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Personnel Management

This chapter presents ways in which to establish and administer an effective human resource management system. It also discusses the significant issue of constitutional protections afforded to public employees and the large body of case law addressing due process and related rights accorded to public employees. Common legal issues that affect county employers and employees are reviewed such as discrimination laws, drug testing, monitoring of computers and telephones, overtime, compensatory time, and other special laws that apply to county employees.

HUMAN RESOURCE MANAGEMENT

Perhaps the most important, yet least attended to, function of county government is human resource management. Human resource costs can exceed 70 percent of a county's noncapital expenditures but often take a back seat to issues such as taxation, finance, and capital improvements. Human resource management covers a broad range of issues such as recruiting and selecting employees, establishing competitive salary rates for employees, properly training new and veteran employees, motivating employees to achieve desired objectives, and fairly and adequately evaluating employee performance.

This part of the chapter will familiarize elected officials with the basic issues involved in human resource management at the county government level. It also suggests appropriate sources of information for the official seeking further information or direct technical assistance. Subjects covered are employee selection, position classification, salary administration, employee benefits, employee training and development, performance appraisal, and personnel policies and procedures.

Employee Recruitment and Selection

In the past, many county governments recruited their employees by word of mouth. Today, the increasing complexity of the work in which counties are involved, coupled with legal requirements and federal guidelines resulting from legislation such as the Civil Rights Act of 1991 and the Americans with Disabilities Act, calls for increased attention to employee recruitment and selection practices.

Recruitment

A broad-based recruitment program that seeks to incorporate all segments of the community is in the best interest of all concerned. Job announcements should clearly state the duties of the position, minimum and desired qualifications, salary ranges, and special licenses or certificates necessary to adequately perform the major duties of the position. Recruitment activities should be both passive (advertisements on the county's official Web site and in local newspapers) and active (recruitment visits to schools and colleges), depending on the nature of the position to be filled. Position vacancies should be announced for at least 10 working days to allow those interested to learn of the vacancy and to have the opportunity to apply. A longer recruitment period is required for department head or county manager positions that are advertised nationally with organizations such as the International City/County Management Association (www.icma.org) or the American Society for Public Administration (www.publicservicecareers.org).[1] It is advisable to post these positions on the Georgia Local Government Access Marketplace site (www.glga.org). This Web site is sponsored by the Association County Commissioners of Georgia and the Georgia Municipal Association and is perhaps the best site available for local government recruitment in the state.

Selection

The selection of employees has come under increasing scrutiny and legal requirements. Counties should strive to create "selection devices" that help them choose the best-qualified applicants without adversely impacting minority and other protected groups. Selection devices include interviews, training and experience evaluations, written examinations, performance examinations, and assessment centers.

The role of county commissioners in employee selection is usually limited to the positions of appointed county administrators and department heads. Executive search firms are sometimes employed by counties

to help them find well-qualified applicants for these high-level positions. Technical assistance is also available through the Carl Vinson Institute of Government.

Hiring in Compliance with the Open Meetings and Open Records Law

There are a few special requirements in the open meetings and open records laws that county commissioners must be aware of when hiring employees. First, if a quorum of the board of commissioners wants to interview applicants for a position, it may do so in executive session, so long as votes are taken in public.[2] Other boards have interviewed applicants in meetings that were properly advertised and open to the public. However, this approach may pose a problem for an applicant for executive head of the county or department who may not want his or her current employer to know that he or she is considering a different job.

Second, the open records law contains requirements that apply when a county is hiring certain employees like county managers, county administrators, or department heads. If the county releases the names of all applicants upon request, the special rules do not apply. However, if the county wants to protect applicants from possible retribution from their current employers, it must observe special rules. The open records law allows the county to keep records that would identify all of the applicants for the position of executive head of an agency (such as county manager, county administrator, or department head) confidential until up to three finalists have been selected. Fourteen days prior to the final decision, the names and application materials of the three finalists must be released, unless an applicant no longer seeks the position. However, the county may be required to provide information regarding the number of applicants and the race and gender of those applicants.[3]

So, when a board of commissioners is hiring an executive head of the county or a department, it has two options:

1. Conduct the entire hiring process in the open, making all of the records available to the public for all of the candidates. Using this method means that the board does not have to wait 14 days before hiring a candidate.
2. Mask the identity of all applicants in order to protect them from retribution from current employers. Once the board has identified up to three best-qualified applicants, it must inform these applicants that their names will be publicly released if they continue to seek the position. Any applicant may decline to have

his or her name publicly released. Using this method means that the board must wait 14 days to hire one of the remaining finalists.

Position Classification

Position classification involves placing similar positions together into groups, or classes. For example, comparable secretarial positions could be grouped under the classification of administrative secretary, or similar equipment operation positions could be grouped under the classification of heavy equipment operator. Positions with the same position classification are assigned the same pay grade and pay range. This practice helps to ensure that a county is providing equitable pay.

Position classification provides the framework for an effective system of human resource management and has an impact on recruitment, selection, and performance appraisal. Job descriptions, which form the basis of a classification plan, should be up to date and specific in their listing of the major duties and responsibilities of positions. If job descriptions are timely and specific, they can be used to create announcements advertising position vacancies and develop performance standards for use in appraising employee performance.

The county commissioner's role in position classification generally involves approving new classification plans or approving modifications to existing ones. For example, a commissioner might approve or disapprove a department's request to reclassify a position from "secretary" to "administrative secretary." In making reclassification decisions, commissioners must be sure that the reclassification request is based on a significant change in duties and not solely on a desire to increase the compensation of the employee.

Salary Administration

The county commission's most visible role in human resource management is salary administration. The commission is called upon to approve new classification plans and annually update the county's pay plan. An effective pay plan is both internally and externally equitable. Being internally equitable means that positions with similar levels of duties and responsibilities are grouped together in the same pay grade. A pay plan is externally equitable when its pay rates are competitive with those of its main competitors.

