WHAT HAVE I GOTTEN INTO?
EMPLOYMENT TRAPS AND HOW TO AVOID THEM

October 12, 2016
Prepared for
PACAH

Presented by
Michael McAuliffe Miller
mmiller@eckertseamans.com
717-237-7174

Eckert Seamans Cherin & Mellott, LLC
213 Market Street, 8th Floor
Harrisburg, PA 17101

*No statements made in this seminar or in the written materials/power point should be construed as legal advice pertaining to specific factual situations.
Your collective bargaining agreement has expired and you have a chance to get a better health care plan. So, contract expired—we can do what we want, right?
The general rule is:

\[a\]n employer is obligated to maintain the \textit{status quo} during contract hiatus while the parties are negotiating a successor agreement.


The Contract Has Expired

Status quo is defined as follows:

\[ \text{the last actual peaceable and lawful non-contested status which preceded a controversy. It is a theoretical level playing field on which the parties begin negotiations for a successor agreement.} \]

*Id.* at 682-683; citing *Fairview School District v. Commonwealth of PA, Unemployment Compensation Board of Review*, 454 A.2d 517 (Pa. 1982) (School District’s refusal to step up teacher’s salaries based upon years of service under expired collective bargaining agreement did not constitute a disruption of the status quo).
The Contract Has Expired

The underlying rationale for the status quo requirement is that during the interim period between contracts, the employer may continue operations and the employee may continue working, while the parties are free to negotiate on an equal basis in good faith.

Maintenance of the status quo is merely another way of stating that the parties must continue the existing relationship in effect at the expiration of the old contract. To require the [employer] to pay stepped up salary increases beyond the specified years contained in the expired contract changes the existing relationship in the context of the terms and conditions subject to the very negotiations sought to be fostered.

Fairview School District, supra.
The Lesson

Is there a contractual privilege to act?

If not, wait and bargain.

Do not give seniority based benefits.
You’re sick of employees who refuse to be accountable and you’ve decided that there needs to be a new level of accountability. So, you decide that there will be a new punishment for people who are caught sleeping at work. Are you good?
Past Practice

“[A] custom or practice is not something which arises simply because a given course of conduct has been pursued by management or the employees on one or more occasions. A custom or a practice is a usage evolved by men as a normal reaction to a recurring type of situation. It must be shown to be the accepted course of conduct characteristically repeated in response to the given set of underlying circumstances. This is not to say that the course of conduct must be accepted in the sense of both parties having agreed to it, but rather that it must be accepted in the sense of being regarded by the men involved as the normal and proper response to underlying circumstances presented.”

The Lesson

Don’t assume a past practice exists just because the Union says so.

Have examples ready about how you departed from the alleged past practice; check with your front-line supervisors.
What About New Technology?

I want to adopt a biometric time clock but, for years, we have used paper to keep time. So, that’s a past practice, right?
No Change Of Circumstances

There are no PLRB cases on point. There are, however, a number of cases under the NLRB (which the PLRB sometimes looks to although it is not required to follow) that address upgraded time clocks. Specifically, in the seminal case of *Rust Craft Broadcasting of New York, Inc. v. Nat’l Ass’s of Broadcast Emps & Techs, AFL-CIO*, 225 NLRB No. 65 (June 29, 1976), the Board found that the employer did not have a duty to bargain about its installation of a time clock in place of a card system involving the manual transcription of employees' time-in and time-out.

The Board pointed out that the rule itself, concerning recordation of employees' time, “remained intact,” and that the employer’s choice of a more dependable, efficient method for enforcing its rule was not a “radical change,” and thus not “material, substantial, and significant.” *Id.* at 327.
Even if a past practice, the adoption of new technology can be a differentiator.

If defined as a new way of operating, then more management rights.
An employee comes to you and says that he has to take medical marijuana off duty because he is dealing with side effects from cancer treatments. He pulls out a medical marijuana card and says, “It’s legal.”

What do you do?
On May 17, Pennsylvania’s Medical Marijuana Act, Act 16, went into effect. The Department of Health has until November 17 to start publishing temporary regulations, although it will issue the first round of temporary rules before the end of the summer. During implementation, the Department is investigating the possibility of providing temporary legal protections for patients.

What does this mean for employers?
Do I Have To Accommodate The Use Of Medical Marijuana?

- Generally speaking, laws like the Americans with Disabilities Act that protect employees specifically exclude from disability any employee or applicant who’s currently engaging in the illegal use of drugs. This is where the murky water starts for employers since marijuana is listed as a Schedule 1 controlled substance under the federal *Controlled Substances Act (“CSA”).*

- So, the question of an employer’s duty in Pennsylvania is a mix of federal law and the application of the MMA.

