



Public Employment and Labor Law – The Basics

Michael R. Blum, Attorney
Foster Swift Collins & Smith, PC
mblum@fosterswift.com
248.785.4722

FOSTER SWIFT
FOSTER SWIFT COLLINS & SMITH PC || ATTORNEYS

fosterswift.com



Disclaimer

- This presentation highlights specific areas of law. This communication is not legal advice. The reader should consult an attorney to determine how the information applies to any specific situation. The original air date of this webinar was April 18, 2013 and the law is subject to change after that date.

FOSTER SWIFT
FOSTER SWIFT COLLINS & SMITH PC || ATTORNEYS

Public Sector Employment Law – The Basics
April 18, 2013

© 2013, Foster Swift Collins & Smith, PC.



Types of Employment

- At-Will
 - Either party may terminate the employment relationship at any time, with or without notice and with or without cause or reason.
 - But cannot be for an illegal reason, e.g. discriminatory or violate public policy.
 - Presumption, if hired for indefinite term.
- Just Cause
 - Collective bargaining agreements.
 - Employees subject to the rules and procedures of the Michigan Civil Service Commission.
 - Explicitly or implicitly created by agreement.
 - Legitimate expectation of just cause employment.
- Political Appointees
 - Terms generally governed by provisions of local charter.
- Independent Contractors
 - Misclassification is common and costly.
 - Determined by economic realities test.

FOSTER SWIFT
FOSTER SWIFT COLLINS & SMITH PC || ATTORNEYS

Public Sector Employment Law – The Basics
April 18, 2013


© 2013, Foster Swift Collins & Smith, PC.



THE HIRING PROCESS

FOSTER SWIFT
FOSTER SWIFT COLLINS & SMITH PC || ATTORNEYS

fosterswift.com




Pre-hire Inquires

- Reference Checks
 - No legal obligation to provide
 - Fair Credit Reporting Act
 - Defamation
 - Bullard-Plawecki Employee Right-to-Know Act
 - Allows an employer to disclose to a prospective employer information that is documented in the employees personnel file.
 - Good faith disclosure under Bullard-Plawecki immunizes employer from civil liability for the disclosure.
 - Separate rules for schools

FOSTER SWIFT
FOSTER SWIFT COLLINS & SMITH PC || ATTORNEYS

Public Sector Employment Law – The Basics
April 18, 2013

© 2013, Foster Swift Collins & Smith, PC.



Fair Credit Reporting Act

- Permits employers:
 - to request a consumer credit report;
 - to evaluate an individual for employment, promotion, reassignment or retention as an employee.
- Requirements:
 - Employer must obtain written authorization from the individual;
 - Must provide to the individual written notice that the consumer credit report may be used in assessing the candidate for employment.

FOSTER SWIFT
FOSTER SWIFT COLLINS & SMITH PC || ATTORNEYS

Public Sector Employment Law – The Basics
April 18, 2013

© 2013, Foster Swift Collins & Smith, PC.



FCRA (Cont.)

- To receive a consumer credit report, the employer must:
 - Certify it will comply the FCRA's disclosure and adverse action requirements;
 - Certify the information will not be used in violation of any applicable federal or state equal employment opportunity law or regulation;
- The agency must provide a written summary of rights under the FCRA along with the report.

FOSTER SWIFT
FOSTER SWIFT COLLINS & SMITH PC || ATTORNEYS

Public Sector Employment Law – The Basics
April 18, 2013

© 2013, Foster Swift Collins & Smith, PC.



FCRA (Cont.)

- Before taking adverse employment action, employer must:
 - Provide pre-adverse action notice;
- After taking adverse, employer must provide notice to the individual of:
 - Name, address and phone number of the agency providing the report;
 - Statement that the agency did not make the decision to take the adverse action;
 - Notice of the right of the individual to dispute the accuracy or completeness of any information the agency furnished; and
 - The right to request an additional free consumer report form the agency within 60 days.

FOSTER SWIFT
FOSTER SWIFT COLLINS & SMITH PC || ATTORNEYS

Public Sector Employment Law – The Basics
April 18, 2013

© 2013, Foster Swift Collins & Smith, PC.



Immigration Reform and Control Act

- It is unlawful for an employer to knowingly hire, recruit or refer for a fee any alien not authorized to work in the United States.
- IRCA requires completion of an I-9 form for every employee hired.
 - Current I-9 form is dated 03/08/13.
 - Older forms dated 02/02/09 and 08/07/09 will be accepted only until May 7, 2013.
- The purpose of the I-9 form is to confirm the employee is authorized to work legally in the United States.
- Public employers must retain completed and signed I-9 forms for three years after the date of hire or one year after termination of employment, whichever is later.