County commissions will find various publications useful as they administer salaries. The Georgia Department of Community Affairs publishes an annual salary survey of the most common county government

positions (www.dca.ga.gov/dcawss/default.asp). The Georgia Department of Labor publishes an annual wage survey for many different types of occupations (www.dol.ga.state.us). The Bureau of Labor Statistics of the U.S. Department of Labor periodically publishes proprietary salary data for the more populous regions of the state (www.bls.gov). Additionally, the International City/County Management Association publishes regional salary data concerning county managers, administrators, and department heads (www.icma.org). When relying on any survey, one should exercise care in interpreting the data contained in published salary surveys. For example, job description titles may have been misinterpreted, resulting in incorrect information being reported. County commissioners should also be sure that they are comparing "apples to apples" and "oranges to oranges." In other words, are the duties and responsibilities of the county positions they are researching sufficiently similar to those reported in the survey? If not, no salary comparison should be made.

An effective pay plan generally has 21 to 29 salary grades. Each of these grades should have a salary range of approximately 50 percent from the minimum to the maximum rate. In order to make salary administration more manageable, steps can be inserted between the minimum and maximum rates. Progression through the steps can be linked to length of service and/or performance. For example, an employee performing at a competent level might be awarded a one-step increase, whereas an employee whose performance was considered outstanding might receive a two-step increase. In the past, many pay plans had steps with values of 4 percent to 5 percent. However, plans with increments of that size should be avoided because they usually require the county to spend a large percentage amount on step raises, resulting in less funds being available for general increases that are applied to the entire salary structure. Over a period of time, the practice of granting large step increases and making small overall adjustments may result in a pay plan that pays tenured employees well but is unable to attract new employees because of low entry rates.

After an equitable classification and pay plan has been implemented in a county, a commission's role in salary administration primarily concerns granting annual and merit increases. Annual (market or cost-of-living) increases should be applied to the entire salary scale and every employee's salary. The Consumer Price Index (CPI) or the Employment Cost Index (ECI), published by the U.S. Bureau of Labor Statistics, should be used as a guide in determining the amount of across-the-board increases. A good rule of thumb is to increase the wage scale by 75 percent of the CPI and then conduct a salary survey every four years

or so in order to gauge the county's placement in the labor market. Additionally, 2 percent to 3 percent of the personnel budget should also be set aside for step or merit raises, and merit increases should be separate from cost-of-living raises.

Employee Training and Development

The systematic training and development of county employees can greatly benefit an organization. A number of county positions require certification and continuing education by law.[4] Other training and certification may be optional. Training support can take the form of providing tuition reimbursement for attending college courses; encouraging fire, police, water, and wastewater personnel to seek additional certifications; or sponsoring in-house training courses specifically designed to increase the management and supervisory skills of county employees. The result of an effective training and development program is a more skilled and motivated workforce that is able to provide better service to the county's citizens. The Carl Vinson Institute of Government provides extensive training resources for local governments (www.cviog.uga.edu/services/education/statelocal.php).

Performance Appraisal

There is no foolproof way to appraise employee performance. However, some methods are more legally acceptable and job related than others. For many years, employee performance appraisal consisted of a manager's annual assessment of subordinate employees based on characteristics such as dependability, personality, and appearance. However, trait-based performance appraisal devices are no longer acceptable: the courts have ruled that performance appraisals, such as employment tests, must be job related. In many cases, adhering to these standards may necessitate writing different performance standards for every job classification. The appraisal format itself can be kept simple, but it should require the supervisor and employee to define in writing what the acceptable level of performance is for each major duty that the employee performs. This exercise underscores the necessity for accurate, job-specific position descriptions.[5]

In a job-based performance appraisal system, the employee develops goals and objectives for an evaluation period (usually one year). These goals and objectives are then discussed and weighted in a performance conference involving the employee and supervisor. At the end of the appraisal period, the employee performs the initial self-evaluation, which is then discussed with the supervisor. The advantages to such a system are that it

lends itself to employee development and provides an avenue by which to link overall organizational goals to individual and group performance.

Successful employee performance appraisal is a continual process, not just an activity that takes place once a year. Employees who receive constant feedback concerning their work are much more likely to make desired behavior changes than are those who receive periodic or infrequent information about their performance.

Performance appraisal is most successful when it is used primarily as a communication tool between supervisor and employee. However, it is being used increasingly to link employee performance and pay. While, on the surface, a pay-for-performance system seems desirable because of the nature of county jobs, such a system would be virtually impossible for a county government to implement. For example, although it is a fairly common practice in the private sector to base an insurance agent's pay on the number or value of policies he or she sells, basing a deputy sheriff's pay on the number of arrests he or she makes would be inappropriate.[6]

Personnel Policies and Procedures

An up-to-date set of personnel policies and procedures provides the ground rules for county employment. Personnel policies generally contain procedures for employee grievances and appeals, definitions of annual and military leave, and a statement of the county's philosophy regarding human resource administration. Due to the changing nature of personnel-related law, a county should have its personnel policies and procedures reviewed periodically by a labor attorney.

TERMINATION AND DISCIPLINE OF EMPLOYEES

The Terminable At-Will Doctrine and Property Interests

Commissioners who have worked in the private sector are often confused about the process for terminating or disciplining county employees. Because of special constitutional protections, it is not as simple to discipline and terminate a government employee as it is an employee in the private sector. One of the first issues to address when considering disciplinary action is whether an employee has a protected "property interest" in his or her job (i.e., a reasonable expectation of continued employment) or whether the employee is "at-will."[7] In Georgia, unless an employee is given a reasonable expectation of continued

employment (i.e., that he or she will not be fired except for cause), then the employee is considered an at-will employee and may be fired for a good reason, a bad reason, or no reason at all as long as he or she is not fired based upon sex, race, national origin, religious belief, disability, or age over 40 years. Employees who have a reasonable expectation of continued employment have a property interest in their county job and may not be fired without receiving their due process rights (e.g., notice of the disciplinary action and a meaningful opportunity to respond at a pretermination hearing and/or post-termination hearing).

Employees Who May Be Terminated without Due Process

An employee does not have a property interest in his or her employment if

1. he or she serves "at the pleasure" of the county or
2. he or she may be terminated if such action is found by a superior to be in the "best interest of the county" and no other applicable laws, provisions, or contracts exist to create a property right.

