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I. AT-WILL EMPLOYMENT

A. Statute

Ohio has no at-will employment statute.

B. Case Law

Absent an alternative agreement, either the employer or the employee may terminate the employment relationship for any reason not proscribed by law. *Mers v. Dispatch Printing Co.*, 483 N.E.2d 150 (Ohio 1985); see also *Leininger v. Pioneer Nat'l Latex*, 875 N.E.2d 36, 44 (Ohio 2007) (reinforcing Ohio's adherence to the common-law doctrine of employment at-will).

In *Lake Land Employment Group of Akron v. Columber*, 804 N.E.2d 27, 32 (Ohio 2004), the Ohio Supreme Court made the following commentary concerning at-will employment in Ohio:

At-will employment is contractual in nature. In such a relationship, the employee agrees to perform work under the direction and control of the employer, and the employer agrees to pay the employee at an agreed rate. Moreover, either an employer or an employee in a pure at-will employment relationship may legally terminate the employment relationship at any time and for any reason. In the event that an at-will employee quits or is fired, he or she provides no further services for the employer and is generally entitled only to wages and benefits already earned.

It follows that either an employer or an employee in an at-will relationship may propose to change the terms of their employment relationship at any time. If, for instance, an employer notifies an employee that the employee's compensation will be reduced, the employee's remedy, if dissatisfied, is to quit. Similarly, if the employee proposes to the employer that he deserves a raise and will no longer work at his current rate, the employer may either negotiate an increase or accept the loss of his employee.

In *Wright v. Honda of Am. Mfg, Inc.*, 653 N.E.2d 381 (Ohio 1995), the employer terminated an employee after seven years of employment for violating the company's anti-nepotism policy. At the time she was hired, the employee did not know about the policy nor did she know that her half-brother was also employed at the company. The court reversed the summary judgment for the defendant upon finding sufficient evidence to create a fact question as to whether the company had altered the at-will nature of the employment agreement. In *Wright*, the court held that the company's handbook, progress reports, promotion letters, supervisor comments and the

company's course of dealing with the plaintiff were sufficient to create an expectation of continued employment.

In deciding *Wright*, the court noted that generally "the employment relationship between employer and employee is terminable at the will of either; thus, an employee is subject to discharge by an employer at any time, even without cause." *Id.* at 384. The court also cited *Mers* for two exceptions to the employment at-will doctrine. The first exception is the existence of an implied or expressed contractual provision that alters the terms of discharge. The second is the doctrine of promissory estoppel.

II. EXCEPTIONS TO AT-WILL EMPLOYMENT

A. Implied Contracts

First recognized in *Mers*, 483 N.E.2d at 154, and later clarified in *Wright*, 653 N.E.2d 381, at (Ohio 1995), a trier of fact should look at certain facts and circumstances which may give rise to an implied contract: (1) history of relations between the employer and employee; (2) facts and circumstances surrounding the employment-at-will relationship; (3) character of employment; (4) custom; (5) course of dealings between the parties; (6) company policy; (7) information contained in employee handbooks; (8) oral representations made by supervisory personnel that employees have been promised job security in exchange for good performance; (9) written assurances reflecting company policy; and (10) any other fact which may illuminate the question of an implied contract.

1. Employee Handbooks/Personnel Materials

In *Tohline v. Cent. Trust Co.*, 549 N.E.2d 1223 (Ohio Ct. App. 1st Dist. 1988), plaintiff was employed at General Electric Company and was discharged due to doubts raised about his judgment and integrity as a result of certain incidents surrounding his withdrawal of funds from an automatic teller machine. Plaintiff alleged his termination was in violation of the employment manuals distributed by General Electric. Plaintiff had two handbooks, one of which contained the following provision:

[T]his guide is not intended to be a contract or create contractual obligations. The practices may be changed from time to time as need arises, and your employment with the Company is not for any fixed period of time. Just as you have the right to resign and leave the Company at any time for any reason, the Company may terminate your employment at any time for any legitimate reason.

Id. at 1227. The second handbook contained the following provision regarding employee misconduct:

Exempt employees are expected to use good judgment and discretion in the management of their personal and Company affairs. When the conduct of an individual's personal affairs adversely influences performance on the job, this becomes a matter of legitimate concern to the manager. In business dealings, integrity is essential. Consequently,

fraudulent acts are viewed as serious breaches of conduct and in the absence of mitigating circumstances will result in dismissal.

Id. The court held that neither of these provisions created an alteration of the at-will nature of Plaintiff's employment with General Electric. It held that there are two exceptions to at-will employment based upon manuals or handbooks:

Under the implied-contract exception, a handbook may be found to alter the terms of employment at-will if the employee and employer agree to create a contract from the writing. [Citation omitted]. Absent mutual assent, a handbook becomes merely a unilateral statement of rules and policy which creates no obligations and rights. [Citation omitted]. The doctrine of promissory estoppel applies to a clear promise which the employer should reasonably expect to induce reliance by the employee, who does rely on a promise and suffers injury as a result. [Citation omitted]. The effect is to limit an employer's right to discharge an employee.

Id. The court concluded that neither exception was proven by plaintiff and rejected his claim.

In *Karnes v. Doctors Hosp.*, 555 N.E.2d 280 (Ohio 1990), the plaintiff was employed by a hospital with no formal written or oral agreement. The relationship instead was governed by an employee handbook that set forth the terms of employment. The handbook specifically noted that employment was at-will. The plaintiff went on vacation after her requested vacation time was reduced because it coincided with another employee's military leave. When asked what would happen if she did not come back on time, the plaintiff was told she would be terminated. The plaintiff then attempted to come back on time from her vacation, but was too ill to fly. The plaintiff then drove back after telling her employer that she would be unable to report to work as scheduled. Several weeks later, the plaintiff was terminated. The plaintiff then sued, alleging that her employee handbook was an employment contract. The court rejected this argument because the handbook contained explicit disclaimers and was never viewed by the plaintiff as an employment contract.

In *Stembridge v. Summit Acad. Mgmt.*, No. 23083, 2006 Ohio App. LEXIS 4034 (Ohio Ct. App. 9th Dist. 2006), the court rejected the employee's attempts to claim that a handbook created an implied contract where the handbook contained three different disclaimers that employment was at-will, and where the application for employment, signed by the employee, stated that the employment was at-will. In *Atkinson v. Int'l Technegroup*, 666 N.E.2d 257 (Ohio Ct. App. 1st Dist. 1995), however, the court held that despite a specific clause in an employee handbook stating that the employee is an employee-at-will, the employer's policy and practice can create evidence which the trier of fact could reasonably conclude creates an implied agreement not to fire an employee without just cause.

2. Provisions Regarding Fair Treatment

In *Tersigni v. Gen. Tire, Inc.*, 633 N.E.2d 1140 (Ohio Ct. App. 9th Dist. 1993), a group of employees argued that General Tire's policy of "bumping," whereby a senior employee bumps a junior employee when a job reduction is required, should have applied to them

because they relied on this policy in remaining at General Tire based on their seniority. The court granted the employer's motion for summary judgment after which the employees appealed. The appellate court reversed the lower court's summary judgment award to the employer, holding that genuine issues of fact existed with respect to the promissory estoppel and implied contract issues. In so holding, the court stated as follows:

If an employer is allowed to make unqualified and high-sounding promises of fair treatment and job security in order to obtain loyal and long-standing employees, and then disaffirm such promises and rely on the "at-will" doctrine . . . , injustice will frequently result.

Id. at 1143, quoting *Jones v. East Ctr. for Cmty. Mental Health, Inc.*, 482 N.E.2d 969, 974 (Ohio Ct. App. 6th Dist. 1984).

The plaintiff in *Hanly v. Riverside Methodist Hosp.*, 603 N.E.2d 1126 (Ohio Ct. App. 10th Dist. 1991), was discharged after a unit clerk alleged that the plaintiff had groped her in an elevator. The plaintiff then sued for breach of contract, slander, breach of implied or express covenant of good faith and fair dealing, intentional infliction of emotional distress, negligent infliction of emotional distress, and promissory estoppel. The trial court granted the defendant's motion for summary judgment on all counts and the plaintiff appealed. The plaintiff argued that an implied contract of employment was created by the employee handbook which stated that "Riverside's policy is to be frank, fair and honest and to respect their rights as employees." The court rejected this argument, holding that "no promise specific enough to give an implied contract of employment" was found in the handbook. *Id.* at 1129.

3. Disclaimers

In *Wing v. Anchor Media, Ltd.*, 570 N.E.2d 1095 (Ohio 1991), the plaintiff was a general manager at a television station operated by Anchor. At the start of his employment with Anchor, the plaintiff received an employee handbook. The company terminated him, after which he sued for breach of contract, promissory estoppel, wrongful discharge, and fraud. In affirming summary judgment for the company, the court observed that "[a]bsent fraud in the inducement, a disclaimer in an employee handbook stating that employment is at will precludes an employment contract other than at will based upon the terms of the employee handbook." *Id.* at 1098; see also *Stembridge*, 2006 Ohio App. LEXIS 4034; *Galgoczy v. Chagrin Falls Auto Parts, Inc.*, No. 94281, 2010 Ohio App. LEXIS 3991 (Ohio Ct. App. 8th Dist. 2010) ("Disclaimers like that used in this case preclude the use of a written employee handbook to demonstrate an implied contract of employment.").

4. Implied Covenants of Good Faith and Fair Dealing

Mers, 483 N.E.2d at 155 reiterates the principle that parties to an employment at-will agreement are not required to act in good faith. See also *Hawley v. Dresser Indus., Inc.*, 737 F. Supp. 445, 465 (S.D. Ohio 1990), *aff'd in part and rev'd in part*, 958 F.2d 720 (6th Cir. 1992) (noting that "Ohio does not recognize an implied covenant of good faith and fair dealing in at-will employment contracts"); *Sheets v. Rockwell Int'l Corp.*, 588 N.E.2d 271 (Ohio Ct. App. 10th Dist. 1990) (dismissing plaintiff's argument that her employer had breached a covenant

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of good faith and fair dealing because Ohio law does not recognize such in the employment context); *Clark v. Collins Bus Corp*, 736 N.E.2d 970, 973 (Ohio Ct. App. 3d Dist. 2000) (“Ohio law does not recognize a good faith and fair dealing requirement in employment-at-will.”); *Dunina v. Lifecare Hospitals of Dayton*, No. 21142, 2006 Ohio App. LEXIS 2648 (Ohio Ct. App. 2d Dist., 2006) (“The duty of good faith and fair dealing is not recognized in Ohio as a cause of action when it involves the discharge of an at-will employee, or, more generally between an employer and employee.”); *Snedigar v. Miami Univ.*, No. 11AP-8, 2011 Ohio App. LEXIS 3638 (Ohio Ct. App. 10th Dist. 2011) (“Because we have determined appellant was an at-will employee at the time of his termination, we conclude appellee was entitled to judgment as a matter of law on appellant's claims for breach of the covenants of good faith and fair dealing.”).

B. Public Policy Exceptions

1. General

In *Greeley v. Miami Valley Maint. Contractors*, 551 N.E.2d 981, 986-87 (Ohio 1990), the court recognized a public policy exception to the employment at-will doctrine, holding that employers may not discharge an employee “for a reason which is prohibited by statute.” Later, in *Collins v. Rizkana*, 652 N.E.2d 653, 657-58 (Ohio 1995), the court established four prerequisites for holding an employer liable for wrongful discharge of an employee in violation of public policy:

- (1) A clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law;
- (2) Dismissing employees under circumstances like those involved in the plaintiff’s dismissal would jeopardize the public policy;
- (3) Plaintiff’s dismissal was motivated by conduct related to the public policy;
- (4) Employer lacked overriding legitimate business justification for the dismissal.

In *Collins*, the plaintiff quit her job after her pay was reduced when she refused her employer’s request to sign a statement that she had never been sexually harassed. After the plaintiff filed a wrongful discharge claim, summary judgment was granted for the employer. The trial court held that there was no *Greeley* claim because Collins could not meet the requirements of Ohio’s anti-discrimination statute, since not enough employees were employed by *Rizkana* to meet the statutory definition of employer. In applying the four-part test, the Ohio Supreme Court reversed the lower court, concluding that Ohio has a strong public policy against sexual harassment due to the statutory provision banning such harassment. In fact, the public policy is so strong that even though employers with less than four employees were deemed exempt by the legislature, the court found that a wrongful discharge claim based on public policy existed for the plaintiff based on sexual harassment despite the employer’s number of employees.

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In 2007, the court limited public policy claims in the employment context. In *Leininger v. Pioneer Nat'l Latex*, 875 N.E.2d 36, 42-43 (Ohio 2007), an age discrimination case brought pursuant to Ohio Revised Code Chapter 4112, the Ohio Supreme Court held that "it is unnecessary to recognize a common-law claim when remedy provisions are an essential part of the statute upon which the plaintiff depends for the public policy claim and when those remedies adequately protect society's interest by discouraging the wrongful conduct." The court specifically held that "a common-law tort claim for wrongful discharge based on Ohio's public policy against age discrimination does not exist, because the remedies in R.C. Chapter 4112 provide complete relief for a statutory claim for age discrimination." *Id.* at syllabus. While not explicitly overruling *Collins*, 652 N.E.2d at 657-58 the scope of *Leininger* has yet to be determined. It can now be argued that no public policy wrongful discharge claims can be brought based on Ohio Revised Code Chapter 4112, which statutorily prohibits employment discrimination based upon an individual's "race, color, religion, sex, military status, national origin, disability, age, or ancestry." OHIO REV. CODE § 4112.02(A); *see also* *Wiles v. Medina Auto Parts*, 773 N.E.2d 526 (Ohio 2002) (noting that Ohio does not recognize a public policy claim based solely upon the FMLA because the statutory remedies available under the FMLA are sufficient to deter employers from refusing to give employees leave under the Act); *Kleinmark v. CHS-Lake Erie, Inc.*, No. 3:07CV1512, 2008 U.S. Dist. LEXIS 52665 (N.D. Ohio, July 10, 2008) (citing *Leininger* for the proposition that Ohio does not recognize a public policy wrongful discharge claim based on the FMLA); *Bialaszewski v. Titanium Metals Corp.*, No. 2:06-CV-1063, 2008 U.S. Dist. LEXIS 45937 (S.D. Ohio, June 11, 2008) (citing *Leininger* in the dismissal of a public policy wrongful discharge claim based on an alleged disability protected under OHIO REV. CODE 4112 and federal statutory law, both providing adequate statutory remedies); *Carter v. Del. County Bd. of Comm'rs*, Case No. 2:07-cv-1189, 2009 U.S. Dist. LEXIS 16436 (S.D. Ohio Mar. 3, 2009) (discussing handicap discrimination and holding that "R.C. Chapters 4112 and 5321 adequately protect society's interests in attempting to prevent the retaliation [plaintiff] allegedly suffered"); *Reid v. Plainsboro Partners, III*, Nos. 09AP-442, 09AP-456, 2010 Ohio App. LEXIS 3694 (Ohio Ct. App. 10th Dist. 2010) ("No public policy race discrimination or retaliation claims exist in Ohio because § 4112, with its full panoply of remedies, including compensatory and punitive damages, adequately protects society's interests.") (citations and internal quotations omitted); *Valley v. Genoa Twp.*, No. 2:14-cv-2641, 2017 U.S. Dist. LEXIS 17108, at *28 (S.D. Ohio Feb. 7, 2017) (summary judgment proper on wrongful termination claims because "§ 1983 would provide complete relief for the alleged First Amendment violation, and the ADEA and O.R.C. § 4112 would provide complete relief for the alleged age discrimination and retaliation.").

In *Pytlinski v. Brocar Products, Inc.*, 760 N.E.2d 385 (Ohio 2002), the court resolved the split in the Ohio Court of Appeals over the statute of limitations for *Greeley* claims. The court held that claims based on the public policy exception to the employment at-will doctrine are governed by a four-year statute of limitations. In *Pytlinski*, the employee brought a *Greeley* suit alleging that his employer violated Ohio's public policy favoring workplace safety based upon working conditions that he believed were a risk to the health and safety of the employees. He did not allege a claim under the Ohio Whistleblower's Statute, OHIO REV. CODE § 4113.52, which has a statute of limitations of 180 days.