FOSTER SWIFT
FOSTER SWIFT COLLINS & SMITH PC || ATTORNEYS

Public Sector Employment Law – The Basics
April 18, 2013

© 2013, Foster Swift Collins & Smith, PC.



EMPLOYMENT DISCRIMINATION

FOSTER SWIFT
FOSTER SWIFT COLLINS & SMITH PC || ATTORNEYS

fosterswift.com



Employment Discrimination

- Types of discrimination claims:
 - Disparate treatment
 - Disparate impact
 - Retaliation
- Protected classifications under federal law:
 - Race, color, religion, sex, pregnancy, national origin, age, disability, genetic information.

FOSTER SWIFT
FOSTER SWIFT COLLINS & SMITH PC || ATTORNEYS

Public Sector Employment Law – The Basics
April 18, 2013

© 2013, Foster Swift Collins & Smith, PC.



Employment Discrimination (cont.)

- Procedural Requirements
 - Exhaustion of administrative remedies
 - File charge with EEOC within 300 days of alleged discriminatory act.
 - Obtain right-to-sue letter.
 - File lawsuit within 90 days.
- State Law
 - Elliott-Larsen Civil Rights Act
 - Covers both private and public employers with at least one employee.
 - Individual agents of the employer can be sued individually.
 - Protects religion, race, color, national origin, age (both over and under 40), sex, pregnancy, height, weight, or marital status.
 - Sex discrimination includes sexual harassment.
 - Exhaustion not required; individual can file with MDCR within 180 days or directly in court within 3 years.

FOSTER SWIFT
FOSTER SWIFT COLLINS & SMITH PC || ATTORNEYS

Public Sector Employment Law – The Basics
April 18, 2013

© 2013, Foster Swift Collins & Smith, PC.



Harassment

- Sexual harassment; two types:
 - Quid pro quo
 - Hostile environment
- Harassment based on any protected characteristic also unlawful.
- Important to:
 - Have written policy prohibiting all forms of harassment.
 - Promptly investigate all claims; written complaint not required.
 - Take appropriate remedial action.

FOSTER SWIFT
FOSTER SWIFT COLLINS & SMITH PC || ATTORNEYS

Public Sector Employment Law – The Basics
April 18, 2013

© 2013, Foster Swift Collins & Smith, PC.



Pregnancy

- Pregnancy Discrimination Act prohibits discrimination in the workplace based on:
 - Pregnancy;
 - Childbirth;
 - Related medical conditions.

FOSTER SWIFT
FOSTER SWIFT COLLINS & SMITH PC || ATTORNEYS

Public Sector Employment Law – The Basics
April 18, 2013

© 2013, Foster Swift Collins & Smith, PC.



Age

- The Age Discrimination in Employment Act:
 - Applies to political subdivisions of the State;
 - Prohibits discrimination against applicants and employees;
 - Who are 40 years of age or older.
- Older Worker Benefit Protection Act
 - Regulates use of release agreements.
 - Waivers must be knowing and voluntary:
 - 21 day consideration period (45 for groups)
 - 7 day revocation period

FOSTER SWIFT
FOSTER SWIFT COLLINS & SMITH PC || ATTORNEYS

Public Sector Employment Law – The Basics
April 18, 2013

© 2013, Foster Swift Collins & Smith, PC.



Disabilities

- Americans with Disabilities Act (ADA)
 - Extends the protections of the Rehabilitation Act to all public entities, without regard to whether the entity is a recipient of federal aid;
 - Subjects local units of government to private claims of discrimination;
 - Protects:
 - Qualified individuals with a disability;
 - Who are with or without accommodation;
 - Can perform the essential functions of the individual's job.
 - Defenses:
 - Undue burden;
 - Direct threat;
 - Bona seniority system.
- Michigan Persons with Disabilities Civil Rights Act (PDCRA)
 - Covers any employer, including governmental entities except state or county correctional facilities, with one or more employees.

FOSTER SWIFT
FOSTER SWIFT COLLINS & SMITH PC || ATTORNEYS

Public Sector Employment Law – The Basics
April 18, 2013

© 2013, Foster Swift Collins & Smith, PC.



Genetic Information

- The Genetic Information Nondiscrimination Act (GINA) of 2008:
 - Applies to both private and public employers;
 - Prohibits the use of genetic information in employment decisions;
 - Prohibits employers from obtaining genetic information about applicants and employees; and
 - Imposes strict confidentiality requirements.