When a county abolishes positions for budgetary or other reasons, an employee whose position is abolished does not have a property interest in his or her job.[8]

Civil Service Systems

Under Georgia law, a county employee generally has no protected property interest and thus no due process rights unless he or she is employed under a civil service system.[9] The General Assembly may place employees under a county civil service system creating such a property right by passing specific authorizing legislation pursuant to a constitutional amendment.[10]

County governments also have the power to create by ordinance or resolution a civil service system for county employees. Such a civil service system may be extended to any and all county departments that are under the jurisdiction of the board of commissioners. The employees of the county constitutional officers may be added to the civil service system only if

1. the elected county officer applies in writing to the commissioners asking to have the employees covered and
2. the commissioners formally provide by ordinance or resolution that the positions be subject to the civil service system.[11]

If these requirements for placing employees under a civil service system are not met, the employees remain at-will, with no protected property interest.[12] Once positions have been moved under the county's civil service or merit system, they cannot be removed from that system unless a vacancy is created and a county officer fills the vacancy with a new employee who is not subject to the merit system.[13]

Employees Who Are Hired for a Certain Period of Time

In addition to a county's creation of a civil service or merit system providing that employees may only be dismissed for cause, a county employee may have a property interest in his or her employment if the county hired an employee for a definite period of time (i.e., a one-year employment contract) and the employee is discharged before the end of that time.[14] If an employee is hired for an indefinite period of time or an initial trial period, however, there is no property interest in his or her employment.[15] Additionally, if the contract specifically provides for early termination or at-will status, then the employee may not have a property interest in his or her employment.

At-Will Employees with Grievance or Appeal Rights

It is clear that county governments that desire to keep some or all of their employees terminable at-will may do so. A public employer, for example, can establish grievance or appeal procedures for its employees without losing its status as an at-will employer.[16] In addition, a public employer may change its policy with respect to whether its employees are employed at-will so long as affected employees are given notice and an opportunity to be heard regarding such changes.[17]

In order for the at-will employment relationship to be maintained, however, the county must ensure that the grievance or appeal procedure in no way restricts its discretion to terminate or otherwise modify its employees' employment by doing the following:

- Placing a disclaimer in the grievance or appeal procedure clearly stating that the procedure is not intended to restrict or limit the county's discretion in any way and reaffirming that the employment relationship is at-will.
- Avoiding the use of language in the grievance or appeal procedure that mandates the outcome of the grievance or appeal if certain conditions are met (i.e., avoiding statements like, "The employee shall be reinstated if . . ." or "The employer must sustain the grievance if . . .").

- Avoiding language in the procedure that establishes the grounds or reason upon which the employment decision in question (e.g., termination, transfer) must be based.
- Shifting the burden of proof onto the employee.

Changing from Property Interest to At-Will Status

A property interest in continuing employment could be revoked or terminated if the county gives employees reasonable notice and an opportunity to respond and the county demonstrates that such a change is in the public interest and "not taken as a subterfuge merely to single out and discharge particular employees."[18]

Thus, a county employer may eliminate a property interest in continuing employment by

- notifying the affected employees of the proposed conversion to at-will status and the reason therefore;
- permitting the affected employees a reasonable period of time to express their position regarding the proposed conversion (e.g., by written objections or suggestions, meeting with the county manager or personnel director); and
- having the matter considered and decided by the county commission in an open meeting.

Resignations

Resignations are presumed voluntary and thus waive any property interest a county employee might have in employment. If the resignation is found to be involuntary or forced by the county, it is called a constructive discharge and is considered to be a violation of due process if a hearing was not held. An employee's resignation will be deemed involuntary and a deprivation of due process if the county forces the resignation by coercion or duress or if the county obtains the resignation by deceiving or misrepresenting a material fact to the employee.[19]

Elements of Procedural Due Process for Employees with a Property Interest in Their Job

If a county makes an employment decision affecting an employee's property interest, the employee is then entitled to procedural due process, which requires the county to provide the employee with both a pretermination and a post-termination hearing.

The Pretermination Hearing

A county employee with a property interest may not be terminated without a hearing prior to his or her separation from employment.[20] County employees who are terminated because of a reduction in force, however, generally are not entitled to a pretermination hearing, as long as post-termination procedures are available.[21]

A pretermination hearing "need not be elaborate"; it is only "an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action."[22] When post-termination hearings are provided, the county is not required to provide full "trial-type" rights, such as the right to present or cross-examine witnesses, for a pretermination hearing.[23] The due process requirements for a pretermination hearing are simply (1) notice to the employee and (2) an opportunity for the employee to respond.[24]

An employee must only be given notice and an opportunity to respond to proposed disciplinary action. Any disciplinary action that may affect a property interest (such as a demotion or a transfer from one job position to another that results in less pay, less authority, or less chance for promotion) also may require that the employee be provided with notice and an opportunity to be heard prior to the actual disciplinary action.

The importance of a pretermination hearing cannot be overstated, although its procedural requirements are minimal. The safest course of action for public employers is to provide the employee with notice in writing and provide for a reasonable period within which the employee may respond to the proposed disciplinary action. This eliminates any possibility that the employee may claim that he or she was never given a pretermination hearing. As long as an employee is told why the proposed disciplinary action is being taken and is given the chance to respond to the charges before the action takes effect, pretermination due process requirements have been satisfied.

The Post-Termination Hearing

Where there is a property right to employment (i.e., the employee may be terminated only for cause), procedural due process requires not only a pretermination hearing but also a "post-termination" procedure. The post-termination hearing, as it is commonly called, is a far different procedure than the pretermination hearing. The post-termination hearing must include opportunity to present and cross-examine

witnesses. In addition, the post-termination proceeding must be held before an impartial tribunal.

When an employee is entitled to procedural due process, the post-termination hearing is often the event most closely scrutinized by a court. It is critical that the employee be accorded every reasonable procedural right so that the post-termination hearing will be considered proper. In order to eliminate any doubt as to the events that transpired in the post-termination hearing, it is important that the proceedings be recorded by a competent court reporter or the proper minutes be taken. The procedures for the post-termination hearing should be given to the employee in writing at the time the adverse employment decision is made.

The following is a list of recommended procedures that should be followed when conducting post-termination hearings:

1. The employee should be given written notice of the charges against him or her, with sufficient detail to enable the employee to show any errors that may exist.[25]
2. The names of all witnesses who will be called by the county as well as an explanation of their expected testimony should be given to the employee.[26]
3. The hearing must be held within a reasonable time.[27]
4. The employee must be allowed to present evidence on his or her own behalf.[28]
5. The employee must be given an opportunity to be heard at the hearing.[29]
6. The employee must be allowed to cross-examine his or her accusers in the presence of the decision maker.[30]
7. The hearing must be held before a tribunal having apparent impartiality to the charges.[31]
8. The employee must be allowed the right to have a lawyer present to assist him or her.[32]

Name-Clearing Hearings and Liberty Interests

A county employee's right to a "name-clearing hearing" stems from the employee's constitutional "liberty interest," or the protection of an employee's good name and reputation. A county may not deprive a county employee of a protected liberty interest without due process of law.