In *Cummings v. Greater Cleveland Reg'l Transit Auth.*, 88 F. Supp. 3d 812, 819 (N.D. Ohio 2015), the court held that city ordinances are not potential sources of public policy that

can support a wrongful discharge claim. Moreover, in *Poland Township Bd. of Trustees v. Swesey*, No. 02 CA 185, 2003 Ohio App. LEXIS 6086, at *14-15 (Ohio Ct. App. 7th Dist. 2003), the court held that an employee handbook does not establish a public policy, even if “the employer is a government entity, corporation, or sole proprietor.”

In *House v. Iacovelli*, 159 Ohio St.3d 466, 2020-Ohio-435, the Ohio Supreme Court reviewed the jeopardy element of the public policy claim. There, plaintiff brought a claim for wrongful discharge in violation of public policy, specifically, alleging she was terminated in violation of Ohio R.C. Chapter 4141, the code provision related to an employer’s obligations to make payments of unemployment compensation insurance premiums. The court held that the remedies in R.C. Chapter 4141 were sufficient to protect the public policy requiring employers to accurately report employees’ pay and tips to the Bureau of Unemployment Compensation and that the lack of a personal remedy for the employee did not jeopardize that public policy. The court distinguished this situation from those situations in which it has held that a personal remedy is necessary to protect aggrieved employees by reasoning that the rights protected in R.C. Chapter 4141 were “government interests” and not “substantial rights of the employee.”

2. Exercising A Legal Right

In *Livingston v. Hillside Rehab. Hosp.*, 680 N.E.2d 1220 (Ohio 1997), the court remanded an age discrimination case based on its holding in *Kulch v. Structural Fibers, Inc.*, 78 Ohio St.3d 134 (Ohio 1997) (holding that an at-will employee who is discharged or disciplined for filing a complaint with OSHA is entitled to maintain an action for wrongful discharge in violation of public policy). The *Livingston* court found that an employee could bring a claim under an antidiscrimination statute in conjunction with a wrongful discharge based on a public policy claim. While the court did not overrule *Livingston* when it ruled in *Leininger*, deciding instead to distinguish *Livingston*, it can now be argued that *Livingston* is no longer effective law.

In *Bickers v. W. & S. Life Ins. Co.*, 879 N.E.2d 201 (Ohio 2007), the Ohio Supreme Court held that “[a]n employee who is terminated from employment while receiving workers’ compensation has no common-law cause of action for wrongful discharge in violation of the public policy underlying OHIO REV. CODE § 4123.90 [Ohio’s Workers’ Compensation Retaliation Provision], which provides the exclusive remedy for employees claiming termination in violation of rights conferred by the Workers’ Compensation Act.”

Because *Bickers* effectively reversed *Coolidge v. Riverdale Local Sch. Dist.*, 797 N.E.2d 61 (Ohio 2003), the court limited *Coolidge* to its specific facts. In *Coolidge*, the plaintiff, a continuing contract teacher employed by a school district, was assaulted and seriously injured by a student. She eventually exhausted all of her leave. The school board terminated her contract because she had exhausted all of her leave and remained unable to fulfill the requirements of her continuing teaching contract. The issue facing the Ohio Supreme Court was whether an employee who is receiving temporary total disability compensation can be discharged solely on the basis of absenteeism or inability to work. The court answered the question in the negative. While noting that a claim of wrongful discharge in violation of public policy is generally an exception to the employment at-will doctrine and the plaintiff

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was not an at-will employee because OHIO REV. CODE § 3319.16 protected her from termination without “good and just cause,” the court determined the plaintiff could show her discharge was “without cause” if she showed her discharge contravened public policy. The plaintiff cited two sources of public policy: (1) the statutory provision providing for TTD compensation; and (2) the statutory provision prohibiting retaliation for filing a workers’ compensation claim. The court, adopting the minority view, then determined that employees who are temporarily and totally disabled as a result of work-related injuries have a right to compensation under the act and whatever period of absence that is medically necessary to recover from the injury. Thus, the court held that it is a violation of public policy for an employer to discharge an employee who is receiving TTD solely on the basis of absenteeism or inability to work, when the absence or inability to work is directly related to an allowed condition.

In *Jerry Welty v. Honda of Am. Mfg. Inc.*, 411 F. Supp. 2d 824 (S.D. Ohio 2005), the plaintiff had been employed at defendant company since 1981 when he took leave under the Family and Medical Leave Act (“FMLA”) in 2003 and 2004. Plaintiff was informed that he was being terminated for excessive absences in June of 2004, but that decision was reversed by an in-house review board. Plaintiff returned to work in July of 2004 and was moved to a new position. While in his new position, plaintiff sustained injuries to his neck and arm and subsequently called off work on July 19 and 20. Defendant informed plaintiff on July 21 that he was terminated as a result of the absences on the prior two days. Plaintiff later received workers’ compensation for his July injuries. Plaintiff filed suit alleging violation of the FMLA, retaliation in violation of § 4123.90, and wrongful discharge in violation of public policy. In deciding on plaintiff’s public policy claim, the court held that the July 19 and 20 absences which were retroactively approved for temporary total disability could not be used as grounds for plaintiff’s termination. In such case, plaintiff’s termination would fall within the public policy recognized in *Coolidge*.

In *Thompson v. Gynecologic Oncology & Pelvic Surgery Associates*, No. 06AP-340, 2006 Ohio App. LEXIS 6326, at *43 (Ohio Ct. App. 10th Dist. 2006), the plaintiff brought a claim for wrongful discharge in violation of public policy for filing a workers’ compensation claim pursuant to Ohio R.C. Chapter 4123. The court held that because the plaintiff based her claims “solely on the public policy expressed in OHIO REV. CODE § 4123.90, non-compliance with the requirements of that statute, including the 180-day limitations period, is fatal to that claim.” *Id.* Furthermore, because plaintiff “failed to file her complaint within the 180-day limitations period” the trial court properly dismissed the case. *Id.*

Although Ohio law still holds that an employee who is terminated from employment while receiving workers’ compensation has no common-law cause of action for wrongful discharge in violation of the public policy, the Ohio Supreme Court has found that there is a wrongful discharge in violation of public policy claim when an employee is injured on the job, but has not yet filed a workers’ compensation claim, because protection of these employees is not included in Ohio’s Workers’ Compensation Retaliation Provision. *Sutton v. Tomco Machining, Inc.*, 129 Ohio St. 3d 153, 161 (Ohio 2011) (“Because the clarity and jeopardy elements are satisfied, Ohio recognizes a common-law tort claim for wrongful discharge in violation of public policy when an injured employee suffers retaliatory employment action

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after injury on the job but before the employee files a workers' compensation claim or institutes or pursues a workers' compensation proceeding.").

3. Refusing to Violate the Law

The Ohio Supreme Court has recognized an at-will employee's claim of wrongful termination in violation of public policy in the context of an employee's refusal to commit criminal acts. *Collins v. Rizkana*, 652 N.E.2d 653 (Ohio 1997). Even though there may have been no crime committed, it is still a violation of public policy to require an employee to do an act proscribed by law. *Id.*

4. Exposing Illegal Activity (Whistleblowers)

In *Kulch*, 677 N.E.2d 308, the court held that a *Greeley* claim may be based on a violation of Ohio's Whistleblower statute (*i.e.*, OHIO REV. CODE § 4113.52). The court further noted that an employee could bring a claim under the Ohio Whistleblower statute in conjunction with a wrongful discharge based on public policy claim. However, the employee must have "fully complied with the [whistleblower] statute." *Id.*; *Seig v. Mercy Franciscan at Schroeder*, No. 1:13-CV-672, 2015 U.S. Dist. LEXIS 29193, at *27 (S.D. Ohio Mar. 10, 2015) (dismissing plaintiff's wrongful discharge in violation of public policy claim based on the Ohio whistleblower statute because plaintiff set forth no argument or evidence that she complied with the requirements of the whistleblower statute).

While not overruling *Kulch*, the scope of *Leininger* (discussed above) has yet to be fully determined. However, it can now be argued that no public policy wrongful discharge claims can be brought based upon Ohio R.C. Chapter 4113, which statutorily prohibits discrimination against whistleblowers. *See Carpenter v. Bishop Well Servs. Corp.*, No. 2009CA00027, 2009 Ohio App. LEXIS 5391 (Ohio Ct. App. 5th Dist. 2009) ("Based upon the clear mandate of the *Leininger* standard, the causes of action alleged by appellant under a public policy tort claim [wrongful discharge in violation of Ohio's Whistleblower statute] fails to meet the 'jeopardy' element test.").

5. Consulting an Attorney or Filing a Lawsuit

Although the Ohio Supreme Court has not addressed the issue, it is fairly clear under Ohio law that "terminating an employee for consulting an attorney regarding the merits of a suit that would affect the employer's interest is a violation of public policy in Ohio." *Chapman v. Adia Servs.*, 688 N.E.2d 604, 610 (Ohio Ct. App. 1st Dist. 1997). *Accord: Kuivila v. City of Conneaut*, No. 09-4564, 2011 U.S. App. LEXIS 14355, at *7 (6th Cir. July 12, 2011) ("Ohio public policy prohibits the discharge of an employee in retaliation for seeking legal advice or retaining the services of an attorney concerning employment-related matters."). Ohio courts are split, however, as to whether there is a cause of action for wrongful discharge in violation of public policy when an employee is discharged for filing a lawsuit against their employer. In *Taylor v. Volunteers of Am.*, 153 Ohio App. 3d 698, 702 (Ohio Ct. App. 1st Dist. 2003), the same court that decided *Chapman* refused to extend the public policy exception to filing a lawsuit. In recognizing the distinction between consulting an attorney and filing a lawsuit, the *Taylor* court explained that:

[A]n employee's need for access to legal representation does not necessarily entail the right to file suit against his employer. As [the Defendant] notes, the employee may consult an attorney to determine his rights and *remedies* under the law. Then, as in other contractual situations, he may weigh the benefits of filing suit against the possible adverse results of the decision to file suit. While we recognize that the respective bargaining positions may be different in the employment setting than in other business relationships, we nonetheless are persuaded that an employee may freely elect between filing suit and jeopardizing his employment on the one hand, and foregoing litigation and protecting the employment relationship on the other. In either case, the employee's right to know his legal rights and remedies are preserved under the *Chapman* holding.

Moreover, we are persuaded that the enunciation of a clear public policy in favor of permitting an employee to file suit against his employer would disrupt the balance of the employer-employee relationship. As [the Defendant] argues, both the employer and the employee have an interest in employee evaluation. The employer should be able to freely inform the employee of performance problems so that the employee may work with the employer to correct those problems. If the filing of suit were a protected decision, we agree that there would be the danger that an employee, anticipating an adverse job action due to poor performance, would file suit against his employer as a 'preemptive strike' against termination. Further, an extension of the *Chapman* holding to the actual filing of a lawsuit would place the employer in the unenviable position of having to continue in a relationship that has been tainted by the acrimonious nature of litigation.

Those districts that hold there is a cause of action for wrongful discharge in violation of public policy when an employee is discharged for filing a lawsuit against their employer find that there is no meaningful distinction between consulting an attorney and filing a lawsuit, and thus, both are entitled to the same protections. *Jenkins v. Parkview Counseling Ctr.*, No. 99 CA 602001, 2001 Ohio App. LEXIS 133, *21 (Ohio Ct. App. 7th Dist. 2001) ("Appellee argues that *Chapman* stands only for the proposition that an employee may not be discharged for consulting an attorney when simply considering a lawsuit against his or her employer. Appellee contends that an employee who actually sues his or her employer is not protected. This argument is misplaced. The Court of Appeals clearly intended to include the right to sue an employer under the umbrella of public policy.").

Courts have recognized limitations regarding the public policy exception for filing a lawsuit or consulting an attorney. For instance, one Ohio court has recognized a distinction between consulting an attorney regarding an employee's rights and consulting an attorney regarding an employee's own business interests, declining to extend a public policy exception to the latter. *Popp v. Integrated Elec. Servs.*, No. CA2005-03-058, 2005 Ohio App. LEXIS 4876, *11-12 (Ohio Ct. App. 12th Dist. 2005). In *Popp*, the court agreed with the trial court that "[t]here is no clear public policy in Ohio to protect an employee from termination when that employee consults an attorney to protect his own business interests against those of his employer, especially when that consultation leads to an adversarial position and the threat of litigation against his employer. . . . Because appellant did not consult an attorney on behalf of a matter that was affecting him as an employee, but instead as a principal partner in

Kentucky Ventures with regard to his own business interests, no public policy exception existed.” Nor does a public policy exception exist where a corporate officer consults with the corporation’s attorney about matters affecting the corporation’s interests, as opposed to seeking access to legal redress for injuries done to the individual. *Abrams v. Am. Computer Tech.*, 168 Ohio App. 3d 362, 372 (Ohio Ct. App. 1st Dist. 2006).

III. CONSTRUCTIVE DISCHARGE

Under Ohio law, constructive discharge is not an independent claim. *Guy v. Bd. of Educ. Rock Hill Local Sch. Dist.*, No. 1:18-cv-893, 2020 U.S. Dist. LEXIS 94778, at *22 (S.D. Ohio May 31, 2020). Constructive discharge is a substitute for termination in an underlying employment discrimination case. *Id.* In *Mauzy v. Kelly Services, Inc.*, 664 N.E.2d 1272 (Ohio 1996), an employee sued her former employer alleging constructive discharge on the basis of age. The trial court entered summary judgment in favor of the employer because the employee had refused a transfer assignment in the face of termination. The Court reversed, finding a genuine issue of material fact regarding whether the former employee was constructively discharged. In reaching this conclusion, the court reiterated the objective, reasonable person standard. “Courts generally apply an objective test in determining when an employee was constructively discharged, *viz.*, whether the employer’s actions made working conditions so intolerable that a reasonable person under the circumstances would have felt compelled to resign.” *See also Mowery v. City of Columbus*, No. 05AP-266, 2006 Ohio App. LEXIS 1051, at *20 (Ohio Ct. App. 10th Dist., 2006) (“Unless conditions are beyond ordinary discrimination, a complaining employee is expected to remain on the job while seeking redress. [Citation omitted]. The fact that the trial court found sufficient evidence to submit Mowery’s hostile work environment claim to the jury does not mandate that the record likewise contained sufficient evidence for submission of Mowery’s constructive discharge claim to the jury.”).

In *Starner v. Guardian Indus.*, No. 00AP-113, 2001 Ohio App. LEXIS 2437 (Ohio Ct. App. 10th Dist. 2001), the plaintiffs appealed a judgment granting summary judgment as to sexual discrimination, sexual harassment and constructive discharge claims. The plaintiff was demoted without a pay reduction, but her benefits and potential for bonuses decreased. The plaintiff was told that she could either take the demotion or be fired. *Id.* at *37. She was yelled at and threatened by her supervisor in front of other employees. These incidents, along with others, caused the plaintiff to feel that she had no choice but to resign. The court reversed the summary judgment as to the constructive discharge claim concluding that there was a genuine issue of material fact that the plaintiff was constructively discharged. Applying the test delineated in *Mauzy*, the fact-finder could determine that the cumulative effect of the employer’s actions would make a reasonable person believe that termination was imminent.

In *Coomer v. Opportunities for Ohioans with Disabilities*, 10th Dist. Franklin No. 21AP-158, 2022-Ohio-387, the defendant appealed a judgment as to the plaintiff’s failure to accommodate and disability discrimination claims. The plaintiff requested an accommodation to change her normal working hours due to an anxiety disorder. *Id.* at *6. After the request was denied, the plaintiff stopped working shortly thereafter. *Id.* Among the issues on appeal, the defendant asserted that the trial court erred by finding that it constructively discharged

the plaintiff. *Id.* at *12. The defendant argued that to prove a constructive discharge based on a failure to accommodate, the plaintiff must demonstrate that the employer completely failed to engage in the interactive process. *Id.* at *23. Relying on *Mauzy*, the court disagreed with the defendant's argument and ruled that the merits of a constructive discharge claim depend on the particular facts of a case.

