



ZASHIN & RICH

# 2024 OPRIMA

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## Jonathan J. Downes

- AV Preeminent rated by Martindale Hubbell.
- Fellow in the College of Labor and Employment Lawyers.
- Ohio State Bar Ass'n. Certified Specialist in Labor and Employment Law.
- More than thirty years of experience and expertise in representing public and private employers in labor and employment law and human resource management.
- Negotiated over 500 labor contracts.
- Represents employers in arbitrations, organizing campaigns, and administrative hearings.
- Defends employers in state trial and appellate courts, courts, the Ohio Supreme Court, federal district courts and the United States Court of Appeals for the Sixth Circuit.
- Recognized many times over as a subject-matter expert, Jonathan is designated as one of the Best Lawyers and Top 50 Central Ohio Lawyers and an Ohio "Super Lawyer" every year since 2004.



Super Lawyers



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# Employment and Labor Law Group

Zashin & Rich's Employment Group has extensive experience representing public sector entities, large and small businesses, and non-profit organizations. Zashin & Rich's Employment Group's expertise extends into many areas including:

- Litigation and EPLI Defense
- Discrimination and Retaliation
- General Employment Counseling
- Labor Law
- Collective Bargaining
- FLSA, Wage and Hour Issues
- Worker's Compensation
- Restrictive Covenants
- Employee Handbooks
- Unemployment Compensation
- Civil Service Law
- Public Records/Sunshine Laws

## Discrimination and Retaliation Laws Representation

- Title VII
- ADA
- ADEA
- FMLA
- PDA
- FLSA
- §1983

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# Introduction/Overview

- Pregnant Workers Fairness Act (PWFA)
- Marijuana Issues in Ohio
- Family and Medical Leave Act (FMLA)
- Fair Labor Standards Act (FLSA)



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# Pregnant Workers Fairness Act (PWFA)

- Effective June 27, 2023
- Employer must reasonably accommodate the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee except where it would impose undue hardship
- **Only applies to accommodations**



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# PWFA Key Terms

- Covered Employer – Employers with 15+ employees, including state/local governments, Congress, federal agencies, employment agencies, and labor organizations
- Reasonable Accommodation – Changes in the work environment, like breaks, telework, light duty, or leave
- Qualified Employee/Applicant – An individual who can perform the essential functions of the job with or without an accommodation or whose inability is temporary and can be accommodated
- Known Limitations – Physical or mental conditions related to pregnancy communicated by the employee
- Undue Hardship – Significant difficult or expense



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# Requesting Accommodations

- Employee Request
  - Employees should communicate their pregnancy-related limitations to employers, initiating the interactive process.
- Employer Response
  - Employers must engage in the interactive process promptly and provide reasonable accommodations if they do not cause undue hardship.

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# Examples of Reasonable Accommodations

- Leave
- Frequent breaks
- Allow water bottle
- Remote work/flexible hours/telework
- Part-time or modified work schedules
- Modification of equipment, uniforms, or devices
- Allowing seating for jobs that require standing or standing in jobs that require sitting
- Light duty
- Lactation accommodations (PUMP Act)

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# PWFA Prohibitions



Employers cannot

- Deny reasonable accommodations
- Retaliate against employees
- Force accommodations other than those reached through the interactive process

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# Employer Compliance

- Train supervisors on the PWFA
  - Focus on handling accommodation requests
  - Avoid retaliation
- Accommodations
  - May be minor or easy to implement
  - Needs may change as pregnancy progresses or conditions vary
  - Understand there is no one size fits all
- Accommodation requests
  - No specific language is needed to start the process
  - Engage in the interactive process once a request is made

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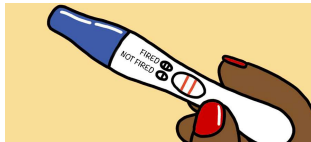


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## Other Protections for Pregnant Employees

- Pregnancy Discrimination Act (PDA)
- Americans with Disabilities Act (ADA)
- Family Medical Leave Act (FMLA)
- Fair Labor Standards Act (as amended by PUMP Act)



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## Marijuana Issues



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## From Medical to Recreational

Ohio's recreational marijuana program will operate alongside the state's medical marijuana program, which was legalized in 2016



Recreational laws are modeled similarly to existing medical use laws  
Ohio Revised Code Chapter 3780

- Nothing in the law requires an employer to accommodate an employee's use of medical or recreational usage of marijuana.
- The law does NOT prohibit an employer from refusing to hire, discharging, or taking an adverse employment action because of a person's use of medical or recreational marijuana.