- In addition, the Drug-Free Workplace Act of 1988 requires employers to maintain a no-drugs environment in order to become a federal contractor or receive federal funding. The upshot: Federal employees and employees of companies that work with the federal government may be terminated for drug use.
Do I Have To Accommodate The Use Of Medical Marijuana?

- An employer does **not** have to allow for an employee to be actively under the influence while at work. Employees who are impaired at work for any reason—alcohol, prescription medication or medical marijuana—are not protected.

- Under the MMA, Pennsylvania employers now may not discharge, refuse to hire, or otherwise discriminate against an employee solely on the basis of an employee’s certification to use medical marijuana. 35 P.S. § 10231.2103.

- However, employers are not required to permit such certified employees to (1) use medical marijuana on company property or any place of employment, (2) be under the influence on company property, or (3) accommodate an employee whose “conduct falls below the standard of care normally accepted for that position.” *Id.*

- Additionally, Pennsylvania employers are not required “to commit any act that would put the employer or any person acting on its behalf in violation of Federal law,” such as federal contractors. *Id.*
The MMA provides further restrictions focused on patients’ conduct. A patient may not handle certain chemicals requiring a permit under federal or state law, work with high-voltage electricity or other public utility, work at heights or in confined spaces, including mines, or work in any setting which an employer deems to be life-threatening while “under the influence” of marijuana. 35 P.S. § 10231.510.

“Under the influence” is defined as having “a blood content of more than 10 nanograms of active tetrahydrocannabis per milliliter of blood in serum.” Id. This metric presents a grey area as employers may find obstacles in timely testing an employee’s blood.

However, an employee’s conduct may fall below the standard of care normally accepted, indicating that he/she may be under the influence. While most of the areas of concern regarding the MMA were not expected to arise until early 2018, employers should be prepared to face these issues much sooner.
Do I Have To Accommodate The Use Of Medical Marijuana?

- In states like Pennsylvania where an employer may not discharge, refuse to hire, or otherwise discriminate against an employee solely on the basis of an employee’s certification to use medical marijuana, an employer needs to carefully evaluate the job before taking any action due to the use of medical marijuana.

- For instance, if an employee tests positive for marijuana, the employer should ask the worker to verify that he or she is a participant in a recognized medical marijuana program. Then the employer conducts a further evaluation of the employment situation.

- In states like Pennsylvania requiring accommodation, the employer should look at the specific demands of the job, as well as any competing regulations that may apply, in considering an employee’s use of medical marijuana. By way of example, the Department of Transportation’s regulations do not permit the use of marijuana.
Do I Have To Accommodate The Use Of Medical Marijuana?

- Once an employer is provided notification that an employee is a medical marijuana user, that employer needs to be especially careful how it uses that information and how far it goes in asking for more.

- This is because the employer now is likely on notice that the employee is potentially disabled under the Americans with Disabilities Act (ADA) or similar state statutes and/or has a serious health condition under the Family and Medical Leave Act.

- While the ADA itself does not require an accommodation based on marijuana use, it does require other accommodations related to a covered disability (for example, glaucoma) and affords certain protections to employees and applicants with disabilities, such as the confidentiality of medical information.
The Colorado Supreme Court recently heard the case of *Coats v. Dish Network*, in which an employee of Dish Network sued under Colorado’s lawful off-duty activities law after being fired for failing a random drug test despite having a medical marijuana license.

- The plaintiff, Brandon Coats, had been a quadriplegic since his teens. Coats was hired by Dish in 2007 and ranked among the top 5 percent of Dish’s telephone customer service representatives.

- In 2009, after the painkiller Coats had been using since he was 16 to treat muscle spasms triggered by his condition had lost its effectiveness, his doctor recommended marijuana. Coats got a medical marijuana license and began consuming it at home after work.

- When Dish conducted a random drug test in May 2010, Coats informed the tester that he would fail but that he had a medical marijuana license.
Coats was terminated in June 2010 for violating the company’s drug policy. He sued for wrongful termination, claiming Colorado’s lawful-activities statute prohibited Dish from firing him for engaging in legal off-the-clock activity.

The company countered that the state’s medical marijuana law didn’t make medical marijuana use legal; it simply provided users an affirmative defense if they were criminally charged for their actions.