IV. WRITTEN AGREEMENTS

A. Standard "For Cause" Terminations

In Ohio, the presumption is in favor of employment at-will. *Mers*, 483 N.E.2d. This presumption, however, can be overcome. In addition to altering the at-will employment relationship by means of implied contract, promissory estoppel or employee handbooks, an employer may elect to be a "just cause" employer.

An often-litigated issue in such situations is what exactly constitutes just cause. Ohio's unemployment compensation statute lends some guidance in refining the often nebulous concept of "just cause." Ohio unemployment compensation law provides that no employee who has been discharged for "just cause" is entitled to unemployment compensation benefits. OHIO REV. CODE § 4141.29(D)(2)(a). The court has noted the difficulty of defining the concept with any true precision, observing that "[t]here is, of course, not a slide-rule definition of just cause. Essentially, each case must be considered upon its particular merits. Traditionally, just cause, in the statutory sense, is that which, to an ordinarily intelligent person, is a justifiable reason for doing or not doing a particular act." *Irvine v. State Unemployment Compensation Bd. of Review*, 482 N.E.2d 587, 589 (Ohio 1985), quoting *Peyton v. Sun T.V. & Appliances*, 335 N.E.2d 751 (Ohio Ct. App. 1975).

In *O'Brien v. Ohio State Univ.*, No. 2004-10230, 2005 Ohio Misc. LEXIS 277 (Ohio Ct. Claims, 2005), the court analyzed the boundaries of contract construction in light of a "for cause" employment contract. The parties' employment agreement defined "for cause," and the issue for the court was whether the University's reasons for terminating its men's head basketball coach fell within those boundaries. *Id.* at 5-7. The court ultimately denied both parties' motions for summary judgment, holding that the trier of fact should determine whether O'Brien's breach of contract was material, thus enabling the University to terminate him "for cause" under the contract. *Id.* at 16.

B. Status of Arbitration Clauses

In *Council of Smaller Enterprises v. Gates, McDonald & Co.*, 687 N.E.2d 1352 (Ohio 1998), the appellant, "COSE," sponsored a Worker's Compensation Group Experience rating program as a service to Cleveland area business-members. COSE entered into an agreement with Gates in January 1992, and the following year issued Gates a nonrenewal notice. Gates then claimed that COSE owed it money on a number of claims. After a dispute over the monetary claims, counsel for Gates demanded that the dispute be submitted to arbitration in accordance with the service agreement. The court noted four basic guiding principles with respect to arbitration clauses: (1) a party cannot be required to arbitrate a dispute unless the party previously agreed to arbitrate; (2) the question of a dispute's arbitrability is a question for the court as opposed to the arbitrator; (3) in determining arbitrability, the court is not to

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rule on the potential merits of the case; and (4) a presumption of arbitrability exists when the contract contains an arbitration clause. See also *Stow Firefighters, IAFF Local 1662 v. City of Stow*, No. 25090, 2011 Ohio App. LEXIS 1370 (Ohio Ct. App. 9th Dist. 2011).

See generally OHIO REV. CODE § 2711.01(A), which states the following:

A provision in any written contract . . . to settle by arbitration a controversy that subsequently arises out of the contract, or out of the refusal to perform the whole or any part of the contract, or any agreement in writing between two or more persons to submit to arbitration any controversy existing between them at the time of the agreement to submit, or arising after the agreement to submit, from a relationship then existing between them or that they simultaneously create, shall be valid, irrevocable, and enforceable, except upon grounds that exist at law or in equity for the revocation of any contract.

In *Maestle v. Best Buy Co.*, 800 N.E.2d 7 (Ohio 2003), the court ruled that “[a] party seeking to enforce an arbitration provision may choose to move for a stay under OHIO REV. CODE § 2711.01, or to petition for an order for the parties to proceed to arbitration under OHIO REV. CODE § 2711.03, or to seek orders under both statutes.”

In *Academy of Med. of Cincinnati v. AETNA Health, Inc.*, 842 N.E.2d 488 (Ohio 2006), the court adopted the test articulated in *Fazio v. Lehman Bros., Inc.*, 340 F.3d 386 (6th Cir. 2003) for determining whether the parties agreed to submit a dispute to arbitration – a court must “ask if an action could be maintained without reference to the contract [arbitration agreement] or relationship at issue.” *Id.* at 190. If it could, it is likely outside the scope of the arbitration agreement. *Id.*

The Ohio Arbitration Act allows for either direct enforcement of such agreements through an order to compel arbitration under R.C. 2711.03, or indirect enforcement through an order staying proceedings under R.C. 2711.02. *SW Acquisition Co. v. Akzo Nobel Paints, L.L.C.*, 2021-Ohio-309, ¶ 24 (Ct. App.). A party may choose to move for a stay, petition for an order to proceed to arbitration, or seek both. However, these are separate and distinct procedures.

Before a court issues an order dismissing or staying the litigation pending arbitration, it must first rule on the validity of the arbitration provision in question. In *Robie v. Maxill, Inc.*, 11th Dist. Trumbull No. 2021-T-0007, 2021-Ohio-2644, the court held that the trial court erred by staying the proceedings before determining whether the arbitration clause was unconscionable.

V. ORAL AGREEMENTS

The plaintiff in *Trader v. People Working Cooperatively*, 663 N.E.2d 335 (Ohio Ct. App. 1st Dist. 1994) was terminated and then sued his employer, alleging breach of contract, promissory estoppel, public policy, defamation and intentional infliction of emotional distress claims. After summary judgment was granted for the employer, the plaintiff appealed. Trader argued that although his employment was covered by a written contract stating his

employment was at-will, oral representations made to him by the employer altered that relationship. The court rejected his argument, observing that Trader failed to offer any evidence of when the alleged representations were made. The general law in this respect, as stated by the court, is that where a contract is clear, the “parol evidence rule prevents parties from introducing evidence of prior or contemporaneous negotiations that would alter the terms of the written document.” *Id.* at 337, citing *Uebelacker v. Cincom Sys., Inc.*, 549 N.E.2d 1210, 1217 (Ohio Ct. App. 1st Dist. 1988). Contracts can, however, be altered by subsequent modifications. The problem for Trader was his inability to establish conclusively when the alleged representations were made. Accordingly, the court affirmed the lower court’s grant of summary judgment.

In *Swafford v. DECA Health, Inc.*, No. L-10-1175, 2011 Ohio App. LEXIS 1960 (Ohio Ct. App., 6th Dist. 2011), the plaintiff was terminated for violating his employment agreement when he entered into a contract to perform consulting services for another company without obtaining written consent from the CEO, as required by the employment agreement. The plaintiff argued he was not terminated “for cause” as required under the employment agreement. The district court granted summary judgment for the employer, and the plaintiff appealed. Plaintiff argued he had the CEO's oral consent to enter into the contract, and therefore, there was an issue of fact as to whether he breached the employment agreement. The appellate court rejected this argument, finding that regardless of whether he had oral consent to enter into the contract, plaintiff's employment agreement required written consent, and that the employment agreement could not be modified, except in writing by the CEO. In reaching its conclusion, the court reiterated "Ohio law is very clear that a contract that expressly provides that it may not be amended, modified, or waived except in a writing executed by the parties is not subject to oral modification." *Id.* at *8-9 (citations omitted).

A. Promissory Estoppel

In *Wing*, 570 N.E.2d 1095, the plaintiff was a general manager at a television station operated by Anchor. He claimed that during his employment he was promised a future opportunity to buy into the station. The company later terminated him; he sued for breach of contract, promissory estoppel, wrongful discharge and fraud. In affirming summary judgment for the company, the court held that a promise of future benefits or opportunities without a specific promise of continued employment does not support a promissory estoppel exception to the doctrine of employment at-will.

In *Helmick v. Cincinnati Word Processing, Inc.*, 543 N.E.2d 1212 (Ohio 1989), the plaintiff brought suit against her former employer for emotional distress, assault and battery, invasion of privacy and breach of contract. As to the breach of contract claim, she alleged that when she first sought work, she was given promises of job security and opportunity for advancement and that these promises enticed her to cease her job search. Likewise, she claimed that while employed, the employer’s Vice President assured her she was doing well and “would have a job if her performance was satisfactory.” She claimed that based on these statements, she ceased looking for other employment. The Ohio Supreme Court held that these allegations were sufficient to state a claim for breach of contract if the plaintiff could show a detrimental reliance on the promises. The court further stated that “[s]tanding alone, praise with respect to job performance and discussion of future career development will not

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modify the employment-at-will relationship.” See also *Craddock v. Flood Co.*, No. 23882, 2008 Ohio App. LEXIS 102 (Ohio Ct. App. 9th Dist. 2008) (“Whether a plaintiff proceeds under a theory of implied contract or promissory estoppel, therefore, specific representations leading to an expectation of continued employment are necessary. [Citation omitted]. General expressions of optimism or good will are not enough.”).

In *Mers*, 483 N.E.2d 150, Mers was employed as a traveling representative of Dispatch Printing for approximately four years. In 1982, he was arrested for rape, kidnapping and gross sexual imposition. His trial ended in a hung jury, and the charges were ultimately dropped because the victim was unwilling to continue the prosecution. Dispatch subsequently notified Mers that his employment was terminated. Mers alleged that, inter alia, oral promises had been made to him which rendered the termination improper. The court held that promissory estoppel may be used to limit a contract that is otherwise terminable at will and stated as follows:

We therefore hold that where appropriate, the doctrine of promissory estoppel is applicable and binding to oral employment-at-will agreements when a promise which the employer should reasonably expect to induce action or forbearance on the part of the employee does induce such action or forbearance, if injustice can be avoided only by enforcement of the promise.

Id. at 154-55. The court also stated that the test in promissory estoppel cases is whether the employer should reasonably have expected its representation to be relied upon and whether the employee’s reliance resulted in a detriment. *Id.* at 155.

In *Poskocil v. Cleveland Inst. of Music*, No. 71425, 1997 Ohio App. LEXIS 1644, at *12 (Ohio Ct. App. 8th Dist. 1997), the court overturned the trial court’s grant of summary judgment for the employer because the employee “testified in her deposition that she received specific assurances of employment . . . for at least three years.” Based on those promises, the employee terminated employment discussions with two other possible employers and relocated from Cincinnati to Cleveland in justifiable reliance. *Id.*

In *Wright v. Schwebel Baking Co.*, No. 04-MA-62, 2005 Ohio App. LEXIS 4041, at *11-12 (Ohio Ct. App. 7th Dist. 2005), the Appellate Court overruled a trial court’s dismissal of an employee’s promissory estoppel claim. The court noted the Ohio Supreme Court holding that “[a] promise of future benefits or opportunities without a specific promise of continued employment does not support a promissory estoppel exception to the employment-at-will doctrine.” *Id.* It then noted that the plaintiff alleged “a specific promise of continued employment – employment until he retired at age 65.” *Id.* at *12. Furthermore, he detrimentally relied on that promise. *Id.* Thus, plaintiff properly stated a claim. *Id.*

In *Steele v. Mara Enters.*, No. 09AP-102, 2009 Ohio App. LEXIS 4808 (Ohio Ct. App. 10th Dist. 2009), the appellate court upheld granting the employer summary judgment on an employee’s promissory estoppel claim. The court recognized that, under Ohio law, to establish a promissory estoppel claim, the promise must be for continued employment for a specific period. *Id.* at *14. The plaintiff claimed the widow of the corporation’s founder repeatedly told the plaintiff he would have a job with the employer for as long as she was

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alive. There was no discussion of a number of specific years of employment, but instead the promise was always tied to statements of the widow's lifespan. The court held that "[a] future event that, by its very nature, could occur in ten minutes or ten years is too indefinite to constitute a 'specific term' for purposes of promissory estoppel. Such statements are, at best, discussions of 'possible future career developments and opportunities.'" *Id.* at *15 (citations omitted).

Promissory estoppel claims against municipalities and other political subdivisions are limited due to statutory restrictions or prohibitions on the municipality's employees' ability to make or be bound to promises made in the employment context. *Nealon v. City of Cleveland*, 746 N.E.2d 694 (Ohio Ct. App. 8th Dist. 2000). In *Nealon*, the plaintiff brought a promissory estoppel claim against the City claiming that promises were made to him about employment in the City's Law Department. The court denied the promissory estoppel claim against the City because the City employee who made the promises (Director of Law) was statutorily unauthorized to make a binding offer.

In *Childs v. Kroger Co.*, 2023 Ohio App. LEXIS 2745,222 N.E.3d 741 (Ohio 10th Dist. 2023), the appellate court upheld the trial court's granting of summary judgment for the employer after it terminated the plaintiff due to his decades-old murder conviction. When the employer initially hired the plaintiff, it conducted a background check, which only processed criminal history in the past seven years in the specified jurisdiction, and, therefore, did not uncover the plaintiff's murder conviction. *Id.* at *3. The plaintiff argued that since the employer hired him after performing a background check, this acted as a promise to not terminate his employment for previous convictions. The court found that although the plaintiff may have subjectively believed that his employment after the background check would mean that the employer would not rely on the murder conviction to terminate employment, such subjective belief does not amount to a specific promise for continued employment. *Id.* at *33

B. Fraud

In *Burr v. Bd. of County Commissioners of Stark County*, 491 N.E.2d 1101, 1105 (Ohio 1986), the court set forth the elements of fraud as follows:

- a) a representation or, where there is a duty to disclose, concealment of fact,
- b) which is material to the transaction at hand,
- c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred,
- d) with the intent of misleading another into relying upon it,
- e) justifiable reliance upon the representation or concealment, and
- f) a resulting injury proximately caused by the reliance.

See also *Windsor Med. Ctr., Inc. v. Time Warner Cable, Inc.*, 5th Dist. Stark No. 2020CA00085, 2021 Ohio App. LEXIS 159, at *11 (Jan. 20, 2021).

The plaintiff in *Chasko v. Ellwood Engineered Castings Co.*, 675 N.E.2d 494 (Ohio Ct. App. 11th Dist. 1996), sued his employer alleging wrongful discharge based on promissory estoppel, fraud and intentional infliction of emotional distress. The plaintiff was discharged for insubordination. He claimed the employer failed to follow a three-step disciplinary procedure prior to discharge set forth in a policy which had been posted on the company bulletin board. The trial court granted employer's summary judgment motion based on the fact that the employer's policy manual was a mere draft and the handbook contained a disclaimer. The appellate court affirmed, noting that the plaintiff's fraud claim failed because the employer had not made a misrepresentation given the fact that the policy in controversy was not yet in effect and the employer had an at-will employment disclaimer in its employee handbook.

The plaintiff-employee in *Atram v. Star Tool & Die Corp.*, 581 N.E.2d 1110 (Ohio Ct. App. 8th Dist. 1989), sued the defendant for fraudulently inducing him to relinquish his employment with another employer to work for the defendant. The plaintiff claimed that the president of the defendant company made express representations to him that if Atram quit his current job, the company would train him on its machinery and give him a job. Based on these promises, Atram quit his current position only to be discharged after one day of work at the defendant company. Atram alleged that the company had committed a fraud upon him as it never intended to fulfill the promise to train him. A jury found in favor of Atram against both the company and the company president, Molnar. Following the trial, the court vacated the judgment against Molnar on the grounds that he had been acting in his official capacity as an officer of the company and therefore could not be held liable. The appellate court reversed the vacation of the judgment against Molnar and held that both the company and president were liable to Atram for fraud. *Id.* at 1113-1114.

In *Langlois v. W.P. Hickman Sys.*, No. 86930, 2006 Ohio App. LEXIS 3693, at *11 (Ohio Ct. App. 8th Dist., 2006), the court noted that an employee's claim for fraudulent inducement was merely his promissory estoppel claim "recycle[d]." The court held that the employer was entitled to judgment as a matter of law because the employer's alleged "promises" lacked specificity of time. *Id.* at *12.

