use of the gun in the workplace?

Continued

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Potential Considerations

- What guns can be brought into the workplace? Type, caliber, automatic, silencer, capacity?
- Report required if gun is displayed or used?
- First aid equipment and training?
- Employees annually sign a declaration they are not a prohibited person under the law.
- Annual documented training and require documentation and employee signature to certify.

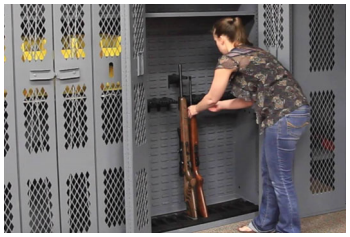
Continued

Potential Considerations

- Ongoing employee proficiency and training in handling and using the gun
- Who will inspect for condition and maintenance of the gun?

Storage Issues

- Will the employer provide gun safes or secure storage for employees to use when they are performing job tasks, including in municipal vehicles, if they must enter restricted locations or while using the restroom?



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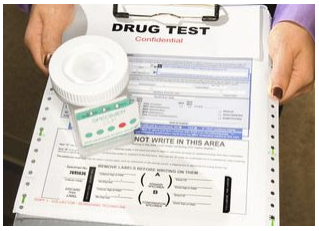
Drug Testing

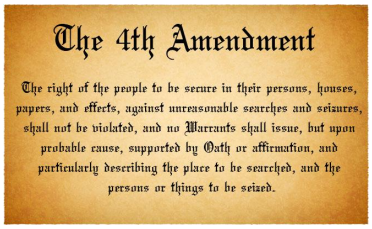
Drug Testing

- Private employers – okay to random, post accident or reasonable suspicion drug test
- Public employers – not so fast
- Public employer must meet higher standard than private employer with respect to drug testing.



Drug Testing - Random

- Fourth Amendment protections for public employees have been interpreted to prohibit:
  - Random drug testing for all employees
  - Requiring all applicants to undergo drug and alcohol testing



Drug Testing - Random

- Public employers' drug policies must balance safety versus privacy.
- Random drug testing is allowed if there is a special need that outweighs the individual's privacy interest.
- Public employers may drug test randomly for safety or security sensitive positions.

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Drug Testing – Safety Sensitive

- Federal law allows random testing (Michigan does not have a statute directly addressing drug testing).
- U.S. Supreme Court has identified three governmental interests that are sufficiently important enough to permit suspicionless (random) drug testing:
  1. Ensuring that certain employees have unimpeachable integrity and judgment

Continued

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Drug Testing – Safety Sensitive

2. Enhancing public safety, otherwise known as "safety sensitive positions;" and
3. Protecting truly sensitive information

- *Knox County Education Ass'n v Knox County Board of Education*, 158 F.3d 361, 373 (6th Cir 1998), *cert denied*, 68 U.S.L.W. 3222 (1999)

Continued

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Drug Testing - Safety Sensitive

- The test for whether employees hold safety sensitive positions is whether the employees "discharge duties fraught with risks of injury to others that even a momentary lapse of attention can have disastrous consequences."
- Courts focus on the degree, severity and immediacy of the harm posed.

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Drug Testing - Random

- Courts have allowed random testing for:
  - Police officers
  - Firefighters
  - Heavy equipment operators
  - Correctional employees
  - Paramedics/EMT's
  - Health care providers
  - Positions required to carry firearms
  - Positions that work with drugs/controlled substances

Drug Testing - Random

- Random testing ok:
  - Sanitation drivers
  - Wastewater / sewage treatment plant operators
  - CDL drivers
  - Regular drivers (but not infrequent drivers)
  - Mechanics
  - Positions which work closely with or oversee children or
  - Regularly work with classified or similar highly sensitive criminal information

DRUG Testing – Reasonable Suspicion

- May ask any employee to take a drug test if there is a reasonable, individualized suspicion that the employee is using/under the influence of illegal drugs
- OSHA published its final rule to improve tracking of workplace injuries and illnesses in 2016. Drug testing was not mentioned in the Final Rule, but in the guidance from OSHA, makes it clear that blanket post-accident drug testing policies can suppress injury reporting among employees.

Drug Testing – Reasonable Suspicion

- Post accident testing is still allowed, but the standard was changed to a reasonable suspicion rather than "post accident" standard.

Opioids

- Thousands of persons are addicted in Michigan.
- Approximately 1,941 of the 2,729 overdose deaths in Michigan in 2017 were opioid related.
- When drug testing applicants and/or employees, may screen for opioids.

Continued

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Opioids

- Depending on results, may need to consider ADA issues.
- Policy should prohibit misuse of prescription drugs.
- Consider having Narcan on-site in case of overdose.
- Call your lawyer, if in doubt, these are very difficult situations.

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Drug Testing - Applicants

- The law is not settled.
- Private employers may require all applicants to submit to drug testing.
- The cases involving public employers suggest the courts will only uphold applicant testing policies that focus on safety sensitive positions or are required by law such as:
  - MCOLES
  - DOT covered drivers

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Drug Policies

- All employers may prohibit employees from being at work under the influence of alcohol or illegal drugs, including medical or recreational marijuana
- Prescription drugs:
  - can prohibit misuse
  - employee duty to bring concerns to your attention
  - must be mindful of ADA concerns

Continued

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Drug Policies

- Careful drafting is essential.
- Define reasonable suspicion.
- Consider zero tolerance or last chance agreements.