Damage to an employee's reputation alone is generally not enough to be considered an unlawful deprivation of the employee's liberty interest.[33] However, if other employment opportunities are foreclosed because false information is created and distributed by the governmental employer, then the employee's liberty interest is implicated. A county employee's liberty interest exists regardless of whether the employee is terminable at-will or has a property interest in continued employment.

When a Name-Clearing Hearing Is Required

A violation of a county employee's liberty interests occurs when there has been (1) a false statement that (2) is of a stigmatizing nature, (3) attends to the county employee's discharge, and (4) was made public (5) by the county and (6) the employee has not had a meaningful opportunity to have a name-clearing hearing.[34] These elements are discussed in more detail below.

Procedural Requirements of the Name-Clearing Hearing

A name-clearing hearing is not intended to evaluate the correctness of the termination decision or to reconsider the termination; it is merely a limited procedure provided so that the employee may have an opportunity to clear his or her name or reputation. Because of this, it is not required that a hearing be held before the termination or even before the publication of any stigmatizing material.[35] Thus, the process due for a name-clearing hearing is not as strict as that for a hearing for deprivation of a property interest.[36]

For a name-clearing hearing, the county must give the terminated employee notice of the charges raised and then the opportunity to refute the allegations against him or her through either cross-examination of the accusing witnesses or introduction of independent evidence.[37] The hearing must provide the employee with "an opportunity to support his allegations by argument however brief, and, if need be, by proof, however informal."[38] The hearing must also be held before an impartial tribunal. This requirement has been interpreted rather narrowly. In one case, for example, the court held that the tribunal could be made up of members of the board of commissioners that originally fired her.[39] The hearing must also be given within a reasonable time after the employee's termination. Finally, the county must merely inform the employee of the right to such a hearing. The county does not need to initiate the hearing process unless requested to do so by the employee after being notified of his or her right to the hearing.

Other Aspects of Name-Clearing Hearings

County governments should be especially careful about any information that is put into written reports regarding the termination of employees. Comments about the ethics, honesty, character, or guilt of an employee should be kept to a minimum or avoided entirely. Moreover, any statements—even those concerning the employee's work performance—should be backed up with factual evidence so as to prove the truth of the statements. Truth is a valid defense.

The offer to the employee of a name-clearing hearing should be made in writing so that there is no dispute over whether the offer was made. In light of the fairly flexible procedural requirements held to be sufficient by the courts, there seems little downside for a county to offer a terminated employee the opportunity for a name-clearing hearing. With such minimal requirements, and with such large consequences for failure to meet them, the safest course of action is to offer a name-clearing hearing in each and every case of employee termination.

Personnel Decisions: The Open Meetings Act and the Open Records Act

Personnel files are generally open records, although some of the information contained in them may not be subject to disclosure (see Chapter 25 for more information). For instance, social security numbers, insurance and medical information, confidential evaluations, mother's maiden name, financial data, account numbers, month and day of birth, home address, and telephone number must be redacted from the files before allowing public inspection.[40] Records obtained during investigations related to the suspension, firing, or complaints against county employees do not have to be released until 10 days after the report has been presented to the board of commissioners or department head or until 10 days after the investigation is concluded.[41]

The board of commissioners may deliberate on the appointment, employment, compensation, hiring, disciplinary action, dismissal, or periodic evaluation of a county employee in a closed executive session. However, the board must be in open session when receiving evidence or hearing arguments to determine disciplinary action or the dismissal of a county employee. Any vote on such a personnel matter must be taken in public.[42]

Occasionally, litigation over the termination of an employee may result in a settlement agreement that requires purging certain information about the employee. In such a case, the personnel file must contain

a notation that the file has been purged as a condition of a settlement agreement. Furthermore, if another governmental agency contacts the county about the former employee's work history in order to make a hiring decision, the county is required to disclose the fact that the personnel file was purged pursuant to a settlement agreement.[43]

COUNTY EMPLOYEES AND THE FIRST AMENDMENT

Claims for violation of freedom of speech and freedom of association by public employees have been the fastest-growing areas of §1983[44] employment law in recent years. As in the case of a liberty interest claim, it is important to recognize that all county employees have First Amendment rights—regardless of whether they are at-will employees or have a property interest in their jobs. In other words, First Amendment rights do not depend on whether the employee is terminable at-will.[45] A county may be sued for any discharge of an employee "on a basis that infringes his constitutionally-protected speech or associations."[46]

Freedom of Speech Cases

In order for a county employee to prevail on a First Amendment cause of action, the employee must show that

1. he or she engaged in speech on a matter of public concern,
2. his or her interest in the speech outweighs the county employer's countervailing interest in providing efficient and effective services to the public, and
3. speech was a substantial or motivating factor leading to discipline. If the employee is able to make that showing, the county must show that it would have made the same employment decision in the absence of the protected speech.[47]

In order to be protected, a county employee's speech must be related to matters of public concern. The First Amendment does not apply when a public employee speaks on matters that are of a personal interest as an employee.[48] The First Amendment protects speech that relates to political, social, or other matters of concern to the community.[49] In order to determine whether the speech touches a matter of public concern, the courts will look at the content, form, and context of the employee's speech.[50]

If a court determines that an employee's speech is constitutionally protected, the court will then apply what is referred to as the Pickering balance test.[51] The Pickering balance test raises the issue of whether

certain types of public employees, because of the duties and requirements for their job, may be limited in speech that otherwise is constitutionally protected. Thus, courts must consider whether the employee's interest in speaking on matters of public concern outweighs the public employer's legitimate interest in promoting efficient public service.

In weighing the competing interests under the Pickering balance test, a court considers

1. whether the nature of the county's public responsibilities are such that a close working relationship is essential;
2. whether the speech at issue impedes the county's ability to perform its duties efficiently;
3. the manner, time, and place of the speech; and
4. the context within which the speech was made.