The rule in Ohio is that one who performs a contract after learning of fraud will thereby waive a claim of fraudulent inducement by continuing to perform. *Hawes v. Downing Health Technologies L.L.C.*, 8th Dist. Cuyahoga No. 110920, 2022-Ohio-1677. In *Hawes*, the plaintiff was misled about the employer's financial health. *Id.* at *11. As a condition of employment, the executives of the company requested a \$250,000 investment into the company. *Id.* at *8. Based on conversations prior to being hired, executives for the employer represented the company as being well-positioned, failing to mention that it had failed to make payroll in the recent past. *Id.* at *12. However, because the plaintiff continued working for the employer, and even accepted a demotion after learning of the fraud, the court held that the plaintiff waived his claim for fraudulent inducement. *Id.* at *58.

C. Statute of Frauds

Ohio's Statute of Frauds, codified at OHIO REV. CODE § 1335.05, requires that contracts not to be performed within one year from the making thereof be in writing and signed by the

party to be charged therewith. In *Van Der Meer v. Ohio Golf Course License Corp.*, No. 1-01-50, 2001 Ohio App. LEXIS 4311 (Ohio Ct. App. 3d Dist., 2001), the court found that a typed written offer of employment explaining the details of employment, including salary, bonuses and benefits, which required a five-year work agreement, was not a valid employment contract because it failed under the Statute of Frauds. Because the offer required a five-year work agreement it could not be completed within the course of one year. As such, the offer fell within the Statute of Frauds, and was required to be signed by defendant. The offer was not signed and therefore was invalid and unenforceable.

VI. DEFAMATION

A. General Rule

Defamation is a false publication causing injury to a person's reputation, or exposing the person to public hatred, contempt, ridicule, shame or disgrace or affecting him adversely in his trade or business. *Matikas v. Univ. of Dayton*, 788 N.E.2d 1108 (Ohio Ct. App. 2d Dist. 2003). Defamation can be in the form of either libel or slander – with slander generally referring to spoken defamatory words and libel referring to written or printed defamatory words. *Id.* The essential elements of a defamation action, whether libel or slander, are that: (1) the defendant made a false statement of fact; (2) the false statement was defamatory; (3) the false statement was published; (4) the plaintiff was injured; and (5) the defendant acted with the required degree of fault. *Id.*

In the context of a legal malpractice action, the Ohio Supreme Court listed the following as elements for a common law defamation claim: falsity, defamation, publication, injury and fault. *State ex rel. Sellers v. Gerken*, 647 N.E.2d 807 (Ohio 1995). See also *Matalka v. Lagemann*, 486 N.E.2d 1220 (Ohio 1985) (defining defamation as a false publication "causing injury to a person's reputation; exposing him to public hatred, contempt, ridicule, shame or disgrace; or affecting him adversely in his trade or business").

1. Libel in the Employment Relationship

In *Hatton v. Interim Health Care of Columbus, Inc.*, No. 06AP-828, 2007 Ohio App. LEXIS 1279 (Ohio Ct. App. 10th Dist. Mar. 27, 2007), the court addressed an employee's defamation claim against her supervisors. The employee, a nurse, claimed that her supervisor defamed her in a report concerning the nurse's administration of drugs to a patient. The report stated that the nurse acknowledged giving "Soma [a drug] to a client without knowing what it was, what the side effects or desired effects were." The nurse was ultimately terminated for this conduct. Thereafter, two supervisors prepared an "Employee Termination Record," which stated that the nurse was terminated for "poor nursing practices." The court ultimately held that the supervisors were entitled to qualified privilege on both claims of defamation because the documents "were created in the scope of [the supervisors'] employment, and both were distributed only to those managerial employees who had a need to know the information contained within. Furthermore, the two documents contained evaluations of [the nurse's] employment – a matter of common interest between Interim [and the two supervisors]." *Id.* at *17.

2. Slander in the Employment Relationship

In *Hanly v. Riverside Methodist Hosp.*, 603 N.E.2d 1126, a former employee brought a claim against his former employer for slander. The employer had suspended and then discharged the plaintiff after determining that he had sexually harassed another employee. Plaintiff's basis for the slander charge was certain meetings at which his employer informed other hospital employees that two employees had been suspended pending investigation of a sexual harassment incident. The appellate court affirmed summary judgment for the employer on the slander claim, finding that the hospital's statements, even if false, fell within a qualified privilege, *see infra*, and as the plaintiff presented no evidence of malice, his claim failed.

In *Temethy v. Huntington Bancshares, Inc.*, No. 83291, 2004 Ohio App. LEXIS 1111, at *2 (Ohio Ct. App. 8th Dist. 2004), the court addressed defamation in the context of one employee reporting at a manager's meeting that the plaintiff alarmed a fellow employee by "referenc[ing] an incident in Texas where an employee at a 'federal building brought a gun to work and blew the place apart' and stated that 'it could happen here.'" The court ultimately held an employer is protected by a conditional/qualified privilege against defamation where: "(1) he acted in good faith, (2) there was an interest to be upheld; (3) the statement was limited in its scope to the purpose of upholding that interest; (4) the occasion was proper, and (5) the publication was made in a proper manner and only to the proper parties. *Id.* at *10, *citing Mosley v. Evans*, 630 N.E.2d 75 (Ohio Ct. App. 11th Dist. 1993).

B. References

OHIO REV. CODE § 4113.71(B)(1) provides that an employer who is requested by a prospective employer to provide a job reference for an employee is not liable for any harm sustained as a result thereof by the employee unless it is established that the employer made the reference "with the knowledge that it was false, with the deliberate intent to mislead the prospective employer or another person, in bad faith, or with malicious purpose."

In *Trader v. People Working Cooperatively*, 663 N.E.2d 335 (Ohio Ct. App. 1st Dist. 1995), the court affirmed the trial court's grant of summary judgment to an employer on an employee's defamation claim in which the defendant told a potential future employer that although the employee was "a good worker," it was "questionable" whether the employer would rehire him. The court noted that defamation claims require that the statement be false. Where, as here, there is no evidence that the statements complained of are in fact false, the plaintiff's defamation claim necessarily will fail.

The plaintiff-employee in *Rainey v. Shaffer*, 456 N.E.2d 1328 (Ohio Ct. App. 11th Dist. 1983), asked her current employer to request a reference from a prior employer following what the employee suspected was a poor reference given to a prospective employer. Upon calling the reference source, the current employer learned that the reference source did in fact give a poor reference for the employee and notified the employee of this fact. The employee then sued the prior employer for defamation. The trial court found for the employee from which the prior employer appealed. The appellate court pointed out that under the qualified privilege for employment references, an employer may pass along "facts, opinions, or suspicions regarding a former employee and may not be subject to an action for

slander.” This privilege is defeated, however, where the statements are made with malice. As the statements made by the prior employer in *Rainey* required additional interpretation by the listener before reaching the level of slander, the court rejected the employee’s claim.

In *Young v. Ohio Bulk Transfer, Inc.*, No. 85575, 2005 Ohio App. LEXIS 4013, at *11 (Ohio Ct. App. 8th Dist. 2005), the court rejected a plaintiff’s claim for defamation because the alleged defamatory statement could not “be attributed to Ohio Bulk.” Plaintiff brought a defamation claim against his previous employer for a reference. However, the defamatory remarks were made by an employee who lacked actual authority to make references on behalf of the company.

C. Privileges

The plaintiff in *A & B-Abell Elevator v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council*, 651 N.E.2d 1283 (Ohio 1995), made the low bid on an elevator and airport maintenance contract for the City of Columbus. The city initially rejected the bids after receiving negative information concerning the plaintiff’s safety history from the defendant. The issue on appeal was whether a qualified privilege for the defendant’s statements existed. The court noted that “[a] publication is privileged when it is ‘fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned.’” The court observed that such privileges have a strong basis in public policy. One such interest considered a qualified privilege is the public interest. This privilege pertains to those communications made to those who are expected to take some sort of affirmative action to protect the public interest. In this case, the court held that the defendant’s actions could properly be considered as serving the public interest. Finally, the court observed that once a qualified privilege is established, it can only be destroyed by a showing of actual malice in making the communication. Actual malice is defined as “‘acting with knowledge that the statements are false or acting with reckless disregard as to their truth or falsity.’”

In *Hahn v. Kotten*, 331 N.E.2d 713 (Ohio 1975), the court held that the elements of a qualified privilege are “good faith, an interest to be upheld, a statement limited in its scope to this purpose, a proper occasion, and publication in a proper manner and to proper parties only.” See also *Costanzo v. Gaul*, 403 N.E.2d 979 (Ohio 1980) (holding that an absolute privilege extends to legislative proceedings as well as other acts of state); *M.J. DiCorpo, Inc. v. Sweeney*, 634 N.E.2d 203 (Ohio 1994) (holding that there is an absolute, as opposed to qualified, privilege for statements made in judicial proceedings); *Atkinson v. Stop-N-Go Foods, Inc.*, 614 N.E.2d 784 (Ohio Ct. App. 2d Dist. 1992) (using the qualified privilege concept to defeat the plaintiff’s defamation claim where the defendant employer made statements to the police regarding the plaintiff’s discharge for theft); *Saha v. The Ohio State University*, No. 10AP-1139, 2011 Ohio App. LEXIS 3245, at *20 (Ohio Ct. App. 10th Dist. 2011) (holding that comments made during a tenure review process were “protected as qualified privilege as it is in OSU’s interest to publish in a reasonable manner for the proper purpose of evaluating a candidate for promotion”).

The plaintiff in *Evely v. Carlon Co., Div. of Indian Head*, 447 N.E.2d 1290 (Ohio 1983), sued his employer after being terminated. He alleged that the reason he was terminated was because of his age and the fact that he knew about and had protested the employer’s

claimed transportation rate violations. Evely also sued for libel and slander after company representatives and officers made oral and written statements characterizing him as dishonest and unbalanced. In rejecting the plaintiff's defamation claim, the court noted that the alleged defamatory statements were made pertaining to the employee's employment status with the company. Therefore, "the statements would be afforded a qualified privilege concerning matters of common business interest between the parties and, accordingly, there must be a showing that they were made with actual malice in order for the [employee] to prevail."

The plaintiff in *Gray v. Allison Div., Gen. Motors Corp.*, 370 N.E.2d 747 (Ohio Ct. App. 8th Dist. 1977), was seen putting raw shell casings on a conveyor while working for the employer, an act which could lead to damage of equipment. After being discharged for violating a shop rule prohibiting sabotage, the employee sued the employer for libel and slander in making the sabotage accusation. After a jury verdict for the employee, the employer appealed. The appellate court reversed the lower court and remanded the case for a new trial, holding that:

[i]t is well established in Ohio that communications between an employer and an employee or between two employees concerning the conduct of a third or former employee made in good faith concerning a matter of common interest are within the doctrine of qualified privilege. While protected by a qualified privilege, defamatory statements will impose liability only by establishing either that the defamation was published to someone not within the scope of the privilege, or if the defamation was only published to individuals within the scope of the privilege, that the act was done with actual malice.

D. Other Defenses

1. Truth

OHIO REV. CODE § 2739.02 states, in part, that "[p]roof of the truth thereof shall be a complete defense" in libel and slander claims." See also *Ed Schory & Sons, Inc. v. Soc'y Nat'l Bank*, 662 N.E.2d 1074 (Ohio 1996) (holding that truth is an absolute defense in defamation claims in Ohio); *Grabow v. King Media Enterprises, Inc.*, 806 N.E.2d 591, 596 (Ohio Ct. App. 8th Dist. 2004).

2. No Publication

Publication is an essential element of any claim for defamation. *Matikas*, 788 N.E.2d at 1115. The plaintiff bringing a defamation claim must prove that the alleged defamatory statement was published to at least one other third party, *i.e.*, someone other than the plaintiff about whom the alleged defamatory statement was made. *Fallang v. Hickey*, 532 N.E.2d 117 (Ohio 1988).

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3. Self-Publication

Ohio courts do not recognize a cause of action for defamation where the defamed party published the defamatory remarks. *Guy v. McCartney*, No. 00 JE 7, 2002 Ohio App. LEXIS 3066, at *17 (Ohio Ct. App. 7th Dist. 2002).

4. Invited Libel

“Invited libel” occurs when a plaintiff, through his or her own actions, induces another person or party to publish a defamatory statement about them. *Golem v. Put-In-Bay*, 222 F. Supp. 2d 924 (N.D. Ohio 2002). Sometimes a plaintiff attempts to meet the publication requirement of a defamation claim by asserting that he or she was *forced* to publish the underlying defamatory statement. This doctrine is called “compelled self-publication.” However, Ohio has not yet recognized “compelled self-publication.” *Guy*, 2002 Ohio App. LEXIS 3066, at *16-17.

5. Opinion

An opinion by its very nature is based on someone’s evaluation and judgment of a situation and is not based on fact. Statements of opinion are specifically protected by the Ohio Constitution. Ohio Const., art. I, § 11. *See also Wampler v. Higgins*, 752 N.E.2d 962, at syllabus (Ohio 2001); *Scott v. News Herald*, 496 N.E.2d 699 (Ohio 1986); *Bentkowski v. Scene Magazine*, 637 F.3d 689 (6th Cir. 2011) (“[t]o determine whether a statement constitutes protected opinion or actionable fact, courts consider the totality of the circumstances, including factors such as: (1) ‘the specific language used;’ (2) ‘whether the statement is verifiable;’ (3) ‘the general context of the statement;’ and (4) ‘the broader context in which the statement appeared.’”); *but see Mehta v. Ohio University*, 958 N.E.2d 598, 607 (Ohio Ct. App. 10th Dist. 2011) (holding that, while opinions are generally immune from liability, “[s]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation,” so ‘what is required is a delicate balance between the constitutional protections afforded to the free expression of ideas and the protections afforded to an individual’s reputation under defamation laws”).

E. Job References and Blacklisting Statutes

OHIO REV. CODE § 4113.71(B)(1) provides that an employer who is requested by a prospective employer to provide a job reference for an employee is not liable for any harm sustained as a result thereof by the employee unless it is established that the employer made the reference “with the knowledge that it was false, with the deliberate intent to mislead the prospective employer or another person, in bad faith, or with malicious purpose.”

F. Non-Disparagement Clauses

In Ohio, non-disparagement clauses are a matter of contract law and may be enforced under the common law of contracts. *Bowden v. Weickert*, No. S-02-017, 2003 Ohio App. LEXIS 2871 (Ohio Ct. App. 6th Dist. 2003).

VII. EMOTIONAL DISTRESS CLAIMS

A. Intentional Infliction of Emotional Distress

In *Phung v. Waste Mgmt., Inc.*, 644 N.E.2d 286 (Ohio 1994), the court set forth the elements of an intentional infliction of emotional distress (“IIED”) claim as follows: (1) The defendant intended to cause the plaintiff serious emotional distress; (2) The defendant’s conduct was extreme and outrageous; and (3) The defendant’s conduct was the proximate cause of the plaintiff’s serious emotional distress. The plaintiff in *Russ v. TRW, Inc.*, 570 N.E.2d 1076 (Ohio 1991), brought a claim for intentional infliction of emotional distress against his employer. The court held that an intentional infliction of emotional distress claim may be brought by an at-will employee even if the employee’s discharge was obtained in a lawful manner. The court carefully distinguished an action for wrongful discharge from an action for intentional infliction of emotional distress, noting that the former is based on contract or quasi-contract while the latter is designed to “redress tortious conduct.” *Id.* at 1082.

In *Strausbaugh v. Ohio Dep’t of Transp.*, 782 N.E.2d 92 (Ohio Ct. App. 10th Dist. 2002), the court held that a fact finder may consider the context or environment in which the acts in question occurred in determining whether a defendant’s conduct is sufficiently extreme and outrageous in an IIED case. Thus, a fact finder should focus both on the particular workplace environment and the broader community. Further, a fact finder may take into account a plaintiff’s role in creating the particular environment at issue.