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National Labor Relations Board

NLRB Concerns

- Drug and alcohol testing are mandatory subjects of bargaining.
- Policies must be negotiated with any unions.

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Testing Implementation

- If you are implementing a new policy that changes testing terms, it is a good idea to give 30 days notice (at least).

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First Amendment Rights

First Amendment Rights

- Protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern
- Courts must balance the interest of the employee in commenting as a citizen on matters of public concern, against the interest of the public employer in promoting the efficiency of the public services it provides through its employees.
  - *Pickering v Board of Education*, 391 U.S. 347 (1976)

Continued

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First Amendment Rights

- Highly fact specific analysis
  - Look at whether an employee's speech actually disrupted the governmental workplace,

    and

  - Whether the speech had the potential to be disruptive.

    Connick v Myers, 461 U.S. 138 (1983)

Continued

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First Amendment Rights

- Courts have looked at the following inquiries to determine the extent of a public employee's First Amendment rights:
  - Matter of public concern?
  - If so, did it motivate an actionable adverse action?
  - Was there adequate justification for the adverse action?

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Matter of Public Concern

- If the employee's speech touches upon a matter of public concern, it may be protected.
- If it is just a matter of personal interest (such as a personnel matter), then it is not protected.
- Where the speech involves mixed questions of private and public concern, the court must decide which one predominates.

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Motivating Factor

- If the speech touches upon a matter of public concern, did it motivate an actionable adverse action by the employer?
- Was the change in employment terms sufficiently adverse?
- Is there a causal connection between employee speech and the adverse action?
- If not, inquiry ends.

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Pickering Balancing Test

- If the public employer can demonstrate that the employee's conduct interfered with governmental operations or that it reasonably believed that the speech would interfere with such operations, it can defeat a First Amendment claim.

Continued

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Pickering Balancing Test

- Legitimate governmental interests that may outweigh an employee's speech interest include:
  - Preserving harmony in the workforce
  - Ensuring workplace efficiency and confidentiality

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Garcetti Test

- In *Garcetti v Ceballos*, 547 U.S. 410 (2006), the U.S. Supreme Court expanded the tests, inquiring:
  - Were the public employee's statements made "pursuant to the employee's official duties?"
  - If so, the speech is not subject to First Amendment protection.

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Garcetti

- The U.S. Supreme Court reasoned that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the First Amendment does not shield them from discipline.

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Protected Conduct

- Public works director alleging city council was violating open meeting law
- Allegations by engineer that his supervisors were illegally claiming inappropriate overtime and excess pay

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Conduct Not Protected

- Comments by employee to third-party consultant about discipline, morale and performance problems in the department
- Memo from athletic director/head coach to office manager and principal criticizing financial management of sports program
- Firearms instructors sending emails and written report concerning the hazards of an indoor firing range

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Political Association

- First Amendment protects employees from retaliation based on:
  - Association with union
  - Engaging in partisan politics (EXCEPT for policymaking and confidential employees)
  - Political non-affiliation

Questions?

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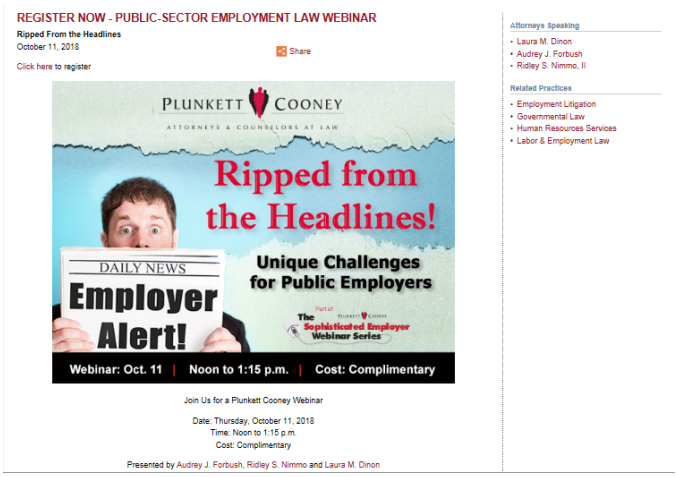

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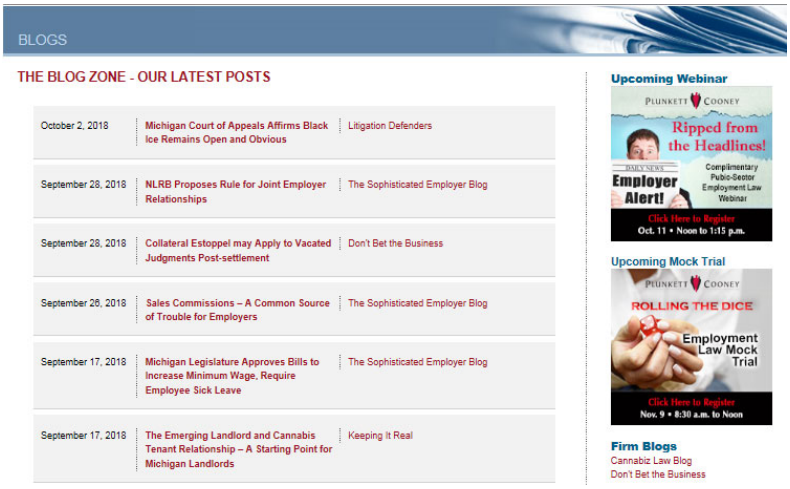

Thank You!