

COUNTY EMPLOYMENT LAW

I. GENERAL COUNTY GOVERNMENT: HIRING / FIRING (WRONGFUL TERMINATION ACTIONS)

A. FIRST AMENDMENT

1. A public employee may not be refused employment or terminated for speaking out about a matter of public concern.

Examples include:

- a. How public money is being spent;
 - b. How inmates are being treated;
 - c. How arrestees are being treated; and
 - c. Safety of employees.
2. *Sowards v. Loudon County, Tennessee*, 203 F.3d 426 (6th Cir. 2000). A public employee may not be terminated for engaging in political conduct, even if the conduct is supporting the county official's opposition or running against the county official, UNLESS the public employee holds one of the following four positions:
 - a. a position that is named in federal, state, county, or municipal law and is given discretionary authority;
 - b. a position to which a significant amount of the discretionary authority of category one is delegated;
 - c. a confidential advisor to category one or category two position-holders on how to exercise their discretionary duties; or
 - d. a position that is part of a group of positions filled by balancing out political party representation.
 3. The First Amendment test ---
 - a. The employee's prima facie case:
 - (1) the employee engaged in protected conduct;
 - (2) an adverse action was taken against the employee that would deter a person of ordinary firmness from continuing to engage in that conduct; and
 - (3) there is a causal connection between elements one and two – that is, the adverse action was motivated at least in part by the employee's protected conduct.
Thaddeus X v. Blatter, 175 F.3d 378 (6th Cir. 1999).
 - b. If the employee meets his burden, then the burden shifts to the county to prove by a preponderance of the evidence that the employment decision would have been the same absent the protected conduct.
Mt. Healthy City Sch. Dist. Bd. Of Educ. v. Doyle, 429 U.S. 274 (1977).
 - c. If the county cannot satisfy the court that the same decision would have been made then the employee may be entitled to damages and his job back.

B. HIRING / FIRING TITLE VII

1. Title VII of the Civil Rights Act of 1964 prohibits workplace discrimination based on the following:
 - a. Religion;
 - b. National origin;
 - c. Race;
 - d. Color; or
 - e. Sex
2. Harassment – The workplace must be free of harassment based on national origin, ethnicity, or religion. Employers may be liable not only for harassment by supervisors, but also by coworkers or by non-employees under their control.
3. Filing A Charge – An individual that believes they were subject to discrimination in violation of Title VII may file a charge with the EEOC. The charge must be filed within 300 days.
4. The test is similar to the First Amendment test discussed previously, i.e., employee proves a prima facie case of discrimination, the employer must establish that the same decision would have been made regardless of the protected status, but then the employee must prove that the employer’s reasons are a “pretext” and that the real reason was discrimination.

C. HIRING / FIRING ADEA

1. The Age Discrimination in Employment Act of 1967 (ADEA) protects individuals who are 40 years of age or older from employment discrimination based on age. This protection pertains to both employees and job applicants.
2. Under the ADEA, it is unlawful to discriminate against a person because of their age with respect to any term, condition, or privilege of employment regarding the following:
 - a. Hiring or firing;
 - b. Promotion or layoff;
 - c. Compensation and/or benefits;
 - d. Job assignments; and
 - e. Training.
3. The ADEA applies to employers with 20 or more employees, including state and local governments.
4. It is unlawful to include age preferences, limitations, or specifications in job notices or advertisements.

5. Pre-Employment Inquires – The ADEA does not specifically prohibit an employer from asking an applicant’s age or date of birth. However, requests for age information may be closely scrutinized.
6. The test for proving a violation is the same as the test set forth previously in the Title VII section.

D. HIRING / FIRING ADA

1. The Americans with Disabilities Act of 1990, prohibits private employers, state and local governments, employment agencies and labor unions from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions and privileges of employment.
2. An individual with a disability is a person who:
 - a. Has a physical or mental impairment that substantially limits one or more major life activity;
 - b. Has a record of such an impairment; or
 - c. Is regarded as having such an impairment.
3. An individual with a disability is considered to be qualified if they can perform the essential functions of the job with or without reasonable accommodations.
4. Reasonable accommodations may include, but is not limited to:
 - a. Making existing facilities readily accessible and usable by persons with disabilities;
 - b. Job restructuring, modifying work schedules, reassignment to a vacant position;
5. An employer is required to make an accommodation to the known disability of a qualified applicant or employee if it would not impose an “undue hardship” on the operation of the employer’s business.
6. Medical Examinations and Inquiries – Employers may not ask job applicants about the existence, nature or severity of a disability. Applicants may be asked about their ability to perform specific job functions. A medical examination may be conditioned on a job offer only if it is required for all entering employees in similar jobs.