In *Craddock v. Flood Co.*, No. 23882, 2008 Ohio App. LEXIS 102 (Ohio Ct. App. 9th Dist. 2008), the court granted an employer’s motion for summary judgment concerning a claim for intentional infliction of emotional distress. After noting the high standard, the court stated that “[t]ermination of employment, without more, does not constitute the outrageous conduct required to establish a claim of intentional infliction of emotional distress, even when the employer knew that the decision was likely to upset the employee.” *Id.* at *13, citing *Mendlovic v. Life Line Screening of Am., Ltd.*, 877 N.E.2d 377 (Ohio Ct. App. 8th Dist. 2007). Plaintiff had identified “the financial strain of lost employment as the distress and injury that he suffered.” *Craddock*, 2008 Ohio App. Lexis 102, at *14. However, he also agreed that the defendant “treated him respectfully at the time of his termination. *Id.* Because the Plaintiff could not show the existence of any “extreme and outrageous conduct” on the part of his employer, he could not avoid summary judgment on a claim for intentional infliction of emotional distress.

B. Negligent Infliction of Emotional Distress

In *High v. Howard*, 592 N.E.2d 818 (Ohio 1992), *overruled on other grounds by Gallimore v. Children’s Hosp. Med. Ctr.*, 617 N.E.2d 1052 (Ohio 1993), the court noted that Ohio courts have “limited recovery for negligent infliction of emotional distress to such instances as where one was a bystander to an accident or was in fear of physical consequences to his own person.”

In *Osman v. Isotec, Inc.*, 960 F. Supp. 118, 122 (S.D. Ohio 1997), plaintiff, in addition to various discrimination claims, alleged negligent and intentional infliction of emotional

distress as well as tortious interference with a business relationship. The court first noted that it had not yet addressed whether a negligent infliction of emotional distress claim may be brought in the employment context, but commented that Ohio's appellate courts had continually refused to recognize such an action. The court then stated that for the plaintiff to prevail on his negligent infliction of emotional distress claim, he is required to meet the test of the so-called "traditional" negligent infliction of emotional distress tort. To survive the defendant's motion to dismiss, the court held that the plaintiff must allege the following: (1) he was a bystander to an accident; (2) he reasonably appreciated the peril of the accident; and (3) he suffered serious foreseeable distress as a result of that recognition or fear of the peril. The court ultimately found that the plaintiff could not satisfy the test and dismissed the claim.

See also Powers v. Pinkerton, Inc., No. 76333, 2001 Ohio App. LEXIS 138 (Ohio Ct. App. 8th Dist. 2001) (noting that Ohio has not recognized a separate tort for negligent infliction of emotional distress in the employment context); *Kulch v. Structural Fibers, Inc.*, 78 Ohio St.3d 134 (Ohio 1997) (noting that there is no basis for an employee's claim for negligent infliction of emotional distress where the employee was allegedly discharged for reporting an OSHA violation by his employer); *Soreo-Yasher v. First Office Mgmt.*, 926 F. Supp. 646 (N.D. Ohio 1996), *aff'd* 129 F.3d 1265 (6th Cir. 1997) (noting that Ohio has not recognized a cause of action for negligent infliction of emotional distress in employment cases); *Tschantz v. Ferguson*, 647 N.E.2d 507, 521 (Ohio Ct. App. 8th Dist. 1994) (observing that "Ohio courts do not recognize a separate tort for negligent infliction of emotional distress in the employment context").

VIII. PRIVACY RIGHTS

A. Generally

In *Welling v. Weinfeld*, 866 N.E.2d 1051, 1053 (Ohio 2007), the Ohio Supreme Court reaffirmed *Housh v. Peth*, 133 N.E.2d 340 (Ohio 1956), stating that "invasion of the right of privacy is (1) the unwarranted appropriation or exploitation of one's personality, (2) the publicizing of one's private affairs with which the public has no legitimate concern, or (3) the wrongful intrusion into one's private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities." In addition, the court expanded its previous holding, stating that "[o]ne who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of privacy if (a) the false light in which the other was placed would be highly offensive to a reasonable person and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed." *Welling*, 866 N.E.2d 1051, at syllabus.

In *Tohline v. Cent. Trust, Co., N.A.*, 549 N.E.2d 1223 (Ohio Ct. App. 1st. Dist. 1988), the court recognized the tort of invasion of privacy in the employment context. In *Tohline*, a discharged employee claimed invasion of privacy after his employer questioned him in the course of the investigation that led to his discharge. The court rejected the claim, noting that the questions were completely within reason as the employer had a right to investigate claims against the employee which might adversely affect his work performance. *See also*

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Gaumont v. Emery Air Freight Corp., 572 N.E.2d 747 (Ohio Ct. App. 2d Dist. 1989) (dismissing an employee's claim of invasion of privacy as employer's allegations about employee, which were made to other employees, fell under qualified privilege).

In *Miller v. Cincinnati Children's Hosp. Med. Ctr.*, No. C-050738, 2006 Ohio App. LEXIS 3837 (Ohio Ct. App. 1st Dist. 2006), the court restated the law concerning invasion of privacy in the context of an employer-employee relationship. Plaintiff's supervisor confronted her about her abilities to continue her job while caring for her granddaughter who she had adopted. The court held that plaintiff had displayed and discussed her granddaughter's medical condition with "coworkers and with the community in general." She even "requested special privileges from her employer to work at home to better deal with her granddaughter's condition." The court found that her supervisor did not overstep the bounds of his duties as the plaintiff's supervisor when he questioned her ability to discharge the responsibilities associated with managing two divisions at the Company. The court stated that the supervisor would have been "derelict in his duties had he ignored the complaints regarding [plaintiff] and allowed her to continue her telework unquestioned."

B. New Hire Processing

1. Eligibility Verification and Reporting Procedures

There is no law in Ohio relevant to this topic.

2. Background Checks

While generally there are no laws in Ohio pertaining to employer background checks, there are specific state statutes requiring background checks for certain professions. *See, e.g.*, OHIO REV. CODE § 3319.391 (requiring criminal background checks for current and future school employees); OHIO REV. CODE § 3712.09 (requiring background checks for employees providing direct care in hospice programs);

In Ohio, employers cannot ask applicants in job applications or job interviews about their sealed conviction records or certain sealed or expunged bail forfeiture records, unless these inquiries are directly and substantially related to positions for which they are being considered. OHIO REV. CODE § 2953.33. Employers also cannot make these inquiries about certain expunged conviction records related to firearms and human trafficking, and applicants legally can deny that such records exist. OHIO REV. CODE § 2953.35; 2953.36. Employers can request state criminal background checks through the Ohio attorney general's Bureau of Criminal Identification and Investigation and obtain information on limited convictions and recent arrests. OHIO REV. CODE § 109.57; OHIO ADMIN. CODE § 109:5-1-01.

C. Other Specific Issues

1. Workplace Searches

In *Branan v. Mac Tools*, No. 03AP-1096, 2004 Ohio App. LEXIS 5011 (Ohio Ct. App. 10th Dist. 2004), the employer took surveillance photographs of the plaintiff's home and opened the plaintiff's unlocked briefcase, which was left in his office after he had been

interrogated by the Company's Asset Protection Team in conjunction with a trade secret investigation. Concerning the photographs taken of the plaintiff's home, the appellate court cited *York v. G.E. Co.*, 759 N.E.2d 865 (Ohio Ct. App. 12th Dist. 2001) for the proposition that "courts have generally held that the invasion complained of must involve the 'viewing of affairs that are private and not in public view.'" Accordingly, photographing plaintiff's home was not violative of Plaintiff's privacy interests. However, concerning the briefcase, the court held that an issue of material fact existed. The court noted the difference between locked office furniture provided by the employer (property for which there is no expectation of privacy) and an individual's personal briefcase (property for which the expectation of privacy should be determined by the jury). See also *Sowards v. Norbar, Inc.* 605 N.E.2d 468 (Ohio Ct. App. 10th Dist. 1992) (holding an employer liable for invasion of privacy after the employer searched an employee truck driver's hotel room for a missing permit book).

Similar standards apply to an employer's monitoring of its employee's activities, even where no "search" is involved. In *Mullins v. Ohio Board of Regents*, No. 2006-07023, 2010 Ohio Misc. LEXIS 11 (Ohio Ct. of Claims 2011), an employee set forth a claim for invasion of privacy arising out of the fact that her employer (1) had her work arrival time monitored, (2) posted scheduling information concerning employee hearings, and (3) monitored her computer use. The court, finding in favor of the employer, held that "a public employee's expectation of privacy in the workplace may be limited by office practices, work procedures or regulation." *Id.* at *9. Moreover, "[t]he actions which plaintiff claims to have been a wrongful intrusion into her private activities were conducted during business hours and were, for the most part, open to public observation." *Id.* Finally, on the employee's allegations concerning monitoring of her computer use, "Ohio courts have found that employees have no expectation of privacy in their office space, computer, or desk if the employer owns them and they are accessible to other employees." *Id.*

2. Electronic Monitoring

In *Brannen v. Kings Local Sch. Dist. Bd. of Educ.*, 761 N.E.2d 84 (Ohio Ct. App. 12th Dist. 2001), defendants suspected that the third-shift custodians were not working during large portions of their shifts. Third-shift custodians usually work without direct supervision between the hours of 10:00 p.m. and 6:00 a.m. Defendants installed a hidden video camera in a staff break room. The camera recorded the activities in the break room for one week from 6:00 p.m. until 6:00 a.m. The camera did not record any sounds or conversations. The court recognized that government employees' Fourth Amendment rights are implicated only when the conduct of government employers or supervisors infringes upon an expectation of privacy in the workplace that society is prepared to consider reasonable. The workplace includes those areas and items that are related to work and are generally within the employer's control, including hallways, offices, locker rooms, break rooms, cafeterias, desks, and file cabinets. Further, an employee's expectation of privacy in the workplace must be assessed in the context of the employment relationship on a case-by-case basis. With these principles in mind, the court found that the employees did not have a reasonable expectation of privacy in the break room because the break room was more of an all-purpose utility room that contained a washing machine, clothes dryer, cleaning supplies, cleaning machines, lockers, a refrigerator, and a microwave oven. Teachers could access the room whenever they needed something contained inside. Thus, the break room was so open to fellow

employees that the custodians could not have a reasonable expectation of privacy in this area.

However, employers with unionized (or organizing) workforces should be mindful of implications under the National Labor Relations Act (“NLRA”) when considering surveillance of employees. In *Stern Produce Co.*, 372 NLRB No. 74 (NLRB 2023), the employer installed cameras in its fleet of delivery trucks that provided an inside view of the truck’s cab and its driver. *Id.* at *1-2. The camera system remained on at all times and alerted the employer when a driver traveled to an unauthorized area, stopped for an extended period, or engaged in harsh braking. *Id.* A driver, who was also a known supporter of an ongoing union organization campaign, covered the camera while he was on his lunch break. The employee’s supervisor later informed him that covering the camera was against company rules. *Id.* at *2-3. The NLRB sided with the employee, determining that the employee “would reasonably have interpreted [the supervisor’s] sudden and unusual interest in viewing camera footage from his inward-facing camera when he was stopped for lunch as an indication that [the employer] was surveilling [the driver] for any signs of union activity in violation of Section 8(a)(1) [of the NLRA].” *Id.* at *3.

Additionally, installation and use of surveillance cameras in the workplace is a mandatory subject of collective bargaining. See *Anheuser-Busch, Inc.*, 342 NLRB 560 (NLRB 2004); *National Steel Corporation*, 335 NLRB 747 (NLRB 2001).

3. Social Media

In *Glenn v. Hose Master, L.L.C.*, 2016-Ohio-1124, 61 N.E.3d 609, 611 (Ct. App.), the court held that summary judgment to an employer was proper in a retaliatory discharge action by a former employee. The court reasoned that terminating the employee for posting to social media a racially and sexually offensive video recorded on the employer’s premises was a legitimate and nondiscriminatory reason for termination. *Id.*

4. Taping of Employees

In *Brannen v. Bd. Of Educ.*, 761 N.E.2d 84 (Ohio Ct. App. 12th Dist. 2001), employees of a public high school alleged their employer violated their Fourth Amendment rights when it videotaped them in the break room. The employees, custodians at the high school, were suspected of not working during large portions of their shifts while turning in time sheets indicating they had worked their full eight-hour shifts. Their supervisor installed a video surveillance camera in the break room to record the employees’ activities. The court concluded that the employees’ Fourth Amendment rights were not violated because they did not have a reasonable expectation of privacy in the break room. Other school employees at the high school had unfettered access to the break room, including the principal and most of the teachers.

In *Stonum v. U.S. Airways, Inc.*, 83 F. Supp. 2d 894 (S.D. Ohio 1999), the plaintiff brought an action against her employer under the Family and Medical Leave act and a state law claim for invasion of privacy. After the plaintiff took FMLA leave to care for her mother, her employer suspected she might be abusing the leave, so it hired a private investigator. The investigator called the plaintiff’s home on several occasions, as well as took photographs

of her. The court granted summary judgment to U.S. Airways on both claims, finding that “neither the investigator's four innocuous telephone calls over a two-month period, nor his observation of Stonum's activities in plain view, would cause outrage, mental suffering, shame, or humiliation in a person of ordinary sensibilities.” *Id.* at 905–06.

5. Release of Personal Information on Employees

Public entities are subject to the Ohio Public Records Act, OHIO REV. CODE § 149.43, and, thus, are required by law to release “public records” upon request (unless an enumerated exception applies). “Records” is broadly defined to include “any document, device, or item, regardless of physical form or characteristic, created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions, which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.” OHIO REV. CODE § 149.011(G). Some Ohio courts have provided further insight into what constitutes a “record” for purpose of the Act. In *Miami Valley Child Dev. Ctrs. v. Dist. 925/Svce. Employees Int'l. Union*, No. 18928, 2002 Ohio App. LEXIS 744 (Ohio Ct. App., Montgomery County 2002), the court clarified that employee home addresses did not constitute “records” and thus were exempt under the Act. Additionally, in *Carlson v. City of Green*, 2016-Ohio-8606 (Ct. Cl.), the court held that the termination letter of a former city employee was a public record that must be disclosed. The court set aside the city's confidentiality agreement with the former employee reasoning that “[a] public entity cannot enter into enforceable promises of confidentiality regarding public records.” *Id.* at ¶ 30 citing *State ex rel. Findlay Publ. Co. v. Hancock County Bd. of Comms.*, 80 Ohio St. 3d 134, 137, 1997 Ohio 353, 684 N.E.2d 1222 (1997). Moreover, *State ex rel. Wilson-Simmons v. Lake County Sheriff's Dep't*, 693 N.E.2d 789, 792 (Ohio 1998), held that the content of allegedly racist emails sent between co-workers regarding the plaintiff were not public records because they were not used to serve any of the public office's specific functions. Similarly, letters from citizens attempting to influence a judge's decision regarding sentencing did not constitute “public records” because they did not document functions of the judicial office. See *State ex rel. Beacon Journal Pub. Co. v. Whitmore*, 697 N.E.2d 640 (Ohio 1998).

In *Levias v. United Airlines*, 500 N.E.2d 370 (Ohio Ct. App. 8th Dist. 1985), the court stated that a private employer may also be liable for invasion of privacy by revealing an employee's personal information to third parties. In *Levias*, the plaintiff, a flight attendant employed by United Airlines, sued her employer for invasion of privacy after United disclosed her personal medical data.

6. Medical Information

Levias v. United Airlines, 500 N.E.2d 370 (Ohio Ct. App. 8th Dist. 1985), discussed briefly above, the court stated that an employer may also be liable for invasion of privacy by revealing an employee's personal information to third parties. In *Levias*, the plaintiff, a flight attendant employed by United Airlines, sued her employer for invasion of privacy after United disclosed her personal medical data referencing her anemic disorder and ways to address said disorder. The court ultimately held that an employer could be held liable for disclosing medical information to another because the employer “has no privilege [to disclose

it] unless [the employer] has reason to believe that the recipient has a real need to know, not mere curiosity.” *Id.* at 374. The court determined that it was unlikely that the plaintiff’s supervisor “had a real need to know the disclosed data” because the supervisor had “no authority to act upon that data.” *Id.* at 375. The supervisor was simply required to rely on the medical examiner’s grant or denial of the requested waiver of weight limits. *See also Ross v. Trumbull County Child Support Enforcement Agency*, No. 200-T-0025, 2001 Ohio App. LEXIS 495 (Ohio Ct. App. 11th Dist. 2001) (addressing the *Levias* Test).