Dish also argued that because marijuana was still a Schedule I drug under federal law, Coats’ use didn’t meet the statutory definition of lawful.
The Federal Problem

The trial court agreed with Dish on both arguments. An appellate court upheld only on the grounds that federal law made marijuana use illegal, leaving for another day the question of whether medical marijuana use is legal under Colorado law. The Colorado Supreme Court also affirmed solely on that basis.

*Coates* is somewhat indicative of how courts interpret a collision between the CSA, the ADA and state law—at least for right now. Even though a particular state may have legalized marijuana, either as a recreational drug or for qualifying patients, because it is still an illegal drug under federal law, the courts—the Colorado decision being indicative—have generally said you’re not allowed to claim a protected status because it is illegal under federal law.
It is critical that employers disseminate their drug policies to employees and enforce them uniformly among all employees.

Monitoring on-site drug use should be uniform and as fair as possible.

Drug policies should expressly state that “illegal substances” are defined by federal law, since marijuana remains illegal under the CSA.

Supervisors should be trained to handle issues regarding potentially impaired employees or to respond to employees’ questions regarding the MMA.

HR must be trained to deal with issues related to reasonable suspicion training for those employees suspected to be impaired.

Supervisors should never make decisions based on social media, workplace chatter or belief about marijuana use, and all decisions to significantly engage in this issue should be reviewed/considered by human resources or labor counsel.
Second, even though *Coates* indicates that there is a conflict between the federal courts’ view of an employer’s duties to accommodate and the provisions of Pennsylvania law, an employee with a disability cannot be automatically discharged because of his disability even though an employer uses its zero tolerance drug policy as its nondiscriminatory reason for the discharge.

Some nexus between off-site marijuana use and on-site work conduct should be established if an adverse employment action is sought.

The smart employer will closely work with their HR professionals and lawyers to avoid related issues under the ADA—such as discrimination based on an employee’s recognized disability (e.g., glaucoma)—and put themselves in a better position to defend their employment decision.
Employment law is a lagging indicator. While the MMA is being implemented, Pennsylvania courts and administrative entities such as the EEOC and PHRC will be forced to refine and address their guidance as to how the CSA, the ADA and the MMA interact. And, as a result, the boundaries will become much clearer.

Employers will have to be patient, deliberate and careful in their employment decisions as well as the underlying justifications for those decisions. Good facts and a reasoned approach will provide the best possible defense in an uncertain time.
The Lesson

This is going to be complicated.

Don’t immediately assume that use of marijuana is disqualifying. Instead, use the statute and define the ability to do the job at hand.
You resolve to publish a new Personnel Manual because the old one is out of date and because the world has changed. Now you have an unfair labor practice staring you in the face. How did that happen?
But I Don’t Have Bargain Over A Manual, Do I?

The Monroe County Correctional Facility issued a revised social media policy that contained several restrictions on employees' usage of social media, including using County equipment to access personal e-mail, the internet and the posting of the facility's logo or patch.

The union filed an unfair labor practice charge against the County alleging the unilateral imposition of the policy interfered with employees' exercise of guaranteed rights under the Public Employee Relations Act. Although the union did not raise a bargaining claim, it did challenge the lawfulness of certain portions of the revised policy.
The hearing examiner directed the rescission of nine (9) sections of the revised policy because he concluded those sections had the “tendency to coerce employees in the exercise of guaranteed rights under Section 1201(a)(1) of PERA.”

Specifically, the hearing examiner found the interests of the MCCF in controlling its reputation were outweighed by the employees' rights under PERA to “address workplace grievances, working conditions, controversial matters affecting employees, or the public interest in transparency in public employer operations.”
The section which “vaguely and broadly prohibits, without defining, any social media usage that ‘would indicate’ that an employee “represents” the MCCF was found illegal.

A section which prohibited the use of photography or images in a social media capacity, “that belong to the MCCF” was found to be illegal.

A section which forbade “photos of any MCCF building, facility or grounds,” was ordered rescinded.

A section which prohibited the use of “any image of an inmate” (with or without permission) on social media. Although the County has a legitimate interest in protecting the privacy of dependent individuals for whom it has care and of whom it has custody and control, the prohibition, as worded, would prohibit photographic or other recordings of inmate overcrowding or hostilities which could pose a safety threat to employees seeking to increase the complement of officers or the reduction of the inmate population.
A section which prohibited the “use of any material for which the County or MCCF holds a copyright, trademark, patent or other intellectual property right” was found to be vague and ambiguous.

A section which provided that—even where an employee had disclaimed association with the County as provided in Section IV(B)(1), “the employee must not be engaged in activity that violates the Monroe County or MCCF Employee Manual, or any MCCF or County policy. A violation shall subject an employee to appropriate discipline, including, when applicable, termination.” The blanket provision is overly broad, vague and ambiguous.