The more the employee's speech touches on matters of significant public concern, the greater the level of disruption to the government that must be shown.[52] Courts will consider whether the speech at issue "impairs discipline by superiors or harmony among coworkers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes performance of the speaker's duties or interferes with the regular operation of the [public employer's] enterprise."[53] The First Amendment "does not require a public employer to tolerate an embarrassing, vulgar, vituperative, ad hominem attack," even if such an attack touches on a matter of public concern.[54]

Courts have consistently recognized that quasi-military organizations such as police and fire departments have "special concerns" that tilt the Pickering balance test in their favor. "Order and morale are critical to successful police work: a police department is 'a paramilitary organization, with a need to secure discipline, mutual respect, trust and particular efficiency among the ranks due to its status as a quasi-military entity different from other public employers.'"[55] Courts have found a "need for discipline, esprit de corps, and uniformity" in police departments.[56]

An employee must show that the county took action in retaliation for the employee's use of his or her First Amendment rights. The employee must only show that the employee's speech was a "substantial" or "motivating" factor behind an employment decision. Even if an employee's speech was a substantial factor in the decision to terminate him or her, the county may still win if it can show that the employee would have been discharged in the absence of the speech.[57]

Political Patronage Cases

In general, a county employee may not be discharged because of his or her political affiliation. However, a county employee who holds a position involving policy making or confidentiality may be dismissed, hired, promoted, transferred, and recalled after layoffs for his or her political beliefs.[58] For instance, an assistant public defender fired because he was not affiliated with or sponsored by the Democratic Party violated the First Amendment since his duty was not to the public at large but rather to individual citizens whom he represented in controversies with the state.

The issue of whether an employee is in a confidential and policy-making position has been particularly troublesome in political patronage cases involving deputy sheriffs. The court found in one case that loyalty to a sheriff and the goals and policies he seeks to implement is an appropriate requirement for the effective performance of a deputy sheriff.[59] The court described deputies as the "alter ego" of the sheriff and reasoned that the "closeness and cooperation required between sheriffs and their deputies necessitates the sheriff's absolute authority over their appointment and/or retention." Therefore, it did not violate the First Amendment for a sheriff to decline to reinstate deputies who did not support the sheriff in an election campaign. In another case, a sheriff was found to have the right to promote and demote based on political patronage.[60] Specifically, deputy sheriffs who had supported the incumbent sheriff alleged that it was a violation of the First Amendment for them to be transferred from their probationary lieutenant positions back to their previous positions by a newly elected sheriff. The court found that personal loyalty to a sheriff is an appropriate requirement for effective performance of a deputy sheriff.

Because of the difficulty in determining an employee's policy-making or confidential status, public employers increasingly are confronted with difficult decisions. However, because courts have viewed these types of cases in a particularly fact-specific manner, there is little certainty in the result of any case. Accordingly, terminations based on clearly protected First Amendment implications or patronage factors must be closely examined based on the particular facts associated with the individuals involved. Counties must recognize that courts are giving increasing protection to freedom of speech claims and that terminations that are clearly based on what is arguably protected speech are difficult to sustain, even in situations in which the employee is a policymaker or party affiliation is a legitimate concern.

In addition, counties must be aware of the Hatch Act's prohibitions against active participation in political management or political campaigns. The Hatch Act[61] prohibits political activities among employees whose employment is made possible by use of federal funds or appropriations from the Federal Treasury. The act prohibits a "state or local officer or employee" from

- using official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for office;
- directly or indirectly coercing, attempting to coerce, commanding, or advising a state or local officer or employee to pay, lend, or contribute anything of value to a party, committee, organization, agency, or person for political purpose; or
- being a candidate for elective office in a partisan election.[62]

However, the act does permit a county officer or employee to be a candidate in nonpartisan elections.[63]

ANTIDISCRIMINATION STATUTES

Race, Sex, Religion, and National Origin: Title VII

Title VII of the Civil Rights Act[64] makes it illegal to make employment decisions like hiring, firing, compensation, and other terms, conditions, or privileges based upon an individual's race, color, religion, sex (including pregnancy), or national origin.[65]

Protection from Intentional Discrimination

Title VII prohibits employers from discriminating against individuals based upon their race, sex, religion, or national origin when hiring, firing, recruiting, testing, compensating, or transferring employees. Title VII also prohibits harassment in the workplace on the basis of race, sex, religion, or national origin. Counties cannot make employment decisions based upon stereotypes about the abilities, traits, or performance of individuals of a certain race, sex, religion, or ethnic group.

Protection from Unintentional Discrimination

Even when a county is not motivated by discriminatory intent, Title VII prohibits the county from having neutral policies that negatively impact a particular race, sex, religion, or ethnic group. For instance, some fire

departments have been required to reexamine their physical fitness requirements to ensure that they do not unfairly exclude women.

Protection from Religious Discrimination

County employees are also protected from employment discrimination based on religion.[66] The statute defines "religion" as including all aspects of religious observance and practice as well as belief, unless an employer demonstrates that it is unable to reasonably accommodate an employee's religious observance or practice without undue hardship on the conduct of the employer's business.[67] Title VII requires that employers reasonably accommodate applicants' and employees' sincerely held religious practices, unless doing so would impose an undue hardship on the operation of the employer's business.

Protection for Those Who Oppose Employment Discrimination

A job applicant or current or former employee who internally or informally opposes a discriminatory employment action by the county is protected by Title VII so long as the employee clearly communicates to the county a belief that its activity constitutes a form of employment discrimination protected by Title VII and the manner of the employee's opposition is reasonable.[68] For instance, the county may not retaliate against an employee or job applicant who has "testified, assisted, or participated, in any manner in an investigation, proceeding, or hearing" brought under Title VII.[69] The protections of the participation clause arise out of the filing of a formal charge or complaint of discrimination with the Equal Employment Opportunity Commission or a court, and the protected activity is limited in scope to testimony, assistance, or participation during the course of an investigation, proceeding, or hearing under Title VII.[70]

Age Discrimination in Employment Act

The Age Discrimination in Employment Act protects people who are 40 years old or older from discrimination because of age.[71] The act also makes it illegal to retaliate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.