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## Employer Rights: O.R.C. 3780.35

- **No Requirement to Accommodate Cannabis Use:** Employers are not required to permit or accommodate an employee's use, possession, or distribution of adult use cannabis.
- **Employment Actions Permitted:** Employers can refuse to hire, discharge, discipline, or otherwise take adverse actions against individuals based on their cannabis use, possession, or distribution
- **Drug Policies Allowed:** Employers can establish and enforce drug testing policies, drug-free workplace policies, or zero-tolerance drug policies
- **Federal Compliance:** Employers must comply with federal employment restrictions



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## Employer Rights Cont.

- **No Legal Claims for Cannabis Use:** Individuals cannot sue employers for adverse employment actions related to cannabis use.
- **Workers' Compensation Discounts:** The statute does not affect the authority of the workers' compensation administrator to offer discounts to employers with drug-free workplace programs.

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## Testing & Detection

- Employers can test for cannabis in accordance with their policies.
- **Pre-Employment Testing:** Employers can require drug tests before hiring new employees.
- **Random Testing:** Employers can conduct drug tests randomly among current employees.
- **Post-Accident Testing:** Drug tests can be administered following workplace accidents.
- **Reasonable Suspicion Testing:** Employers can test employees if there is reasonable suspicion of drug use.
  - Federal funding or regulated industries may require mandatory drug testing.

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# Testing Issues

- As marijuana is now treated similarly to alcohol in the workplace, employers must be aware that marijuana can remain detectable in the system for up to a month, unlike alcohol.
  - Drug tests may yield positive results and indicate the presence of THC even if the employee used cannabis days or weeks before being tested
    - Traditional tests like urine and hair are less effective as they fail to measure real-time impairment
- Breath testing could offer a more accurate measure of recent use

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# Testing Issues Cont.

- A positive drug test can lead to termination and loss of unemployment benefits, even if the employee was not impaired at work.
- A positive test can result even if an employee is not inebriated at work.
  - For example, an employee who used cannabis as a painkiller outside of work and subsequently tested positive on a drug test taken off the clock was terminated. This positive test is now affecting the employee's eligibility for unemployment benefits.



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# Testing Approaches for Policies

Employers have the flexibility to choose from several approaches:

- **Test All Employees:** Include pre-employment, random, post-accident, and reasonable suspicion tests
- **Discontinue Testing:** Stop all drug testing
- **Stop Pre-Employment Testing:** End testing for new hires but keep it for current employees
- **Remove Marijuana from Testing Panels:** Exclude marijuana from panels or pre-employment tests, but test in other contexts
- **Focus on Specific Positions:** Test all drugs but focus on safety-sensitive roles

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# Marijuana and Safety Roles

- Safety-sensitive roles require strict drug policies to comply with OSHA regulations.
- OSHA mandates a drug-free environment for roles involving machinery or transportation to ensure safety.



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## Cities & Sheriff's Continue Policies

- Columbus will not change its drug and alcohol policy, which prohibits recreational marijuana use for all city employees, including police and firefighters.



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## Allen v. City of Jackson

981 F. Supp. 2d 738

- Joe Allen, a police officer with the City of Jackson, was terminated for failing a random drug test.
  - The City maintained a zero-tolerance policy prohibiting its employees from being under the influence of, among other drugs, THC (cannabinoids/marijuana) while working for the City.
- The Court dismissed Allen's lawsuit because Allen was an at-will employee with no expectation of continued employment after violating the City's zero-tolerance drug policy.

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## Williams v. Akron

141 Ohio App. 3d 724

- Akron police officer tested positive for marijuana and was discharged.
- The acting mayor and civil service commission upheld the discharge.
- Officer appealed and attempted to introduce evidence that other officers violated the drug policy but were not discharged.
- The court refused to hear it and affirmed the discharge, finding no abuse of discretion.

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## Ortiz v. Department of Corrections

2023 WL 4101330 (Fla. App. 2023)

- A Florida correctional officer tested positive for marijuana and presented his medical marijuana card.
- The court ruled that while legal under state law, his marijuana use is illegal under federal law, making him unable to lawfully possess a firearm.
- Since firearm use is essential for the job, his termination was deemed lawful.

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# Family and Medical Leave Act (FMLA)



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## FMLA Coverage

- Covered Employers:
  - Private sector if employ 50+ employees
  - All public sector regardless of size
- Covered Employees:
  - At least one year of service credit with the employer
  - 1,250 hours worked within the last year
  - Employed at worksite with 50+ “employees” within 75-mile radius of worksite

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## Qualifying Reasons for FMLA

- Birth or care of a child
- Adoption or foster care placement
- Employee's own serious health condition
- Care for a spouse, child, or parent with a serious health condition
- Military-related exigencies for covered servicemembers
- Care for an injured or ill servicemember on active duty



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## “Serious Health Condition”

- An illness, injury, impairment, or physical or mental condition involving:
  - Inpatient care
  - OR
  - Continuing treatment by a health care provider



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## Inpatient Care

- An **overnight** stay in a hospital, hospice, or residential medical care facility
- A period of incapacity (inability to work, attend school or perform other regular daily activities) connected to that inpatient care, the treatment, or the recovery process
- Any subsequent treatment in connection with the inpatient care.