E. FMLA

1. The Family and Medical Leave Act entitles eligible employees to take up to 12 weeks of unpaid, job-protected leave in a 12-month period for specified family and medical reasons.
2. The employer may elect to use the calendar year, a fixed 12-month leave or fiscal year, or a 12-month period prior to or after the commencement of leave as the 12-month period.
3. Employer Coverage – FMLA applies to all:
 - a. public agencies, including state, local and federal employers;
 - b. private-sector employers who employ 50 or more employees in 20 or more workweeks in the current or preceding calendar year; and who are engaged in commerce or in any industry or activity affecting commerce.
4. Employee Eligibility – To be eligible for FMLA benefits, an employee **must**:
 - a. Work for a covered employer;
 - b. Have worked for the employer for a total of 12 months;
 - c. Have worked at least 1,250 hours over the previous 12 months, and
 - d. Work at a location in the United States where at least 50 employees are employed by the employer within 75 miles.
5. Leave Entitlement – A covered employer must grant an eligible employee up to a total of 12 workweeks of **unpaid** leave during any 12-month period for one or more of the following reasons:
 - a. For the birth and care of the newborn child of the employee;
 - b. For placement with the employee of a son or daughter for adoption or foster care;
 - c. To care for an immediate family member (spouse, child, or parent) with a serious health condition; or
 - d. To take medical leave when the employee is unable to work because of a serious health condition.

F. GENERAL CONSIDERATIONS

1. In general, employees are at-will, which means that they can be terminated for any reason or no reason, so long as not for one of the reasons previously discussed.
2. EXCEPTIONS

- a. Before terminating an employee, one should always consider whether the employer's policy and procedure manual and/or any county resolutions or ordinances that may alter an employee's at will status. If there is any language that entitles an employee to a hearing before termination and/or discipline or if there is a list of offenses for which an employee may be terminated, the relationship has been altered and is no longer an at-will employment relationship. The policy, procedure, resolution, or ordinance must be followed.
- b. Sheriffs and Jailers --- statutes provide otherwise (discussed below)

II. SHERIFF DEPARTMENT: HIRING / FIRING (WRONGFUL TERMINATION ACTIONS)

A. KRS 15.520 – COMPLAINTS AGAINST POLICE OFFICERS – Manner of investigation and hearing.

- 1. In order to establish a minimum system of professional conduct of police officers, the following standards of conduct are intended to deal fairly and set administrative due process rights for police officers and at the same time provide a means for redress by citizens for wrongs allegedly done to them by police officers
 - a. Any complaint taken from any individual alleging misconduct on the part of any police officer, shall be taken as follows:
 - (1) If the complaint alleges criminal activity
 - (2) If the complaint alleges abuse of official authority
 - (3) If a complaint is required to be obtained
 - (4) Nothing in this section shall preclude
 - b. No threats, promises, or coercions shall be used at any time
 - c. The accused officer may be interrogated if given 48 hours notice
 - d. The accused officer may be suspended with or without pay until a hearing on the allegations can be held
 - e. The County may not make any public statement about the allegations until after the hearing is held
 - f. The accused officer must be given 72 hours notice of the hearing

- g. The accused officer shall have the right to present witnesses and to his/her attorney
 - h. The hearing must be held within sixty (60) days after the charge is filed
2. Unless the County has adopted KRS 78.410 (discussed below), the hearing authority (officer) is the Sheriff.
 3. Any police officer found guilty by any hearing authority of any charge, may bring an action in the Circuit Court in the county in which the local unit of government may be located.
 4. The judgment of the Circuit Court shall be subject to appeal to the Court of Appeals.
 5. The provisions of this section shall apply only to police officers of local units of government who receive funds pursuant to KRS 15.410 through 15.992.
 6. A recent Court of Appeals opinion held that this section is only applicable to complaints received from a citizen and not to internal complaints, such as insubordination, etc. *Marco v. University of Kentucky*, 2006 WL 2520182.