Equal Pay Act

The Equal Pay Act prohibits, with certain exceptions, differentials in pay based on sex in jobs that require equal skill, effort, and responsibility

and that are performed under similar working conditions.[72] The Equal Pay Act was recently amended by the Lilly Ledbetter Fair Pay Act (Fair Pay Act) to expand the length of time an employee has to file a claim of discrimination. The Ledbetter Fair Pay Act amends Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Rehabilitation Act to state that an act of discrimination occurs each time wages are paid to an employee following a discriminatory pay decision. As a result, an employee who normally would have been time-barred from asserting a claim of pay discrimination based on a decision made years or perhaps decades in the past can now make a claim as long as it is filed within 180 days of when the employee last received a pay check.

Thus, counties may need to review their record retention policies and consider preserving records of pay decisions for much longer than they have in the past so that they are able to defend themselves in pay discrimination cases that are filed later. These records would include decisions about not only direct pay increases but also promotions, job assignments, layoffs, and other matters that affect compensation. It would also be prudent for counties to document which managers and supervisors make pay decisions or decisions that might affect compensation. Otherwise, if a pay discrimination charge is filed, there may be no way of identifying who made the pay decision at issue.

Americans with Disabilities Act

The Americans with Disabilities Act[73] (ADA) prohibits discrimination by employers against qualified individuals with disabilities in virtually all aspects of employment, including the application process, hiring, advancement, termination, compensation, and training. The ADA contains extensive and sweeping provisions preventing discrimination against persons with disabilities. A disability is a physical or mental impairment that substantially limits one or more major life activities. The definition applies to individuals who have a record of such impairment or who are regarded as having an impairment. Examples of conduct specifically prohibited by the ADA include

1. segregating, limiting, or classifying on the basis of disability a qualified individual with a disability in a way that would adversely affect employment opportunities or status (for instance paying a disabled employee less than is paid a similarly situated nondisabled employee);

2. excluding or denying equal job benefits to a qualified individual because that person has an association or relationship with a disabled person; or

3. using tests or other selection criteria that tend to screen out individuals with disabilities, unless the test is job related and consistent with business necessity.

The ADA prohibits the county from asking an applicant about any disabilities. The only acceptable preemployment questions that the county may ask would pertain to the applicant's ability to perform all of the essential duties of the job.

A county may require a medical examination of an applicant after tendering an offer of employment and before the applicant begins work. The employer may condition the offer on the results of the examination if all entering employees in the same job category are subjected to such an examination.

The ADA requires a county to provide "reasonable accommodation" of an otherwise qualified person with a disability unless the county can show that it would constitute an undue hardship. A reasonable accommodation is any modification or adjustment to a job or the work environment that would allow a qualified employee or job applicant with a disability to perform the essential job functions. Examples of reasonable accommodations include restructuring a job and modifying work schedules or equipment.

The ADA requires the county to determine the essential functions of a job and look at possible modifications and adjustments to the job and/or the work environment that would allow a person with a disability to perform those functions. Counties should make sure that they have written and updated job descriptions that list the essential functions of every job.

Georgia Antidiscrimination Laws

In addition to the federal antidiscrimination statutes, Georgia has enacted the Georgia Fair Employment Practices Act, which specifically prohibits discrimination in public employment on the basis of race, color, religion, national origin, sex, disability, or age.[74] An individual seeking relief under this statute must file a written, sworn complaint with the administrator of the Commission on Equal Employment within 180 days of the alleged adverse employment action. If the administrator finds that there is

cause to believe that a violation occurred and efforts at conciliation are not successful, the governor may appoint a special master to conduct a hearing on the complaint.

RIGHT TO PRIVACY: WORKPLACE MONITORING AND SEARCHES

Workplace Searches

Counties are subject to different standards than are private companies with respect to workplace searches. For county employees, searches are governed by the Fourth Amendment. In order to establish a violation of rights under the Fourth Amendment, an employee first must prove that he or she had a legitimate expectation of privacy with regard to the place searched or the item seized. Counties should make it clear from the outset to all employees that all county property, including offices, computers, desks, and file cabinets, are subject to search and that there is no expectation of privacy for employees.

All workplace searches by a county must be reasonable.[75] Typically, a search of an employee's office by a supervisor will be justified if there are reasonable grounds for suspecting that the search will produce evidence of work-related misconduct by the employee or that the search is necessary for some noninvestigatory work-related purpose.

Monitoring of Telephones and E-mail

Rapidly expanding communications technology creates new ways in which an employer can monitor its employees' activities. These methods include telephone surveillance, audio surveillance, and monitoring of employees' electronic and voice mail messages. Many of the same considerations applicable to workplace searches apply to searches of employees' e-mail and phones.

The Electronic Communications Privacy Act of 1986 (ECPA)[76] prohibits an employer from secretly monitoring certain communications of its employees. Both employees and nonemployees who claim to have been monitored as a result of an investigation of an employee may bring a civil action under the ECPA.[77] Furthermore, the ECPA is applicable to the electronic and oral communications of public employees.[78]

There are certain exceptions to the ECPA. A county would not be liable if the "interception" of a communication was by the human ear alone (i.e., overhearing a conversation). Additionally, a county may monitor covered communications when one of the parties has given his or her prior consent.[79]

Finally, pursuant to the "business extension exception" or "telephone extension exception," a county may utilize telephone extension equipment provided by a communications carrier in the normal course of business.[80] For example, a county could monitor employee communications with a special switchboard and other intercom equipment that is a regular component of its business phone system. The federal courts have found that an employer's recording of phone conversations of two of its employees while both were on duty fell within the "telephone extension exception."[81] The court first noted that in order to qualify for the exception, the employer is not required to use a standard telephone extension but rather is permitted to use any telephone instrument, equipment, or facility. The court then held that the employer's interception was in the ordinary course of business and was not the interception of a personal call, reasoning that the conversation occurred during "office hours, between co-employees . . . and concerned scurrilous remarks about supervisory employees in their capacity as supervisors. Certainly the potential contamination of the working environment is a matter in which the employer has a legal interest."

The Stored Communications Act[82] prohibits searching certain stored electronic data without authorization. Although this is a developing area of law, county employers generally have the right to access communications of their employees made on county-owned and -operated devices within the scope of their employment under the ECPA provided that the search is made for a legitimate work-related reason and is not excessive in scope.[83] Counties should consider enacting a clear policy regarding the right to access and monitor the communications of employees on county-owned devices, including obtaining employee consent to search as a general practice, and to follow that policy consistently, emphasizing that employees do not have a reasonable expectation of privacy in communications made on county-provided devices.