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## Continuing Treatment

- Incapacity plus treatment
- Pregnancy
- Chronic conditions
- Permanent/long-term conditions
- Absence to receive multiple treatments

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## Mental Health & FMLA

- Mental health conditions are serious health conditions under the FMLA if they require inpatient care or continuing treatment by a health care provider
- Examples
  - An overnight stay in a treatment center for addiction or eating disorders
  - Chronic conditions such as anxiety, depression, or dissociative disorders

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## Amount of Leave

- Eligible employees may use to 12 workweeks of FMLA in a 12-month period
- Military Caregiver – Eligible employees may use up to 26 workweeks of FMLA in a “single 12-month period”
- “**12-month period**”
  - Calendar year
  - Any fixed 12-month leave year
  - A 12-month period measured forward
  - A rolling 12-month period measured backward

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## Other FMLA Entitlements

- Continued health care benefits during leave
  - Employee must continue to pay their share of premium
- Job protection/restoration
  - Same or similar position
    - Same duties, responsibilities, status
    - Same level of skills, effort, responsibility, and authority
    - Identical pay, including premium pay, overtime, and bonus opportunities
    - Identical benefits, such as life insurance, disability insurance, sick leave, vacation, pensions, etc.

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## Employee Obligations

- Employee must:
  - Provide enough information for FMLA coverage (mentioning FMLA not required)
  - Reference qualifying reason for additional leave requests
  - Certification of need (DOL forms)
  - Periodic reporting
- **Timing:**
  - 30 days' notice for foreseeable leave; if impractical, notify as soon as possible.
  - Notify as soon as practicable for unforeseeable leave.
  - Recertification every 30 days unless extension requested or circumstances changed

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# Employer Obligations

- Post general notice
  - Also provide general notice in employee handbook
- Notification/Designation requirements
  - Eligibility Notice (5 business days)
  - Notice of Rights and Responsibilities (5 business days)
  - Designation Notice (5 business days)
  - Certification Form

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# Eligibility Notice

- Inform employee of FMLA eligibility
- May be oral or in writing
- Provide reason if not eligible

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## Rights and Responsibilities Notice

- Must be in writing
- Must include a statement on:
  - Leave potentially counted as FMLA
  - Applicable 12-month period
  - Certification and substitution requirements
  - Premium payment arrangements
  - Employee liability
  - “key” employee status
  - Job restoration and benefits rights

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## Designation of Leave Notice

- Must be in writing. Written notice must include:
  - Designation determination
  - Paid leave substitution
  - Fitness for duty
- Specify amount of leave designated against entitlement, if known; if unknown, provide upon request at least once every 30 days
- If not FMLA qualifying, a simple statement suffices
- Retroactive designation allowed if no harm to employee

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# Record Keeping Requirements

- Basic payroll information
- Copies of leave notices
- Documents describing benefits/leave policies
- Premium payments of employee benefits
- Dates FMLA leave is taken
  - Hours of leave if leave is taken in less than one full day
- Records of disputes
- Documents relating to medical conditions, certifications, and histories must be maintained as confidential medical records

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# Prohibited Employer Actions

- Employers cannot
  - Interfere with, restrain, or deny employees' FMLA rights
  - Discriminate or retaliate against an employee for having exercised FMLA rights
  - Use the taking of FMLA leave as a negative factor in employment actions
  - Discharge or in any other way discriminate against an employee because of involvement in any proceedings related to the FMLA

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# Enforcement of the FMLA

- File a complaint with Wage and Hour Division
- File a private lawsuit under Section 107(a)
- Statute of Limitations
  - 2 years after the last action which the employee alleges was in violation of the Act
  - 3 years if the violation was willful

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# Fair Labor Standards Act (FLSA)



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# FLSA Key Provisions

- Must be an employment relationship between an “employer” and an “employee”
  - Properly classified “independent contractors” are not covered under the FLSA
- Mandates payment of minimum wage (\$7.25/hour) (Ohio = \$10.45)
- Establishes who is entitled to overtime, including the appropriate overtime rate
- Establishes what constitutes hours worked
- Establishes recordkeeping requirements