A section which precluded the “dissemination of information obtained through the course of MCCF employment” was found partially overbroad. That section prohibited the employees from “divulging any confidential or non-public information obtained by virtue of his/her employment.” However, broad restrictions prohibiting the sharing of information on inmate criminal history, prison layout and photographs of the prison violate the Act.
Social Media

A section that provided that MCCF employees were expected to conduct themselves in a manner that preserves the public trust and confidence inherent in a public servant even during off-duty hours was found improper. That policy provided that:

“An MCCF employee must refrain from posting comments in social media that discredit his/her profession, discredit MCCF or disparage his/her position as a public servant. A social media site is not an appropriate forum for airing internal workplace grievances, including, complaints about any inmate, coworker, or supervisor, or otherwise discrediting the public service offered by MCCF. To the extent that an MCCF employee uses social media in a way that discredits his/her profession, responsibilities, MCCF or public service at large, he/she shall be subject to appropriate discipline.”
In contrast, the hearing examiner concluded directives regarding the maintenance of the confidentiality of inmate and employee medical information, as well as security and intelligence information, did not infringe on employees' Article IV rights under PERA.

The hearing examiner also noted that other provisions, which placed employees on notice that they had no expectation of privacy in any information received or generated by use of county-owned equipment, and which addressed the misuse of county IT resources to inappropriately access or use social media, were lawful.

Although the hearing examiner found the disciplinary portion of the provision vague and overbroad, he nevertheless determined the triggering event for discipline—the misuse of IT resources—was clearly defined and did not violate Section 1201(a) (1). Moreover, the hearing examiner noted that the unilateral subjectivity of the level of discipline, although a matter of bargaining, was not a disputed issue in the instant matter.
The Lesson

Know what is bargainable and what is not.

Marketing and communications is the key.
Why Should He Get Paid?

A maintenance worker at the Reading Area Water Authority removed discarded compressor parts from the scrap pile behind the employer's office at one filtration plant and used the parts to fix a compressor at another filtration plant.

Although he immediately advised his supervisor of his actions, the employer conducted an investigation and contacted the local police department about allegations of theft. The water authority subsequently suspended and later terminated the employee for violating its policy, which prohibits the theft or inappropriate removal or possession of property.

The police also filed criminal charges of theft and receiving stolen property against the former employee, who later entered into an Accelerated Rehabilitation Disposition for 30 days and paid $130 in costs. However, the charges did not result in a conviction and his successful completion of the ARD allowed any criminal charges expunged from his record.
The term “willful misconduct” is not defined by statute. The courts, however, have defined “willful misconduct” as:

(a) wanton or willful disregard for an employer's interests; (b) deliberate violation of an employer's rule; (c) disregard for standards of behavior which an employer can rightfully expect of an employee; or (d) negligence indicating an intentional disregard of the employer's interest or an employee's duties or obligations.

_Grieb v. Unemployment Comp. Bd. of Review_, 827 A.2d 422, 425 (Pa. 2003). For an employee's conduct to constitute willful misconduct, it must be “of such a degree or recurrence as to manifest culpability, wrongful intent, or evil design, or show an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to the employer.” _Id._ at 425-26. Furthermore, Courts have previously held that an employee's theft from an employer is willful misconduct. _On Line Inc. v. Unemployment Comp. Bd. of Review_, 941 A.2d 786, 790 (Pa. Cmwlth. 2008).
What’s Willful Misconduct Mean Anyways?

Thus, the question becomes whether employer proved claimant committed theft. The Board concluded that employer failed to carry this burden. In order to prove its case, employer relies on claimant's entry into the ARD program. Employer argues that by accepting entry into the ARD program, claimant essentially admitted his guilt to the criminal charges of theft and receipt of stolen property.

Courts have previously addressed the question of whether entry into an ARD program is sufficient proof of willful misconduct. In *Unemployment Compensation Board of Review v. Vereen*, 370 A.2d 1228 (Pa. Cmwlth. 1977), the claimant was charged with theft from his employer. Although he maintained his innocence, he entered into and successfully completed an ARD program which consisted of six months' probation and no restitution.
What’s Willful Misconduct Mean Anyways?