Drug Testing

Drug testing of county employees is considered a search. Counties may not require employees to take a drug test without reasonable suspicion that the employee is under the influence of drugs or alcohol unless the county has a compelling special interest. There are two basic types of drug testing:

1. Drug testing when there is a reasonable suspicion of an employee being under the influence of drugs.

2. Random drug testing of employees in "high-risk jobs" (e.g., bus drivers, mechanics who work on buses or Rideshare vehicles), which is considered a compelling interest.

Counties wishing to subject their employees to drug tests must comply with the Fourth Amendment guaranteeing the right against unreasonable searches and seizures.[84] Public employees working in high-risk jobs are subject to random drug testing pursuant to Georgia law.[85]

WHISTLEBLOWER STATUTES

Georgia's Whistleblower Protection Act

Georgia's Whistleblower Protection Act includes protection of county employees.[86] The act prohibits counties from retaliating against employees who "blow the whistle" on waste, fraud, or abuse in government. Specifically, counties are restricted on personnel actions that may be taken against a county employee who refuses to participate in activity that he or she reasonably believes to be in violation of the law. Accordingly, county employees may sue counties for retaliation, thus greatly increasing local governments' exposure to litigation. Commissioners need to be mindful of whether policies and directives comport with the law and can be defended in the face of challenges from alleged whistleblowers.

Federal False Claims Act

The Federal False Claims Act[87] prescribes liability for a person who knowingly presents a false or fraudulent claim for payment or approval to the United States government. The statute includes a whistleblower provision,[88] which prohibits the discharge, demotion, suspension, threat, harassment, or other manner of discrimination in the terms and conditions of employment of an employee because of lawful acts done by the employee in furtherance of an action for a false or fraudulent claim for payment or approval to the United States government.

EMPLOYEE COMPENSATION, LEAVE, AND BENEFITS

Minimum Wage, Overtime, and Compensatory ("Comp") Time: Fair Labor Standards Act

The Fair Labor Standards Act (FLSA) sets standards for minimum wage, maximum hours, overtime pay, record keeping, and child labor for all

covered employment, unless a specific exemption applies. The FLSA requires employers to

- maintain payroll records,
- pay men and women equal pay for equal work,
- pay at least the statutory minimum wage,
- pay an overtime premium that must be at least one and one-half times the average hourly straight time pay for the employee or provide compensatory time off at the rate of at least one and one-half times the number of hours worked over 40 in a workweek, and
- maintain established child labor standards.

As employers, counties must be aware that although the FLSA is the primary federal wage law, there are additional federal laws governing the payment of wages to their employees, such as the Equal Pay Act. Like the FLSA, these statutes are designed to ensure the payment of minimum wages, overtime pay, and equal pay for equal work.

For most employees, the FLSA requires the payment of overtime wages in an amount of one and a half times the employee's regular rate for all hours actually worked in excess of 40 in any workweek. If a holiday occurs during the workweek or the employee takes any other time off during the week, these hours do not count toward the 40 hours actually worked. For every hour over 40 actually worked in a workweek, the employee must be paid one and a half times his or her regular rate (i.e., overtime) or receive one and a half hours in paid leave (i.e., compensatory time, or "comp" time).

The FLSA contains a number of exemptions and exceptions. Some county employees, such as elected officials and their staff, policy-making employees, legal advisors, legislative employees, volunteers, and others, simply are not covered by the FLSA. Other types of employees are covered but are exempt. Courts have noted that the FLSA is remedial in nature and should be read liberally in favor of workers.[89] Generally speaking, employees are not considered to be "volunteers" for any work they perform for their employer.

"White-Collar" Exemptions

There are several exemptions to the overtime requirements of the FLSA, the most common of which are for "white-collar" employees. The catego-

ries under the FLSA are executive employees, administrative employees, professional employees, and computer-related personnel.

The minimum salary level for all white-collar employees is $455 per week ($23,660 per year). For computer employees, the salary requirement applies, but the regulations also stipulate an hourly rate qualification of at least $27.63 per hour.

For executive employees, the regulations require that

1. the employee's primary duties consist of the management of the enterprise for which he or she is employed or of a customarily recognized department or subdivision,
2. the employee customarily and regularly directs the work of two or more other employees, and
3. the employee has the authority to hire or fire other employees or is able to provide suggestions and recommendations that are given particular weight as to the hiring, firing, advancement, promotion, or any other change of status of other employees.

The duties test for administrative employees requires that

1. the employee's primary duty is performing office or nonmanual work directly related to management policies or general business operations of the employer or the employer's customers and
2. the employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

The standard test for the professional exemption requires learned professionals to perform work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study. "Work requiring advanced knowledge" is defined as work that is predominantly intellectual in character and that requires consistent exercise of discretion and independent judgment. Creative professional employees are required to perform work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor. The exemption does not apply to work that can be produced by a person with general manual or intellectual ability and training.

Under the regulations, an exempt computer employee must

1. have a primary duty of performing work requiring theoretical and practical application of highly specialized knowledge in computer systems analysis, programming, and software engineering;
2. be employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer software field; and
3. consistently exercise discretion and judgment.

Other court decisions indicate that improperly disciplining an employee who is exempt from the FLSA and is paid on a salary basis by suspension without pay may result in that employee and all other similarly situated employees becoming subject to the FLSA and thus entitled to overtime pay or compensatory time off for all hours worked in excess of a 40-hour workweek.[90]

Public Safety Employees

Recognizing that public safety employees often work 12- to 24-hour shifts, the FLSA provides an exception to the general requirement that overtime or compensatory time be computed on a weekly basis and a premium paid for hours in excess of a 40-hour workweek for firefighters and law enforcement personnel.[91] The exemption allows a public employer to have firefighters work up to 212 hours and law enforcement personnel work up to 171 hours in a 28-day work period without incurring overtime pay liability. The work period set out in this provision may be any period of at least 7 consecutive days but not more than 28 consecutive days.