IX. WORKPLACE SAFETY

A. Negligent Hiring

The elements of an action for negligent hiring are (1) the existence of an employment relationship, (2) the employee’s incompetence, (3) the employer’s actual or constructive knowledge of such incompetence, (4) the employee’s act or omission causing plaintiff’s injuries, and (5) the employer’s negligence in hiring or retaining the employee as the proximate cause of plaintiff’s injury. *Linder v. Am. Nat’l Ins. Co.*, 798 N.E.2d 1190 (Ohio Ct. App. 1st Dist. 2003).

B. Negligent Supervision/Retention

The elements of a negligent supervision/retention claim are the same as those required to prove negligent hiring. *Cooke v. Montgomery County*, 814 N.E.2d 505 (Ohio Ct. App. 2d Dist. 2004).

C. Interplay with Workers’ Compensation Bar

Section 35, Article II of the Ohio Constitution makes worker’s compensation the exclusive remedy for most injuries suffered by employees that have been received in the course of or arising out of the injured worker’s employment:

For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom. Such compensation shall be in lieu of all other rights to compensation, or damages, for such death, injuries, or occupational disease, and any employer who pays the premium or compensation provided by law, passed in accordance herewith, shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease.

This part of the Ohio Constitution is codified in OHIO REV. CODE § 4123.74 which states that employers who comply with other provisions of the worker’s compensation laws (notably payment of premiums) “shall not be liable to respond in damages at common law or by statute for any injury, or occupational disease, or bodily condition, received or contracted by any employee in the course of or arising out of his employment, or for any death resulting from such injury, occupational disease, or bodily condition”

Employers still remain liable for damages resulting from “an intentional tort committed by the employer during the course of employment,” but only if the plaintiff proves “the employer committed the tortious act with the intent to injure another or with the belief that the injury was substantially certain to occur.” OHIO REV. CODE § 2745.01(A). In this context, “‘substantially certain’ means that an employer acts with deliberate intent to cause an employee to suffer an injury, a disease, a condition, or death.” OHIO REV. CODE § 2745.01(B). Deliberate removal by an employer of an equipment safety guard or deliberate misrepresentation of a toxic or hazardous substance creates a rebuttable presumption that the removal or misrepresentation was committed with intent to injure another if an injury or an occupational disease or condition occurs as a direct result. OHIO REV. CODE § 2745.01(C). However, “[t]his section does not apply to claims arising during the course of employment involving discrimination, civil rights, retaliation, harassment in violation of Chapter 4112 of the Revised Code, intentional infliction of emotional distress not compensable under Chapters 4121 and 4123 of the Revised Code, contract, promissory estoppel, or defamation.” OHIO REV. CODE § 2741.01(D).

In *Steinbrink v. Greenon Local Sch. Dist.*, No. 11CA0050, 2012 Ohio App. LEXIS 1233 (Ohio Ct. App. 2d Dist. 2012), the court of appeals relied on R.C. 2741.01(D) in finding that an employer was not immune from liability on an employee’s defamation and intentional infliction of emotional distress claims. The court noted that OHIO REV. CODE § 2741.01(D) expressly exempted defamation and intentional infliction of emotional distress claims from coverage of OHIO REV. CODE § 2741.01. The court also stated that “R.C. 2745.01 cannot create a basis for worker’s compensation coverage.” *Id.* at *14.

Moreover, the worker’s compensation statute does not provide the exclusive remedy for claims based upon sexual harassment in the workplace. *Kerans v. Porter Paint Co.*, 755 N.E.2d 428 (Ohio 1991).

In *Armstrong v. John R. Jurgensen Co. et. al.*, 990 N.E.2d 568 (Ohio 2013), the Ohio Supreme Court held that Ohio Workers’ Compensation laws limit coverage for psychiatric conditions to those conditions which are caused by (or arise out of) the claimant’s compensable physical injury. In *Armstrong*, the claimant suffered an on-the-job injury when his one-ton dump truck was rear-ended by another vehicle. After the accident, Armstrong observed the driver of the other vehicle motionless, slumped over the wheel of his car, and bleeding. After being transported to the hospital for treatment of his injuries, Armstrong learned that the other driver had died. Armstrong thereafter filed a workers’ compensation claim for his physical injuries, and his claim was allowed. He later requested an additional allowance for post-traumatic stress disorder (PTSD), which was initially allowed by the Bureau of Workers’ Compensation but subsequently challenged by the employer. The Ohio Supreme Court held in favor of the employer, finding that, while the psychological injury (PTSD) arose contemporaneously with the physical injury, it was not caused by the physical injury. The court held that a physical injury was a prerequisite to recovering workers’ compensation for mental conditions and, because the claimant could have suffered from PTSD regardless of physical injury, the claim was disallowed.

D. Firearms in the Workplace

Under Ohio law, a state license is required to carry a concealed handgun. However, a valid license does not authorize the licensee to carry a concealed handgun into designated places, including places of private employment where the employer has a policy concerning or prohibiting the presence of firearms on the employer's property, including employer-owned motor vehicles. OHIO REV. CODE § 2923.126.

A private employer is immune from civil liability for any injury, death, or loss to a person or property that allegedly was caused by or related to a licensee being permitted or prohibited from bringing a handgun onto the property of the employer, including motor vehicles owned by the employer, unless the employer acted with malicious purpose.

A private employer may post a conspicuous notice prohibiting persons from carrying concealed firearms onto the property and any person violating a posted prohibition is guilty of criminal trespass and a misdemeanor of the fourth degree. However, if the property is a parking lot, the person is subject only to a civil cause of action for trespass.

Private employers have the right to ban employees from carrying firearms onto the employer's property. *Plona v. UPS*, 558 F.3d 478, 481 (6th Cir. Ohio 2009) ("Although the Ohio Constitution provides a general right to bear arms, the state certainly does not have a 'clear public policy' of allowing employees to possess firearms on the premises of their private employers. To the contrary, the Ohio legislature has specifically provided that employers may limit their employees' rights to bear arms.").

However, under OHIO REV. CODE § 2923.1210, a private employer may not establish a policy that prohibits or has the effect of prohibiting an employee with a valid concealed carry handgun license from transporting or storing a firearm or ammunition in the employee's private vehicle if the vehicle is in a permitted location. If the employee is present in the vehicle, the handgun and ammunition do not need to be secured. However, if the employee is not present in the vehicle, the handgun and ammunition must be locked within the trunk, glove box, or other enclosed compartment within the vehicle.

E. Use of Mobile Devices

OHIO REV. CODE § 4511.204(A) prohibits the use of handheld electronic wireless communication devices to write, send, or read text-based communications while driving a motor vehicle on any street, highway or property open to the public for vehicular traffic. Violation of the statute is a minor misdemeanor.

The statute does NOT authorize police officers to stop an operator or visually inspect any automobile for a violation of OHIO REV. CODE § 4511.204(A) and does not invalidate, preempt, or supersede a substantially equivalent municipal ordinance that prescribes penalties that are greater than those levied under OHIO REV. CODE § 4511.204.

X. TORT LIABILITY

A. Respondeat Superior Liability

Ohio recognizes that the doctrine of respondeat superior imposes liability upon an employer for the acts done by an employee in the course and scope of employment. As a starting point, Ohio courts generally hold that when an employee commits an intentional tort, the employee does not act within the course and scope of their employment. According to Ohio courts an employee's conduct is considered within the "scope of employment" when (a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; and (c) it is actuated, at least in part, by a purpose to serve the master. *Rockwell v. Ullom*, NO. 73961, 1998 Ohio App. LEXIS 4101 (Ct. App. Sep. 3, 1998) at *10 citing *Martin v. Cent. Ohio Transit Auth.*, 70 Ohio App. 3d 83, 92, 590 N.E.2d 411 (1990).

However, Ohio courts have also held employers liable for the intentional torts of employees where they ratified the employee's actions outside of the scope of employment.

In *Amato v. Heinika Ltd.*, No. 84479, 2005 Ohio App. LEXIS 206 (Ohio Ct. App., 8th Dist. Jan. 20, 2005), plaintiff patron alleged that defendant restaurant owner was liable, under a theory of respondeat superior, for an assault that a restaurant employee committed upon the patron. The Common Pleas Court directed a verdict in favor of the owner. The patron appealed, contending that the owner ratified the employee's actions when it failed to terminate the employee immediately and instead conducted an investigation of the incident. In discussing the issue of ratification, the court stated that: "The Ohio Supreme Court has stated that negligence or inaction alone is insufficient to show ratification of an agent's unauthorized act, but ratification must follow knowledge of the facts. This is interpreted to mean that inaction or silence alone is not enough to prove ratification of an agent's unauthorized action, but that ratification can be shown by inaction or silence where the principal is fully informed of all of the material facts to the agent's action." Finding for the employer the court stated: "The touchstone of any ratification argument in the context of respondeat superior is whether the employer derived a benefit from the employee's actions. When an employee strikes patrons, there is no obvious benefit to the principal, for it is an action to vent his own spleen or malevolence against the injured person, and is a clear departure from his employment and his principal or employer is not responsible therefor." Thus, despite the court's recognition of the potential for employer liability premised on inaction, the liability did not attach because the employer gained no benefit from the actions of the employee.

B. Tortious Interference with Business/Contractual Relations

The elements of a tortious interference with a contract or business opportunity claim include (1) the existence of a contract; (2) the wrongdoer's knowledge of the contract; (3) the wrongdoer's intentional procurement of the contract's breach; (4) the lack of justification; and (5) resulting damages. *Landskroner v. Landskroner*, 797 N.E.2d 1002 (Ohio Ct. App. 8th Dist. 2003). See also *Fred Siegel Co. v. Arter & Hadden*, 707 N.E.2d 853 (Ohio 1999); *Kenty v. Transamerica Premium Ins. Co.*, 650 N.E.2d 863 (Ohio 1995).

XI. RESTRICTIVE COVENANTS/NON-COMPETE AGREEMENTS**A. General Rule**

In *Raimonde v. Van Vlerah*, 325 N.E.2d 544 (Ohio 1975), the Ohio Supreme Court held that a covenant not to compete is valid if it is reasonable. A covenant is reasonable when it satisfies the following three-part test: (1) the restriction is no greater than necessary to protect the employer's legitimate business interest; (2) the restriction does not impose an undue hardship on the employee; and (3) the restriction is not injurious to the public. The court also found that various factors must be considered when determining the reasonableness of restrictive covenants: "[t]he absence or presence of limitations as to time and space; whether the employee represents the sole contact with [a] customer; whether the employee is possessed with confidential information or trade secrets; whether the covenant seeks to eliminate competition which would be unfair to the employer or merely seeks to eliminate ordinary competition; whether the covenant seeks to stifle the inherent skill and experience of the employee; whether the benefit to the employer is disproportional to the detriment to the employee; whether the covenant operates as a bar to the employee's sole means of support; whether the employee's talent which the employer seeks to suppress was actually developed during the period of employment; and whether the forbidden employment is merely incidental to the main employment." *Id.* at 547.

Ohio courts have also held that the plaintiff must prove irreparable injury or the existence of an actual threat of injury before preliminary injunctive relief will be granted. See *Ohio Urology v. Poll*, 594 N.E.2d 1027 (Ohio Ct. App. 10th Dist. 1991). In making the determination of whether or not the restraints are reasonable, each particular case must be decided upon its own facts. *Extine v. Williamson Midwest*, 200 N.E.2d 297 (Ohio 1964), *overruled on other grounds by Raimonde v. Van Vlerah*, 325 N.E.2d 544 (Ohio 1975).

In *Hamilton Ins. Serv., Inc. v. Nationwide Ins.*, 714 N.E.2d 898 (Ohio 1999), a former agent brought suit alleging that Nationwide's termination of employment was wrongful and in bad faith and that a noncompete agreement was unconscionable. The noncompete agreement disallowed competition within a twenty-five-mile radius and one year of termination. Citing *Raimonde*, the court stated that a noncompete clause is reasonable if the restraint is no greater than necessary for the protection of the employer, does not place undue hardship on the employee, and is not injurious to the public. *Id.* at 901. The court held that the twenty-five-mile radius and one-year restrictions were reasonable and enforceable. *Id.*

In *Owusu v. Hope Cancer Ctr. of Northwest Ohio, Inc.*, No. 1-10-81, 2011 Ohio App. LEXIS 3713, at *23 (Ohio Ct. App. 3rd Dist. 2011), the court held that "[c]ovenants not to compete pertaining to physicians are not per se unenforceable pursuant to American Medical Association's principles of medical ethics or interpretations of those principles. . . . Although the law does not favor such restrictive covenants, they will be upheld if they are reasonable." *Id.* (citations omitted).

In *Charles Penzone, Inc. v. Koster*, No. 07AP-569, 2008 Ohio App. LEXIS 266 (Ohio Ct. App. 10th Dist. 2008), a hair salon brought an action against a former hair stylist, for among other things, breaching a covenant not to compete. The parties' contract restricted the hair

stylist from competing for an eight-month time period and within a nine mile radius of her former employer. It also prevented the hair stylist from rendering “any hair care treatment, hair care styling, massage, esthetics, nails, pedicures, or related services . . . to any persons who are or were customers of [Charles Penzone, Inc.] and with whom [the hair stylist] had personal contact during the time of [her] employment” While the trial court ruled in favor of the former employee, the appellate court reversed. The court held that the contract was reasonable, that Charles Penzone, Inc. was irreparably harmed by virtue of losing 95 customers, a loss in trained staff as a lost expense, and marketing (among other things). The appellate court found that the trial court abused its discretion in denying the salon’s motion for a preliminary injunction.

In *Brentlinger Enters. v. Curran*, 141 Ohio App. 3d 640, 752 N.E.2d 994 (2001), the plaintiff, Brentlinger Enterprises, appealed from a judgment declining to enforce a noncompete clause against defendant, John T. Curran. The noncompete agreement prohibited Curran from directly or indirectly soliciting or attempting to solicit any of the defendant’s clients or prospective clients, for a period of 18 months immediately following separation from employment. The agreement also prohibited Curran from soliciting any of the defendant’s employees to leave or sever their relationship with the defendant. Although the court agreed that the hardship to the defendant was not too great and that the public would not be injured by the enforcement of the noncompete agreement, the court affirmed the judgment denying an injunction. The defendant was mid-level management and only held the position for three months. The court stated that the defendant had no real access to trade secrets, and there was no legitimate interest that required protection.

In *Am. Bldg. Services v. Cohen*, 603 N.E.2d 432, 435 (Ohio Ct. App. 12th Dist. 1992), the court modified a restrictive covenant that was found “unreasonable” where the restriction prohibited the employee from working for any commercial janitorial service that was in direct competition with the employer for a period of two years. The court, in modifying the restriction to allow the employee to work in the cleaning industry, noted that the original covenant was not required to protect the employer’s interest and imposed an undue hardship on the employee.

In *Lake Land Employment Group of Akron v. Columber*, 804 N.E.2d 27 (Ohio 2004), the Ohio Supreme Court held that consideration for a covenant not to compete exists even where the employee signs a covenant not to compete after his employment has commenced under the threat that the employer will otherwise terminate the employee. In other words, continued employment of an at-will employee is consideration for a covenant not to compete. The court stated that “[m]odern economic realities . . . do not justify a strict prohibition of non-competition agreements between employer and employee in an at-will relationship.” *Id.* at 30.