B. KRS 78.410 – COUNTY POLICE FORCE MERIT BOARDS

1. Any county may by order of its fiscal court, create a county police force merit board, who shall promulgate rules and regulations governing the qualification, examination, appointment, promotion, disciplinary, and termination actions of all county police officers
2. The county judge/executive, subject to the approval of the fiscal court of the county, shall appoint four (4) persons, who shall constitute the county police force merit board.
3. Disciplinary action/termination may be taken by the Chief (sheriff) (but only after a hearing is KRS 15.520 is applicable).
4. Disciplinary action/termination may also be taken by the Board after a hearing before the Board (regardless of whether KRS 15.520 is applicable)
5. Action of chief may be appealed to the Board
6. Action by the Board may be appealed to the Circuit Court

III. **JAILER: HIRING / FIRING (WRONGFUL TERMINATION ACTIONS)**

- A. KRS 71.060 provides that “The jailer shall be responsible for the appointment and removal of jail personnel, and the jailer may dismiss his deputies at any time with cause.”
1. If Jail’s personnel manual lists reasons for termination, make sure it uses language such as “but not limited to”, “list is not exhaustive”, etc.
 2. Deputy Jailers are not entitled to a due process hearing before termination unless the Jail’s personnel manual or County’s personnel manual allows for a pre-termination hearing or provides for a grievance procedure.
Said v. Lackey, 731 S.W.2d 7 (Ky. Ct. App. 1987).
 3. *Lackey* also indicates that a deputy jailer can agree to termination without notice or cause, in effect waiving the provisions of KRS 71.060.

IV. **WAGE and HOUR**

A. **STATE AND FEDERAL STATUTORY LAW**

There are two bodies of law that regulate wage and hour concerns:

1. The Federal Fair Labor Standards Act, 29 USCS § 201 et seq, which is commonly abbreviated FLSA; and
2. Kentucky law. This is codified at KRS Ch. 337. In addition, regulations construing these statutes are contained at 803 KAR Ch 1. For the most part the Kentucky laws mirror the FLSA. However, to the extent they don’t, the typical rule of thumb is that the employer must follow whichever law gives the most benefit to the employee.

B. **OVERTIME REQUIREMENTS**

1. **General Requirements** -- Both the state and federal law requires employers who are covered under the state or federal law to pay employees who work more than forty (40) hours in a work week overtime pay for all work in excess of forty (40) hours at a rate of not less than one and one-half (1 ½) times the hourly rate at which the employee is employed.
2. **Exceptions to the Overtime Requirements**
 - a. individuals employed in a bona fide executive, administrative, supervisory, or professional capacity from overtime. If an employee is exempt by virtue of being employed in one of these capacities, then the employer is not obligated to pay any overtime for hours worked over 40 in one week.
 - b. Bona Fide Executive Employee

- (1) paid a salary of not less than \$455 per week; and
- (2) The executive's primary duty consists of managing the enterprise in which the executive is employed or a customarily recognized department or subdivision of that enterprise; and
- (3) The executive customarily and regularly directs the work of two (2) or more other employees; and
- (4) Who has the authority to hire and fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion, or other change of status of other employees are given particular weight.

c. Bona Fide Administrative Capacity

- (1) The performance of office or non-manual work directly related to management policies or general business operations of his employer or his employer's customers. This entails performing work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working in a retail or service establishment. This includes work in functional areas such as tax, finance, accounting, budgeting, auditing, insurance, quality control, purchasing, procurement, advertising, marketing, research, safety and health, personnel management, human resources, labor relations, public relations, government relations, computer network, internet and database administration, legal and regulatory compliance, and similar activities. Some of these activities would also qualify for another exemption; and
- (2) Who customarily and regularly exercises discretion and independent judgment with respect to matters of significance.
- (3) Must be compensated for his services on a salary or fee basis at a rate of not less than \$455 per week.

d. Bona Fide Supervisory Capacity

- (1) Customarily and regularly directs the work of two or more other employees where he/she is employed; and
- (2) Who is compensated for his services on a salary basis at a rate of not less than \$455 a week.

e. Bona Fide Professional Capacity

- (1) Work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training and the performance of routine mental, manual, or physical process; or
- (2) Work that is original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person

endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination, or talent of the employee; or

- (3) Teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher certified or recognized as such in the school system or educational establishment or institution by which he is employed.
- (4) Compensated for his/her services on a salary or fee basis at a rate of not less than \$455 per week.