FOSTER SWIFT
FOSTER SWIFT COLLINS & SMITH PC || ATTORNEYS

Public Sector Employment Law – The Basics
April 18, 2013

© 2013, Foster Swift Collins & Smith, PC.



Uniformed Services

- The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA):
 - Applies to most employers, including states and political subdivisions;
 - Protects veterans and other military service members returning to the workforce after serving;
 - Includes, in its definition of uniformed services, the Army, Navy, Marine Corps, Air Force, Coast Guard, Army National Guard, Commissioned Corps of the Public Health Service, and appointees of the National Disaster Medical System.

FOSTER SWIFT
FOSTER SWIFT COLLINS & SMITH PC || ATTORNEYS

Public Sector Employment Law – The Basics
April 18, 2013

© 2013, Foster Swift Collins & Smith, PC.



Retaliation

- Prohibits employers from taking adverse action against employees for:
 - Making a claim or complaint of discrimination;
 - Participating in an investigation, internal or government conducted; or
 - Testifying at a hearing or other legal proceeding.

FOSTER SWIFT
FOSTER SWIFT COLLINS & SMITH PC || ATTORNEYS

Public Sector Employment Law – The Basics
April 18, 2013

© 2013, Foster Swift Collins & Smith, PC.



Due Process/Liberty Interest

- *Quinn v. Shirey*, 293 F3d 315 (6th Cir), cert denied, 537 US 1019 (2002)
 - Fourteenth amendment forbids state actors from depriving individuals of life, liberty or property without due process of law.
 - A person's reputation, good name, honor and integrity are among the liberty interests protected by the due process clause.
 - In *Quinn*, statements regarding job performance alleged to have infringed on constitutionally protected liberty interest.
 - But, failure to request a name-clearing hearing resulted in dismissal of lawsuit.

FOSTER SWIFT
FOSTER SWIFT COLLINS & SMITH PC || ATTORNEYS

Public Sector Employment Law – The Basics
April 18, 2013

© 2013, Foster Swift Collins & Smith, PC.



MEDICAL MARIJUANA

- The Michigan Medical Marijuana Act (MMMA) allows individuals who are in need of the ameliorative affects of marijuana to be able to legally use marijuana.
- Employers do not need to accommodate the ingestion of marijuana in any workplace or accommodate an employee working while under the influence of marijuana.
- A U.S. District Court for the Western District of Michigan court case held that the MMMA does not prohibit employers from terminating employees who test positive based on the use of marijuana outside of work for medical purposes.

FOSTER SWIFT
FOSTER SWIFT COLLINS & SMITH PC || ATTORNEYS

Public Sector Employment Law – The Basics
April 18, 2013

© 2013, Foster Swift Collins & Smith, PC.



Wage and Hour

FOSTER SWIFT
FOSTER SWIFT COLLINS & SMITH PC || ATTORNEYS

fosterswift.com



Applicable Statutes

- The Fair Labor Standards Act (FLSA) addresses pay practices engaged in by public employers, including:
 - Minimum wage (\$7.25; \$7.40 in Michigan);
 - Overtime;
 - Recordkeeping.
- Exemptions
 - Major exemptions include administrative, executive and professional.
 - Elected officials and their personal staff members also exempt if they meet certain requirements.
 - Personal staff member includes only employees 1) under the direct supervision of the elected official and 2) who also have regular contact with that official.
- Michigan Wages and Fringe Benefits Act (WFBA)
 - Applies to all employers, public and private, with one or more employees.
 - Generally requires pay on a frequency no longer than one month.
 - Required fringe benefits be provided according to the terms of a written contract or policy.
 - Requires payment of all wages and fringe benefits for separated employees on at least the next regularly schedule payday.

FOSTER SWIFT
FOSTER SWIFT COLLINS & SMITH PC || ATTORNEYS

Public Sector Employment Law – The Basics
April 18, 2013

© 2013, Foster Swift Collins & Smith, PC.



Family and Medical Leave Act

- Public agencies, including federal, state and local government agencies, are covered by the FMLA regardless of the number of employees.
- However, public employees must also be eligible for FMLA benefits. To be eligible, the employee must:
 - Have been employed by the employer for at least 12 months;
 - Have worked at least 1,250 hours during the 12-month period preceding commencement of the leave; and
 - Currently work at a site where the employer employs 50 or more employees within a 75-mile radius.

FOSTER SWIFT
FOSTER SWIFT COLLINS & SMITH PC || ATTORNEYS

Public Sector Employment Law – The Basics
April 18, 2013

© 2013, Foster Swift Collins & Smith, PC.