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# Exempt & Non-Exempt

- Exempt employees receive a salary and are not entitled to overtime pay
- Non-exempt employees are entitled to overtime pay
- Exemptions:
  - Executive
  - Administrative
  - Professional
  - Computer
  - Other



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## Executive Exemption

- Weekly salary of \$844+ effective July 2024
- Primary duty
  - manage the enterprise or a department;
  - regularly direct the work of 2+ full-time employees;
  - authority to hire/fire or have significant input on employment decisions

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## Administrative Exemption

- Weekly salary of \$844+ effective July 2024
- Primary duty
  - Office or non-manual work related to management or business operations
  - Must exercise discretion and independent judgment on significant matters

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# Professional Exemption

- Weekly salary of \$844+ effective July 2024
- Primary duty
  - Learned Professional: Performance of work requiring knowledge or an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual study
  - OR
  - Creative Professional: Work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor

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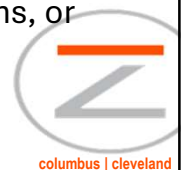
# Computer Exemption

- Weekly salary of \$844+ or paid on an hourly basis of at least \$27.63/hour, effective July 2024
- Employee must be a computer systems analyst, programmer, software engineer, or similar role
- Primary duty (any of the following):
  - Applying systems analysis techniques to determine specifications, or
  - Designing, developing, documenting, or modifying computer systems/programs, or
  - Creating/modifying programs related to machine operating systems, or
  - Performing a combination of these duties requiring similar skills

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## Other Exemptions

- **Outside Sales Employee**
  - Primary Duty: Making sales or obtaining orders/contracts for paid services
  - Must regularly work away from the employer’s business locations
- **Highly Compensated Employee**
  - July 2024: \$132,964+ total annual income
  - January 2025: \$151,164+ total annual income
  - July 2027, and every 3 years thereafter, the threshold will increase
  - Primary Duty: Performs office or non-manual work and customarily and regularly performs one or more of the duties of an executive, administrative or professional

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## Overtime Pay Requirements

- When compensable time exceeds 40 hours, must pay overtime for every hour over 40 in a workweek (unless exempted)
  - Calculated on a workweek basis
- Overtime pay = 1.5x “regular rate of pay”
  - “Regular rate of pay” = total remuneration divided by total hours worked
    - Includes all earnings except certain exclusions (e.g., bonuses, expenses, gifts)

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# Compensable Time

- **Waiting Time:** If the employee is “engaged to wait” (employer still controls time)
- **On-Call Time:** If the employee must remain on the employer’s premises while on-call, or if there are considerable restraints on the employee’s freedom
- **Rest Breaks:** Generally, short breaks of 20 minutes or less are compensable
- **Meal Breaks:** Generally, meal periods of less than 30 minutes are compensable
- **Sleeping Time:** Employees who are on duty for less than 24 hours are working even if permitted to sleep or engage in personal activities when not busy; employees on duty for 24 hours or more may agree with the employer to exclude regularly scheduled sleeping periods of 8 hours or less from compensable time, so long as facilities are furnished by the employer and 5 hours of sleeping occurs
- **Preliminary or Postliminary Time:** Only if integral and indispensable to a principal activity
- **Donning and Doffing Time:** Depending on whether the activity is integral and indispensable to a principal activity (e.g. putting on protective gear)
- **Training:** Generally, time spent at employer-sponsored lectures, meetings, and training programs is compensable

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# Not Compensable Time

- **Waiting:** If the employee is “waiting to be engaged”
- **On-Call:** If the employee may leave the premises, be at home, or leave contact information where they may be reached
- **Rest Breaks:** Rest periods, generally longer than 20 consecutive minutes, if the employee is completely relieved of duties and may leave his or her post
- **Meal Breaks:** Meal periods, generally 30 consecutive minutes or longer, if the employee is completely relieved of duties and may leave his or her post
- **Sleeping Time:** If employees on duty for 24 hours or longer agree with the employer to exclude bona fide sleeping periods of 8 hours or less
- **Preliminary and Postliminary Time:** Generally not compensable
- **De Minimus Time:** Insignificant and infrequent amounts of time spent before or after the working duties
- **Donning and Doffing:** If not considered integral and indispensable to the principal activity
- **Training:** If the attendance is outside of normal working hours, is voluntary, not directly related to the employee’s job, and the employee does not perform productive work

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# Wage and Hour Claims

- Litigation
  - DOL
  - Employee private suit
- Damages
  - Back wages for 2-3 years + equal liquidated damages
  - Interest
  - Attorneys' fees and costs for employee
  - Possible criminal prosecution + fines for willful violations
- Statute of Limitations
  - 2-year to the recovery of back wages and liquidated damages
  - 3-year for willful violations



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# Questions?



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