C. SALARY REQUIREMENTS

In order to be exempt under either the executive, administrative, supervisory, or professional capacity, the employee must be paid on a salary or fee basis. This means that the employee cannot be docked for time worked less than 40 hours a week. The employee must receive his/her full salary for any week in which he/she performs any work without regard to the number of days or hours worked. Nonetheless, an employer can deduct from a salaried employee for absences from work for a day or more which are occasioned by the employee and not the employer.

D. OVERTIME CALCULATIONS

1. General Rules

- a. There is no requirement under either the state or federal law that an employee be paid for work over 8 hours in a given day. It only requires that the employee be paid for work performed over 40 hours in a given week.
- b. Overtime only applies to actual "hours worked". An employer is not required to include time not actually worked such as holidays, vacation, or sick leave in the 40 hour calculation.
- c. A "work week" is a fixed and regularly recurring period of 168 hours, 7 consecutive 24 hour periods. It need not coincide with the calendar week but may be on any day and at any hour of the day. A single work week may be established at different times for different employees or groups of employees. Nonetheless, once established it must remain fixed. For example, one classification of employees could have a work week that goes from Friday to Friday while another group of employees could have a work week from Monday to Monday.

E. COMPENSATORY TIME.

1. **General Rule:** All non-exempt employees must be paid overtime for work performed in excess of 40 hours per week at a rate of one and one-half (1-1/2) times the hourly rate.
2. **Exceptions for County Employees.** Kentucky wage and hour law (KRS 337.285) specifically authorizes the payment of compensatory time in lieu of overtime pay which must be at the rate of not less than one and one-half (1-1/2) hours for each hour the county employee is authorized to work in excess of forty (40) hours in a work week.

a. **Requirements/Rules Relating to County Employee Comp Time**

- (1) The comp time must be by written request of the county employee;
- (2) There must be a written agreement reached between the employer and the county employee before performance of the work;
- (3) The request must be made freely and without coercion, pressure, or suggestion by the employer.
- (4) Comp time may be accrued by county employees who provide work in excess of 40 hours in a public safety activity or emergency response activity up to 480 hours. A county employee engaged in other work may accrue up to 240 hours.
- (5) A county employee who has accrued the comp time and who has requested the use of the time off, shall be permitted to use the compensatory time within a reasonable period after making the request if it does not unduly disrupt the operations of the employer.
- (6) Upon termination of employment, all unused comp time shall be paid at a rate of compensation no less than:
 - a. The average regular rate received by the county employee during the last three (3) years of the county employee's employment; or
 - b. The final regular rate received by the county employee, whichever is higher.

F. MISCELLANEOUS WAGE AND HOUR RULES

1. **Payment of wages upon dismissal.** An employer is required to pay in full, all earned wages or salary earned by employee upon discharge of employment by the next normal pay period following dismissal or 14 days following dismissal whichever last occurs.
2. **Unauthorized deductions.** It is illegal for an employer to make any unauthorized withholdings from any agreed upon wage such as fines, cash shortages, breakage, losses due to acceptance by the employee of a bad check, losses due to defective or faulty workmanship, lost or stolen property, default of customer credit, or nonpayment for goods or services received by the customer if such losses are not attributable to employee's willful or intentional disregard of employer's interest.
3. **Lunch/Rest Periods.** Employers must provide a reasonable lunch period which shall not be sooner than 3 hours after the start of a shift nor more than 5 hours from the time the shift commences. Employers must provide a rest period of at least 10 minutes during each 4 hour period of work which shall be in addition to the lunch period.

4. **Records.** Every employer must keep a record of
 - (1) the amount paid each pay period to each employee,
 - (2) the hours worked each day and each week by each employee, and
 - (3) such other information as the Executive Director of the Labor Cabinet requires. The records must be kept on file for at least one (1) year after entry.