B. Blue Penciling

Raimonde, 325 N.E.2d 544 set forth Ohio’s position on “blue-penciling.” The court rejected the blue-pencil approach and instead approved the rule of reasonableness that “permits courts to determine, on the basis of all available evidence, what restrictions would be reasonable between the parties.” The court held that “[a] covenant not to compete which

imposes unreasonable restrictions upon an employee will be enforced to the extent necessary to protect an employer's legitimate interests." *Id.* at syllabus. In determining what modifications would render a noncompete agreement reasonable, courts in Ohio are to look at a number of factors, including the absence of time and space limitations, whether the employee had access to confidential information or trade secrets, whether the employee is the only point of contact with a customer, whether the covenant is seeking to eliminate unfair competition or simply ordinary competition, whether the restriction would squelch the employee's inherent work skill and experience, whether the employer's benefit would be disproportionate in relation to the employee's detriment, whether the covenant would eliminate the employee's sole means of livelihood, whether the employee's skill was developed during the period of employment with the employer in question and whether the competition being sought to be restricted is "merely incidental" to the primary employment.

C. Confidentiality Agreements

Ohio employers have a protectable interest in preventing, or at least limiting, the appropriation of the benefits or information and experience acquired in an employee's service with an employer and the employment thereof for an employee's own personal advantage and to the disadvantage of the employer by a direct competitor. *Briggs v. Butler*, 45 N.E.2d 757, 763 (Ohio 1942) overruled on other grounds by *Raimonde v. Van Vlerah*, 325 N.E.2d 544 (Ohio 1975); see also *UZ Engineered Prods. Co. v. Midwest Motor Supply Co.*, 770 N.E.2d 1068, 1080 (Ohio Ct. App. 10th Dist. 2001) ("[A]n employer has a legitimate interest in preventing a former employee from using the skill, experience, training, and confidential information the former employee has acquired during the employee's tenure with his employer in a manner advantageous to a competitor in attracting business . . .").

D. Trade Secrets Statute

OHIO REV. CODE §§ 1333.61-1333.69 constitute Ohio's Uniform Trade Secrets Act. Section 1333.61 defines a "trade secret" as "information, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses or telephone numbers that satisfies both of the following: (1) [i]t derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use and (2) [i]t is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." OHIO REV. CODE § 1333.61(D).

Section 1333.62(A) states that actual or threatened misappropriation may be enjoined. The statute provides that, in exceptional circumstances, an injunction may require that future use is conditioned upon payment of a royalty for a time not longer than use could have been prohibited. OHIO REV. CODE § 1333.62(B). "Exceptional circumstances" are defined as those which include "a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation that renders a prohibitive injunction inequitable."

In *Al Minor & Associates, Inc. v. Martin*, 881 N.E.2d 850, 851 (Ohio 2008), the Ohio Supreme Court decided “whether the use of a memorized client list can be the basis of a trade secret violation pursuant to Ohio’s Uniform Trade Secrets Act.” The court held that “[i]nformation that constitutes a trade secret pursuant to R.C. 1333.61(D) does not lose its character as a trade secret if it has been memorized.” *Id.* at syllabus. The case involved a pension analyst who worked for an actuarial firm. After organizing a competing business, the pension analyst left the actuarial firm and began competing. He immediately began successfully soliciting former clients of the actuarial firm.

On appeal, the court reiterated its holding from *State ex rel. Plain Dealer v. Ohio Dep’t of Ins.*, 687 N.E.2d 661 (Ohio 1986), in which it created “a six-factor test for determining whether information constitutes a trade secret pursuant to R.C. 1333.61(D): (1) The extent to which the information is known outside the business; (2) the extent to which it is known to those inside the business; (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information; (4) the savings effected and the value to the holder in having the information as against competitors; (5) the amount of effort or money expended in obtaining and developing the information; and (6) the amount of time and expense it would take for others to acquire and duplicate the information.” *Al Minor & Assocs., Inc.*, 881 N.E.2d at 853. Thereafter, the court stated that “[t]he legislature, when enacting R.C. 1333.61(D), could have excluded memorized information from the definition of a trade secret or added a requirement that such information be reproduced in physical form in order to constitute a trade secret. But it did not, and we are not in a position to read such language into the statute.” *Id.* The court ultimately concluded that “[t]he form of the information and the manner in which it is obtained are unimportant; the nature of the relationship and the defendant’s conduct should be the determinative factors.” *Id.* at 854. Notably, at the first appellate level in this case, the Tenth District Court of Appeals for Ohio made a significant statement concerning customer lists: “A customer list is an intangible asset that is presumptively a trade secret when the owner of the list takes measures to prevent its disclosure in the ordinary course of business to persons other than those the owner selects.” *Al Minor & Associates v. Martin*, No. 06AP-217, 2006 Ohio App. LEXIS 5881, at *6 (Ohio Ct. App. 10th Dist. Nov. 6, 2006).

In *Procter & Gamble Co. v. Stoneham*, 747 N.E.2d 268 (Ohio Ct. App. 1st Dist 2000), an Ohio court recognized the “inevitable disclosure” doctrine as a basis for enjoining misappropriation of trade secrets. Under the inevitable disclosure doctrine, a plaintiff company need not prove actual disclosure by an ex-employee to a competitor in seeking injunctive relief. Instead, what must be shown is that there are substantial similarities between the work to be performed at the new position and that which was performed at the old position which make it impossible for the employee to perform his new duties without (inevitably) disclosing or using the former employer’s trade secrets. *See also Litig. Mgmt. v. Bourgeois*, No. 95730, 2011 Ohio App. LEXIS 2363 (Ohio Ct. App. 8th Dist. 2011) (“When a trade secret is misappropriated, a threat of actual harm is presumed.”).

E. Fiduciary Duty and Other Considerations

Ohio courts have concluded that an employee “owes his or her employer a duty to act ‘in the utmost good faith and loyalty toward his . . . employer.’” *Berge v. Columbus*

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Community Cable Access, 736 N.E.2d 517, 549 (Ohio Ct. App. 10th Dist. 1999) (quoting *Connelly v. Balkwill*, 116 N.E.2d 701 (1954)). Ordinarily, this duty of loyalty is breached when an employee competes with his or her present employer. *Berge*, 736 N.E.2d 517 at 549.

However, merely preparing to compete is “qualitatively different [from] actually competing with one’s present employer and will not, by itself, support a breach of loyalty claim.” *Fitness Experience, Inc. v. TFC Fitness Equip., Inc.*, No. 1:03 CV 2313, 2004 U.S. Dist LEXIS 26227, *41 (N.D. Ohio Dec. 16, 2004). And absent an express agreement prohibiting termination of employment and embarking upon a new competitive business venture, or evidence that confidential or trade secret information has been taken, a former employee is free to undertake competitive business against his former employer. *Albert B. Cord Co. v. S&P Mgmt. Serv.*, 207 N.E.2d 247 (1st Dist. 1965); *Frazier v. City of Kent*, No. 2006-P-0082, 2007 Ohio App. LEXIS 5067, at *15 (Ohio Ct. App., 11th Dist. Oct. 26, 2007).

Also, acting for a party whose interest is adverse to the employer’s breaches the duty of loyalty if the employer has no knowledge or has not consented. *Greenburg v. Meyer*, 50 Ohio App. 2d 381, 363 N.E.2d 779, 780 (1st Dist. 1977). “Self-dealing” for personal profit violates the employee’s duty of loyalty to his or her employer. *United States v. Skeddle*, 940 F. Supp. 1146, 1150 (N.D. Ohio 1996).

Corporate officers likewise owe a duty of loyalty to the corporation. *Wing Leasing, Inc. v. M&B Aviation, Inc.*, 542 N.E.2d 671, 676 (Ohio Ct. App. 10th Dist. 1988). Violation of a corporate officer’s “duty of disclosure” also violates the duty of loyalty. *Skeddle*, 940 F. Supp. at 1150.

However, the Ohio Uniform Trade Secrets Act preempts a common law claim for breach of the duty of loyalty to the extent that the cause of action derived from the same operative facts. On the other hand, if there are separate factual bases for the cause of action, the breach of the duty of loyalty claim can withstand a preemption defense. *Office Depot, Inc. v. Impact Office Prods., LLC*, 821 F. Supp. 2d 912 (N.D. Ohio 2011).

XII. DRUG TESTING LAWS

A. Public Employers

As a constitutional matter, the Sixth Circuit has held that “government ordered collection and testing of urine samples effects a search within the meaning of the Fourth Amendment because such tests intrude upon the reasonable expectation of privacy that society has long recognized as reasonable.” *UAW, Local 1600 v. Winters*, 385 F.3d 1003, 1007 (6th Cir. 2004). Searches under the Fourth Amendment require a court to review a state’s drug testing policy for reasonableness, which requires the court to weigh the extent of the intrusion upon the privacy interest of the individuals being tested against the promotion of the government’s proffered special need in conducting the tests. *Id.*

B. Private Employers

Ohio law permits employers to require that employees/applicants undergo drug testing. In fact, OHIO REV. CODE § 4112.02(Q) specifically provides for drug testing where: (1)

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an employee, applicant, or other person has successfully completed a supervised drug rehabilitation program and no longer is engaging in the illegal use of any controlled substance, or the employee, applicant, or other person otherwise successfully has been rehabilitated and no longer is engaging in that illegal use; and (2) an employee, applicant, or other person is participating in a supervised drug rehabilitation program and no longer is engaging in the illegal use of any controlled substance. Preferably, drug testing of employees/applicants should be conducted (1) pursuant to an established, written policy, and (2) with sufficient procedural safeguards (*e.g.*, chain of custody, etc.) to ensure/verify the accuracy of test results.

Under Ohio's Workers' Compensation Regulations, codified at Ohio Administrative Code § 4123-17-58, an employer can obtain discounts on workers' compensation premium rates by meeting the requirements of a drug-free workplace program. While the program has many specific requirements, it allows for drug testing in the following situations: (1) pre-employment/new-hire testing; (2) post-accident testing; (3) testing based on reasonable suspicion based on documentation and concurrence among trained observing supervisor and a second trained supervisor; and (4) follow-up testing under certain circumstances.

Also, OHIO REV. CODE § 153.03(B) details the requirements an employer must meet to be deemed a drug free workplace and thus be awarded public improvement contracts. Specifically, § 153.03(B) requires, among other things:

- (1) that a contractor be enrolled in and be in good standing in the drug-free workplace program of the Bureau of Workers' Compensation; or
- (2) that a contractor have a comparable program approved by the Bureau that requires an employer to do all of the following:
 - (a) Develop, implement, and provide to all employees a written substance use policy disclosing the employer's expectations that no employee be at work with alcohol or drugs in the employee's system, as well as specifying the consequences for violating the policy.
 - (b) Conduct drug and alcohol tests on employees in accordance with the law and under the following conditions: (i) pre-employment/probationary period testing; (ii) random testing; (iii) post-accident testing; (iv) reasonable suspicion testing; and (iv) testing prior to and after an employee returns to a work site to provide labor for a public improvement contract after the employee tested positive for drugs or alcohol.
 - (c) Use the following types of tests under certain circumstances: (i) drug and alcohol testing that uses the federal testing model that the administrator has incorporated into the bureau's drug-free workplace program; and/or (ii) testing to determine whether the concentration of alcohol on an employee's breath is equal to or in excess of the levels specified at OHIO REV. CODE § 4511.19(A)(1)(d) or (h), or the

concentration of alcohol in the person's blood is equal to or in excess of the levels specified at OHIO REV. CODE § 4511.19(A)(1)(b) or (f).

In *Groves v. Goodyear Tire & Rubber Co.*, 591 N.E.2d 875 (Ohio Ct. App. 3d Dist. 1991), an appellate court, citing to 62 Am. Jur.2d (1990) 683, Privacy § 61, held that drug testing of employees does not constitute an invasion of privacy, given an employer's legitimate interest in creating a safe workplace.

Ohio allows for medical and recreational marijuana use. Under Ohio's medical marijuana statute, registered patients can use medical marijuana and registered patients or caregivers can possess medical marijuana and approved paraphernalia or accessories. The law protects a registered patient from arrest or criminal prosecution for obtaining, using, or possessing medical marijuana or approved paraphernalia and accessories. However, the law does not authorize registered patients to operate vehicles while under the influence of medical marijuana. OHIO REV. CODE §§ 3796.22; 3796.23.

Under Ohio's recreational marijuana statute, individuals aged 21 years and older can sell, purchase, and possess limited amounts of marijuana. OHIO REV. CODE § 3780.36. Similar to the medical marijuana statute, individuals are prohibited from operating vehicles while under the influence of marijuana. *Id.*

Employers are not required to permit or accommodate employees' use, possession, or distribution of medical or recreational marijuana. Employers can refuse to hire applicants, discharge or discipline employees, and otherwise take adverse action against employees and applicants because they use, possess or distribute medical or recreational marijuana. Employers also can establish and enforce drug testing policies, drug-free workplace policies, and zero-tolerance drug policies. OHIO REV. CODE §§ 3796.28; 3780.35.

Employees and applicants do not have a cause of action against an employer for taking any adverse action related to medical or recreational marijuana. Employees discharged for using medical or recreational marijuana in violation of employers' drug-free workplace policies are considered to be discharged for just cause under Ohio unemployment compensation law. *Id.*

XIII. STATE ANTI-DISCRIMINATION STATUTE(S)

Ohio's fair employment practices statute is codified at OHIO REV. CODE Chapter 4112.

A. Employers/Employees Covered

Section 4112.01(A)(2) defines an employer as "the state, any political subdivision of the state, any person employing four or more persons within the state, and any person acting directly or indirectly in the interest of an employer."

Individual supervisors generally cannot be held liable for violations of OHIO REV. CODE § 4112. OHIO REV. CODE § 4112.08. However, supervisors can still be held liable for claims of retaliation, "aiding and abetting" in discrimination, or other common law torts.

In *Nagel v. Horner*, 833 N.E.2d 300 (Ohio App. 4th Dist. 2005), the plaintiff, a former police officer with the Portsmouth Police Department, sued the department and the city of Portsmouth for retaliation and hostile work environment, claiming that he was terminated for his refusal to help discredit another officer. The police department moved for summary judgment on the basis of sovereign immunity, but the trial court denied its motion. The appellate court held that an Ohio police department is not entitled to sovereign immunity on retaliation and hostile work environment claims brought by an officer based on an exemption in OHIO REV. CODE § 2744.09(B) because the claim arose out of the employment relationship.

B. Types of Conduct Prohibited

Section 4112.02 covers a broad spectrum of discriminatory practices. Several provisions relate directly to unlawful discriminatory practices by employers.

Section 4112.02(A) states that it shall be an unlawful discriminatory practice “[f]or any employer, because of the race, color, religion, sex, national origin, handicap, age or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.”

Section 4112.02(E) states that unless based on a bona fide occupational requirement which has been certified in advance by the Ohio Civil Rights Commission, employers may not do any of the following prior to employment: (1) elicit or attempt to elicit any information pertaining to the race, color, religion, sex, national origin, handicap, age or ancestry of any applicant for employment; (2) make or keep a record of the race, color, religion, sex, national origin, handicap, age or ancestry of any applicant for employment; (3) use any application form which seeks to elicit information regarding race, color, religion, sex, national origin, handicap, age or ancestry, with certain exceptions for employers holding contracts with the government with respect to citizenship requirements; (4) print or publish or cause to be printed or published any notice or advertisement relating to employment indicating any preference, limitation, specification or discrimination, based upon race, color, religion, sex, national origin, handicap, age or ancestry; (5) announce or follow a policy of denying or limiting, through a quota mechanism or otherwise, employment opportunities of any group because of the race, color, religion, sex, national origin, handicap, age or ancestry of that group; or (6) utilize in the recruitment or hiring of persons, any employment agency, personnel placement service, training school or center, labor organization or any other employee-referring source known to discriminate against persons because of their race, color, religion, sex, national origin, handicap, age or ancestry.

Section 4112.02(I) prohibits retaliation. It makes it unlawful for any person to discriminate against another person “because that person has opposed any unlawful discriminatory practice . . . or because that person has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing” under OHIO REV. CODE §§ 4112.01-4112.07.

Section 4112.14 states that no employer may discriminate in any job opening against any applicant or discharge without just cause any employee age 40 or older. This cause of action is not available to any employee who has available the opportunity to arbitrate his

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discharge or any employee who has arbitrated the discharged and against whom a just cause finding was made.