FMLA (Cont.)

- Eligible employees are entitled to take leave for:
 - The birth of a newborn child;
 - The placement of a child with the employee for adoption or foster care;
 - Caring for the employee's son, daughter, or parent with a serious health condition;
 - A serious health condition that makes the employee unable to perform one or more essential functions of his/her job;
 - Qualifying exigencies arising out of the fact the employee's spouse, son, daughter or parent is a covered military member on active duty; or
 - Caring from a covered service member with a serious injury or illness who is a spouse, son, daughter, parent, or next of kin on the service member.

FOSTER SWIFT
FOSTER SWIFT COLLINS & SMITH PC || ATTORNEYS

Public Sector Employment Law – The Basics
April 18, 2013

© 2013, Foster Swift Collins & Smith, PC.



PA 152 of 2011


Publicly Funded Health Insurance Contribution

- Limits amount public employers may contribute toward health benefits of employees.
- Two approaches: hard cap and 80/20.
- Hard cap amounts for 2013 were adjusted, as follows:
 - \$5,692.50 - employee only
 - \$11,385 – employee plus spouse
 - \$15,525 – family
- Local units of government may opt out annually

FOSTER SWIFT
FOSTER SWIFT COLLINS & SMITH PC || ATTORNEYS

Public Sector Employment Law – The Basics
April 18, 2013


© 2013, Foster Swift Collins & Smith, PC.



UNIONIZED EMPLOYEES

FOSTER SWIFT
FOSTER SWIFT COLLINS & SMITH PC || ATTORNEYS

fosterswift.com



Public Employment Relations Act

- The Public Employment Relations Act (PERA)
 - Provides public employees, including supervisors, the right to organize, form, join or assist unions;
 - Engage in concerted activities;
 - But not strike.

FOSTER SWIFT
FOSTER SWIFT COLLINS & SMITH PC || ATTORNEYS

Public Sector Employment Law – The Basics
April 18, 2013

© 2013, Foster Swift Collins & Smith, PC.



Freedom (Right) to Work

- Amended PERA, among other things, to:
 - Permit public employees to engage in, or refrain from, collective bargaining activities.
 - Prohibit public employers from requiring an individual from joining or paying union dues/agency fees as a condition of employment, except for police and fire department employees and State Police troopers and sergeants.

FOSTER SWIFT
FOSTER SWIFT COLLINS & SMITH PC || ATTORNEYS

Public Sector Employment Law – The Basics
April 18, 2013

© 2013, Foster Swift Collins & Smith, PC.



RTW (Cont.)

- Law took effect March 28, 2013.
- But is currently subject to legal challenges.
 - Constitutionality
 - Open Meetings Act
 - Civil Service Commission exemption

FOSTER SWIFT
FOSTER SWIFT COLLINS & SMITH PC || ATTORNEYS

Public Sector Employment Law – The Basics
April 18, 2013

© 2013, Foster Swift Collins & Smith, PC.



PA 116 of 2011

- Amended PA 312 of 1969, which provides for arbitration of labor disputes involving municipal police, fire and emergency medical service personnel.
- Requires the arbitration panel, among other things, to give priority to the financial ability to pay.

FOSTER SWIFT
FOSTER SWIFT COLLINS & SMITH PC || ATTORNEYS

Public Sector Employment Law – The Basics
April 18, 2013

© 2013, Foster Swift Collins & Smith, PC.




PA 54 of 2011

- Upon expiration of a CBA, public employers cannot pay wages and benefits greater than those in effect on the expiration date.
- HB 5780, which would have created an exemption to PA 54 for employees eligible for Act 312 arbitration, failed to pass in the lame duck session of 2012.

FOSTER SWIFT
FOSTER SWIFT COLLINS & SMITH PC || ATTORNEYS

Public Sector Employment Law – The Basics
April 18, 2013

© 2013, Foster Swift Collins & Smith, PC.



QUESTIONS?

FOSTER SWIFT
FOSTER SWIFT COLLINS & SMITH PC || ATTORNEYS

fosterswift.com



Upcoming Webinar

- Ten Things to Know Before Your Municipality Borrows Money
 - May 9, 2013
 - 11am-12pm

Register: www.bit.ly/Bondwebinar

FOSTER SWIFT
FOSTER SWIFT COLLINS & SMITH PC || ATTORNEYS

Public Sector Employment Law – The Basics
April 18, 2013

© 2013, Foster Swift Collins & Smith, PC.