The Court held that the employer failed to prove willful misconduct and that the claimant was, therefore, eligible for unemployment benefits:

*We have no doubt that even one isolated instance of theft is sufficient to constitute willful misconduct, and we so held in Kostik v. Unemployment Compensation Board of Review, . . . 315 A.2d 308 ([Pa. Cmwlth.] 1974).*

However, we have also held that more is needed than mere evidence of criminal arrest before the Board may deny compensation benefits. In *Unemployment Compensation Board of Review v. Derk, . . . 353 A.2d 915, 917 [(Pa. Cmwlth. 1976)], we stated:*

*The employer must present some evidence showing conduct of the claimant leading to the criminal arrest which is inconsistent with acceptable standards of behavior and which directly reflects upon his ability to perform his assigned duties. Of course, no proof of criminal conviction is necessary. Cf. Commonwealth v. Daugherty, . . . 305 A.2d 731 ([Pa. Cmwlth.] 1973). The employer need only produce evidence that would have established fault on the part of the employee which would be incompatible with his work responsibilities.’ (Footnote omitted. Emphasis in original.)*
What’s Willful Misconduct Mean Anyways?

Employer also asserts that entry into the ARD program should be treated the same way as a *nolo contendre* plea for purposes of unemployment compensation, arguing that ARD does not assert the innocence of a criminal defendant, but it is instead used by prosecutors to lessen a criminal punishment. Employer offers no legal argument in support of this assertion. To the extent employer is making a policy argument, it ignores this Court precedent regarding both *nolo contendre* pleas and entry into an ARD program.

As the Court explained in *Smith v. Unemployment Compensation Board of Review*, 967 A.2d 1042 (Pa. Cmwlth. 2009), a plea of *nolo contendre* “says, in effect, ‘I will not contest’ and admits the facts charged,” and, therefore, “essentially constitute[s] admission[] of the facts charged in the underlying criminal proceeding[].” *Smith*, 967 A.2d at 1046. Conversely, entry into the ARD program “does not at any point determine guilt or culminate in a criminal conviction.” *Vereen*, 370 A.2d at 1231.
Do an independent investigation.

Note that criminal charges are not convictions (special note: the Pennsylvania Criminal History Information Act).
There’s a motor vehicle accident at 10 p.m. and the police officer on duty volunteers to get a temporary stop sign and place it at the affected intersection so cars don’t, you know, run into each other.

The public works department has filed a grievance claiming that this was their work. What now?
Why Can’t A Supervisor Do Union Work?

There is no threshold amount of bargaining unit work that needs to be diverted; even a *de minimis* amount is actionable under PERA. *Lake Lehman Educational Support Personnel Ass'n v. Lake Lehman School District*, 37 PPER 56 (Final Order, 2006). Nor does it matter whether the removal of bargaining unit work resulted in the termination or layoff of bargaining unit employees, or whether the unit members lost pay; instead, the analysis is whether the unit lost work. *Tredyffrin-Easttown School District*, 43 PPER 11 (Final Order, 2011).

Is it bargaining unit work exclusively?

Is there a contractual privilege?

Are there exigent circumstances?
The Days Of Wine And Roses

IAFF Local 735 v. City of Bethlehem, (DeTreux, May 2013).

The moral of the story: Don’t drink and drive into a telephone pole.
A City firefighter called his supervisor to claim the use of a sick leave day. The relevant CBA has a provision that says that anyone using a sick leave day must stay at home unless they are engaged in activities related to the treatment of their illness.

It is undisputed that the firefighter in question left home to visit a fair 30 minutes away while on sick leave. He posted pictures to Facebook documenting where he was.
The firefighter took another sick leave the following day. On that day, he left home to fill a prescription. Before he got the prescription, he stopped at his fire house. After he got his prescription, he drank at a bar.

He was involved in an accident on his way home that sheered off a utility pole, shut down a highway and caused his own fire platoon to respond.

His BAC was .256, or over three times the legal limit.
He was terminated following an investigation and the issuance of *Loudermill* for two violations of the CBA and two violations of the code of ethics.

*The City did not argue that he was terminated solely for the DUI because other employees had not been terminated for DUIs.*

*The City did not argue that he was terminated solely for sick leave abuse because other employees had gotten, at most, a 3-day suspension for similar circumstances.*
The arbitrator upheld the termination reasoning that as a 17-year firefighter, the grievant knew that he was not supposed to leave home to go drinking.

Arbitrator reasoned that employee’s very public flaunting of his use of the sick leave day and his decision to drink was a decision to separate himself from other employees who had DUIs or abused sick leave and were not terminated.
What’s important here is the acknowledgement that the DUI, or the abuse of sick leave, would not have sustained the termination.

Here, what moved the arbitrator was the very public nature of the conduct.

Also, and I cannot say this too strongly, Facebook is the devil.
Thank you!