In *Osborne v. AK Steel/Armco Steel Co.*, 775 N.E.2d 483 (Ohio 2002), the Ohio Supreme Court held that OHIO REV. CODE § 2305.19 (the Ohio saving statute, which provides that a new action may be filed with one year when a claim fails otherwise than upon the merits) applies to claims filed under § 4112.

In *Bruce v. Office Depot, Inc.*, No. 3:03cv464, 2005 U.S. Dist. LEXIS 13418 (S.D. Ohio July 5, 2005), the plaintiff was a sales employee who was terminated for buying merchandise for friends at a “substantial discount” in violation of company policy. Following his termination, the plaintiff filed suit under Ohio R.C. Chapter 4112, claiming he was discriminated against due to his age. The employer argued that the plaintiff’s discrimination claim should be dismissed because he could not show that he was replaced by someone outside the protected class. The court held that an employee hired by the company eleven months after the plaintiff’s termination was not a “replacement” under Ohio law. As such, the plaintiff was unable to satisfy his prima facie burden of proof.

C. Administrative Requirements

Under Ohio’s Employment Law Uniformity Act, Plaintiffs must exhaust their administrative remedies with the Ohio Civil Rights Commission (“OCRC”) before filing a lawsuit directly against their employer. This requirement to exhaust administrative remedies mirrors federal law.

Section 4112.051 sets forth the administrative requirements for bringing a state discrimination claim with the OCRC. A charge under this section must be in writing, under oath, and must be filed with the OCRC within two years after the alleged unlawful discriminatory practice was committed. *Id.* Any charge timely received may be signed under oath after the limitations period for filing set forth above and will relate back to the original filing date. *Id.*

Upon receiving a charge, the OCRC may initiate a preliminary investigation to determine whether it is probable that an alleged unlawful discriminatory practice relating to employment has occurred or is occurring. *Id.* The OCRC also may conduct, on its own initiative and independent of the filing of any charge, a preliminary investigation relating to any alleged unlawful discriminatory practice. *Id.* The complainant can, at any time, request that the OCRC cease its preliminary investigation and issue a notice of right to sue letter to the complainant. *Id.*

If the OCRC finds an unlawful discriminatory practice has occurred, and the complainant does not withdraw his or her charge and file a civil suit, the OCRC will attempt to eliminate the alleged unlawful discriminatory practice through informal means such as conciliation and mediation. *Id.* If the OCRC cannot eliminate the unlawful practice through informal means, it will issue and serve a complaint. *Id.* The complaint shall state the charges involved and shall contain a notice of a hearing before the commission, a member of the commission, or a hearing examiner, as well as the hearing’s location. *Id.* Any such hearing shall be held in the county in which the alleged unlawful discriminatory practice occurred or

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is occurring or in which the respondent transacts business, and shall be held not less than thirty days after service of the complaint. *Id.*

D. Remedies Available

Civil remedies for violations of Chapter 4112 of the Ohio Revised Code include damages, injunctive relief and any other appropriate relief. OHIO REV. CODE § 4112.99. This has been interpreted to include both compensatory and punitive damages.

XIV. STATE LEAVE LAWS

A. Jury/Witness Duty

An employer may not discharge or threaten to discharge an employee summoned to serve as a juror, provided the employee gives reasonable notice of the summons before jury service begins, and is absent because of actual jury service. OHIO REV. CODE § 2313.19.

B. Voting

An employer must allow employees to take a reasonable amount of time to vote on election day and may not interfere with the employee's right to vote or to serve as an election official on any registration or election day. OHIO REV. CODE § 3599.06.

C. Family/Medical Leave

Ohio does not have a Family/Medical leave statute.

D. Pregnancy/Maternity/Paternity Leave

Ohio, like many other states without a family or maternity leave law at the state level, must follow the guidelines for federal FMLA leave. Additionally, the federal Pregnant Workers Fairness Act requires covered employers to provide reasonable accommodations to an employee's known limitations related to pregnancy, childbirth, or related conditions – including leave.

The job-protected clause under FMLA stipulates that when an employee returns from leave, he or she must be given the same job, or a position with comparable salary, duties and benefits. In addition, the employee cannot be terminated while on FMLA leave, nor can the absence be used for disciplinary situations.

In *McFee v. Nursing Care Management of America*, 931 N.E.2d 1069 (Ohio 2010), the Ohio Supreme Court held that Ohio law does not prohibit minimum length of service requirements for maternity leave and does not require preferential treatment of pregnant employees who do not qualify for leave under an employer's leave policies. Despite interpretive regulations issued by the Ohio Civil Rights Commission that appear to require preferential treatment for pregnant employees, the court held that OHIO REV. CODE § 4112 does not provide greater protection for pregnant employees than for non-pregnant employees in need of medically-related leave, and that the regulations therefore cannot be

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interpreted to do so, or they would unconstitutionally expand the public policy established by the legislature in the statute.

E. Day of Rest Statutes

Ohio does not have a day of rest statute.

F. Military Leave

Ohio Rev. Code § 5903.02 provides that employees called to military service will have the same rights they have under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). However, Ohio law further provides that “[t]he court of common pleas...shall have exclusive original jurisdiction for such actions, unless the defendant is the state, in which case the court of claims shall have exclusive original jurisdiction” If a plaintiff prevails in an action brought pursuant to Ohio’s Military Leave Law, “the court shall require the defendant to pay the court costs.” If the plaintiff is not the prevailing party, the court “may use its discretion in allocating court costs among the parties to the action.” Furthermore, “the court may award to a plaintiff who prevails in such action or proceeding reasonable attorney’s fees, expert witness fees, and other litigation expenses. If the plaintiff does not receive a favorable judgment from the court in that action, the court shall not require the plaintiff to reimburse the state or the defendant for attorney’s fees.” To ensure quick relief, Ohio Rev. Code § 2311.07 provides that “actions pursuant to section 5903.02 of the Revised Code shall be first in order for trial.”

XV. STATE WAGE AND HOUR LAWS

A. Ohio Minimum Wage Law

A Constitutional Amendment passed by Ohio voters in November 2006 states that Ohio’s minimum wage shall increase on January 1 of each year by the rate of inflation. Specifically, the state minimum wage is tied to the Consumer Price Index (CPI) for urban wage earners and clerical workers for the 12-month period prior to September. The Amendment also states that the non-tipped employees’ wage rate shall be rounded to the nearest five cents.

For employees at smaller companies (with annual gross receipts of \$385,000 or less per year) and for 14- and 15-year-olds, the state minimum wage is \$7.25 per hour. For these employees, the state wage is tied to the federal minimum wage of \$7.25 per hour which requires an act of Congress and the President’s signature to change.

As of January 1, 2024, the minimum wage for non-tipped employees in Ohio is \$10.45, and \$5.25 for tipped employees, plus tips. Minimum wage applies to employees of businesses with annual gross receipts of more than \$385,000 per year.

Employees of a family owned and operated business who are family members of the owner are not subject to the amendment.

Employers may obtain a state license authorizing sub-minimum wage pay rates for employees with mental or physical disabilities.

No employee may be discharged for reporting that he has been paid less than minimum wage; no employee may be discharged for filing a complaint or testifying in a proceeding under the act. Ohio Rev. Code § 4111.13(B).

Ohio Rev. Code §§ 4111.17(A) and (D) prohibit employers from discriminating in the payment of wages on the basis of race, color, religion, sex, age, national origin, or ancestry. No employee may be disciplined for filing a complaint or participating in proceedings under those sections either.

According to a June 30, 2016 Ohio Attorney General opinion, the Ohio Constitution does not grant municipalities the authority to adopt ordinances that set the minimum wage within the city's boundaries at a rate that exceeds and conflicts with the statewide hourly minimum wage rate. 2016 Ohio AG LEXIS 20.

B. Deductions from Pay

1. Permitted Deductions

Employers may deduct federal, state, or local taxes; may make deductions pursuant to written agreements to provide fringe benefits to employees; and may make any employee-authorized deduction.

Employees may authorize deductions for purchasing savings bonds or stock, making charitable contributions, making deposits to a credit union or other savings plan, or repaying a loan or other obligation. Ohio Rev. Code § 4113.15.

An employer who agrees to withhold authorized deductions for benefits must pay to the appropriate person, organization, or agency the withheld amounts within 30 days of the close of the pay period. Ohio Rev. Code § 4113.15.

Deductions for damages of employer's wares, tools, or machinery may be made only pursuant to express contract with employees. Ohio Rev. Code § 4113.19.

2. Prohibited Cost Shifts

An employer may not require an applicant to pay the cost of a medical examination that is required as a condition of employment. OHIO REV. CODE § 4113.21.

3. Garnishment

Personal earnings owed for services are exempt from execution, garnishment, or attachment in an amount equal to the greater of: 1) 75 percent of disposable earnings; or 2) 30 times the federal minimum wage if paid weekly, 60 times minimum wage if paid biweekly, 65 times if paid semi-monthly, or 130 times if paid monthly. OHIO REV. CODE § 2329.66.

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Income exempt from execution, garnishment, or attachment, except to satisfy child support orders, includes pension, annuity, or retirement benefits; workers' and unemployment compensation; and payments for aid to dependent children, general assistance, and disability assistance. OHIO REV. CODE § 2329.66.

4. Assignment

An assignment of wages or salary is invalid except for an assignment for spousal or child support. This provision does not apply to any contract or agreement for check-off of union dues, or to any deduction from wages or salary made pursuant to a payroll deduction plan agreed upon between the employer and employee provided that the agreement is revocable by employee. OHIO REV. CODE § 1321.32.

An employee may assign whatever portion of earnings that is needed to comply with a court order for spousal or child support. OHIO REV. CODE § 1321.33.

C. Overtime Rules

Generally, Ohio wage and hour law follows the same requirements as federal law. For example, OHIO REV. CODE § 4111.03 provides that an employer, shall pay an employee for overtime at a wage rate of one and one-half times the employee's wage rate for hours worked in excess of forty hours in one workweek, in the manner and methods provided in and subject to the exemptions of section 7 and section 13 of the "Fair Labor Standards Act of 1938," 52 Stat. 1060, 29 U.S.C.A. 207, 213, as amended.

Ohio's overtime requirements only apply to employers whose annual gross volume of sales exceeds \$150,000, exclusive of excise taxes at the retail level which are separately stated. For all other employers, no overtime is required for employees working over 40 hours a week.

D. Time for Payment Upon Termination

OHIO REV. CODE § 4113.15 requires that an employer must issue a final paycheck to a terminated employee on the next regularly scheduled pay date, or within fifteen (15) days, whichever is earlier. Likewise, pursuant to OHIO REV. CODE § 4113.15, an employee who quits his or her job is entitled to receive his or her final paycheck on or before the next regularly scheduled pay date.

The rules are similar for payment of employees in the regular course of business. Employers are to pay employees on or before the first day of each month for wages earned the first 15 days of the preceding month, and on the 15th calendar day of the month for wages earned from the 16th to the last day of the preceding month. *Id.* Longer pay periods are permitted where customary or when established by written contract or law. *Id.*

E. Record Keeping and Employee Requests

Under Ohio law, Ohio employers must apprise each employee of the following information when an employee is hired and upon any change in such information: (a)

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employer's name; (b) employer's address; (c) employer's telephone number; and (d) other employer contact information.

For no less than three years following the last date an employee is employed, employers must maintain employee records with the following information relevant to each employee: (a) name; (b) address; (c) occupation; (d) pay rate; (e) hours worked for each day worked; and (f) each amount paid an employee.

The employer must also make the above information available to an employee or any person "acting on behalf of" the employee upon request and at no cost to the employee or her representative. See OHIO REV. CODE § 4111.14(G) (defining "acting on behalf of an employee" as "any of the following: (a) the certified or legally recognized collective bargaining representative for that employee under the applicable federal law or Chapter 4117 of the Revised Code; (b) the employee's attorney; or (c) the employee's parent, guardian, or legal custodian"). Additionally, "a person 'acting on behalf of an employee' must be specifically authorized by an employee" to act on his/her behalf. OHIO REV. CODE § 4111.14(G)(2).

F. Meal and Rest Breaks

Ohio does not generally require employers to provide meal or rest breaks to employees, except that minors must be provided an unpaid 30-minute break if they work more than 5 hours consecutively. OHIO REV. CODE § 4109.07.

XVI. MISCELLANEOUS STATE STATUTES REGULATING EMPLOYMENT PRACTICES

A. Smoking in Workplace

With limited exceptions, the Smoke-Free Workplace Act requires that smoking be prohibited in the following three places: (1) public places; (2) places of employment; and (3) any area directly or indirectly controlled by a proprietor that is immediately adjacent to the entrance and/or exit to the public place or place of employment. OHIO REV. CODE § 3794.01, *et seq.*

A proprietor of a public place or place of employment must ensure that tobacco smoke does not enter any area in which smoking is prohibited through entrances, windows, ventilation systems, or other means. Additionally, the proprietor must post a "No Smoking" sign or the international no-smoking symbol at every public place and place of employment where smoking is prohibited, including at each entrance to the public place or place of employment. Signs must be of sufficient size to be clearly legible to a person of normal vision throughout the areas they are intended to mark. All signs shall contain a telephone number for reporting violations.

Right to Prohibit Smoking: With some exceptions, the owner, manager, operator, or other person in charge or control of an establishment, facility, or outdoor area which does not otherwise qualify as a public place or place of employment may declare such establishment, facility, or outdoor area as a non-smoking place.

Retaliation Prohibited: No person or employer shall discharge, refuse to hire, or in any manner retaliate against an individual for exercising any right, including reporting a violation, or performing any obligation under the act.

B. Health Benefit Mandates for Employers

There are no health benefits mandated by Ohio Law.

C. Immigration Laws

There are no immigration requirements mandated by Ohio Law.

D. Right to Work Laws

A right to work law secures the right of employees to decide whether or not to join or financially support a union. Ohio is not a right to work state.

E. Other Key State Statutes

1. OHIO REV. CODE § 3123.20 – No employer shall discharge an employee by reason of any order issued to collect child support.
2. OHIO REV. CODE § 2945.451 – No employer shall discharge or otherwise penalize or punish an employee because of time lost from regular employment as a result of the employee’s attendance at a criminal proceeding pursuant to a subpoena.
3. OHIO REV. CODE § 2930.18 – No employer of a victim shall discharge, discipline or otherwise retaliate against the victim, the member of a victim’s family or the victim’s representative for participating, at the prosecutor’s request, in preparation for a criminal justice proceeding, or, if subpoenaed, for participation in a criminal justice proceeding if such attendance is reasonably necessary to protect the victim’s interests.
4. OHIO REV. CODE §§ 3599.05, 3599.06 – No employer may attempt to influence an employee’s political action or interfere with an employee on election day.
5. OHIO REV. CODE § 4113.52 – Ohio Whistleblower Statute – An employee, first orally and then in writing, shall report to the supervisor any violation of law, if the employer has authority to correct the violation. If the employer does not take appropriate action, the employee may file a complaint with the proper authorities. No employer may take disciplinary or retaliatory action against an employee for reporting a violation if the report was made in good faith.
 - a) For an employee to be afforded protection as a “whistleblower,” the employee must comply strictly with the statute’s procedural requirements. *Contreras v. Ferro Corp.*, 652 N.E.2d 940 (Ohio 1995).
 - b) To acquire protection as a “whistleblower,” it is sufficient that the employee had a reasonable belief that a violation of law occurred. *Fox v. City of Bowling Green*, 668 N.E.2d 898 (Ohio 1996).

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6. OHIO REV. CODE § 4123.90 – No employer shall discharge, demote, reassign, or take any punitive action against an employee because the employee filed a claim or instituted, pursued or testified in any proceedings under the Worker’s Compensation Act for an injury or occupational disease which occurred in the course of and arising out of his employment with that employer.
7. OHIO REV. CODE § 4731.91(D) – No employee may be discharged for refusing to participate in an abortion.
8. Employees do not have a general right to view/copy their personnel files in Ohio. However, OHIO REV. CODE § 4111.14(G) provides employees the right to access information pertaining to Ohio’s minimum wage requirement, and OHIO REV. CODE § 4113.23 provides employees with the right to obtain copies of their “medical reports” that are in their employer’s possession.