Not included in the exemption are the "civilian" employees of a fire department and law enforcement department dispatchers, radio operators, repair workers, janitors, clerks, or stenographers.[92] Rescue and ambulance service personnel will qualify for the exemption as employees engaged in fire protection activities if they "form an integral part of the public agency's fire protection activities" or as employees engaged in law enforcement activities if they "form an integral part of the public agency's law enforcement activities."[93] Ambulance and rescue service employees may also qualify if they are employees of a public agency other than a fire department or law enforcement agency and their services are substantially related to firefighting or law enforcement activities.[94]

Under the FLSA, courts have held counties liable for overtime pay to law enforcement personnel for off-duty time, including nights, week-

ends, and holidays, spent caring for a canine used for law enforcement purposes, either in-house or for outside task force participation with other law enforcement agencies such as those dealing with drug and bomb detection. If an officer is responsible for feeding, training, grooming, and cleaning up after the dog and does this caretaking in addition to his or her regular 40-hour workweek or extended work period, the extra time spent caring for the dog constitutes overtime, and the officer must be compensated.[95]

The FLSA also provides a complete overtime pay exemption for individuals employed by a public agency with fewer than five employees in fire protection or law enforcement activities.[96] In determining whether a public agency qualifies for the exemption, fire protection and law enforcement activities are considered separately. Thus, if a county employs fewer than five employees in fire protection activities but five or more in law enforcement activities, it may claim the exemption for fire protection but not law enforcement.[97]

Compensatory Time Off in Lieu of Overtime Pay

Although public safety employees may accumulate up to 480 hours of compensatory time, other nonexempt employees may accrue only 240 hours. After that maximum is reached, a covered employee must be paid overtime if he or she works more than 40 hours in a workweek. However, the county may require employees to use compensatory time. Employees must be permitted to use their compensatory time within a "reasonable period" of a request unless it would be "unduly disruptive." Employees protected by the FLSA must be paid any unused compensatory time upon separation from employment with the county.[98]

Family and Medical Leave Act

The Family and Medical Leave Act of 1993 (FMLA) requires all public employers to provide unpaid leave to employees in certain situations. Up to 12 weeks of unpaid leave must be provided to an eligible employee during any 12-month period for the birth or adoption of a child or placement of a foster child; in order to care for a spouse, child, or parent with a serious health condition; or due to the employee's own serious health condition. Additionally, eligible employees are allowed 12 weeks of unpaid leave for a qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on active duty (or has been notified of an impending call or order to active duty) in support of a contingency operation.[99] Finally, eligible employees may now take unpaid leave or substitute appropriate paid

leave if the employee has earned or accrued it for up to 26 workweeks in a single 12-month period in order to care for a covered service member with a serious injury or illness.[100]

An employee who takes leave under the FMLA must be returned to the same position that he or she held prior to taking such leave or to an equivalent position, and the county must maintain group health insurance coverage for the employee during the period of leave, as if the employee had worked. The leave guaranteed by FMLA is unpaid, although a county may require that an employee use any available vacation, personal, family, or sick leave before the unpaid portion of the 12-week leave period begins. In addition, leave under the FMLA may be taken intermittently or on a reduced schedule when medically necessary.[101]

Military Leave of Absence: Uniformed Services Employment and Reemployment Rights Act and Georgia Law

The Uniformed Services Employment and Reemployment Rights Act (USERRA) is the primary federal law applicable to reemployment rights of employees who are called to active duty.[102] In general, USERRA and Georgia law require employers to reinstate employees who have been absent from work because of active military service, and they prohibit discrimination and/or retaliation against such individuals. All county officers and employees who serve in the Army, Navy, Marine Corps, Air Force, Coast Guard, or National Guard or in any of their reserves are entitled to a military leave of absence while they are engaged in the performance of military duty as well as while traveling to and from such duty.[103] In addition to active duty, both active and inactive duty for training are included.

The employee or the appropriate officer of the military branch in which the employee is serving must provide written or oral notice of the military service unless military necessity prevents the giving of notice or the giving of notice is otherwise impossible or unreasonable.[104] The county may neither refuse to allow an eligible employee or official to take the military leave of absence nor require the employee or official to find a suitable replacement to cover his or her county duties during such absence.

Military leave of absence may not be considered an interruption of employment, regardless of any local legislation or county ordinance to the contrary.[105] Additionally, the county may not discriminate against an employee because of his or her military obligations.[106] This provision includes consideration of military obligations when making decisions to hire, promote, terminate, or provide benefits to individuals.

In general, Georgia law requires counties to pay their officers and employees who are on military leave of absence their regular county salary or other compensation for the first 18 days of ordered military service per federal fiscal year (i.e., October 1 through September 30).[107] In certain circumstances, members of the National Guard may be entitled to their county salary for 30 days per federal fiscal year.[108] Additionally, USERRA provides that these officers and employees may use any vacation leave that accrued prior to their military service. However, the county may not require an employee to use vacation leave.[109]

If the county provides health insurance coverage for employees, it must continue to provide the coverage for the first 30 days of ordered military service. However, after the initial 30 days, if the employee chooses, he or she may elect to continue coverage for up to 18 months or the period of military service, whichever is shorter.[110] The employee may be required to pay up to 102 percent of the cost to provide health insurance coverage after the initial 30 days.

There are specific rules for determining pension and retirement benefits for county employees and officers on military leave of absence.[111] County commissioners are encouraged to consult with their retirement plan administrator as well as the county attorney in order to determine pension or retirement benefits during the military leave of absence.

The time limits for reporting to the county after completion of military leave of absence depend upon the length of military service.[112] When these officers and employees return to the country, they may not lose any benefits or privileges because of their absence. They are entitled to seniority and all seniority rights and benefits that they would have reasonably obtained if they had not taken a military leave of absence.[113] Additionally, they are entitled to non-seniority-based rights and benefits on the same basis as any other employee on any type of leave of absence provided by the county.[114]

The length of service also determines the position into which an employee is reinstated.[115] In general, returning employees and officers are entitled to be reinstated in the job that they would have had if they had remained continuously employed (including any likely promotions) so long as the person is qualified for the job or can become qualified after reasonable efforts are made by the county.

For questions about the USERRA, commissioners should contact the National Committee for Employer Support of the Guard and Reserve or the Veterans' Employment and Training Service division of the U.S. Department of Labor.

Leave for Voting

Each employee must be given up to two hours off of work to vote in any municipal, county, state, or federal election in which he or she is qualified to vote. However, if the county's work hours begin at least two hours after the opening of the polls or end at least two hours prior to the closing of the polls (i.e., if the employee does not have to be at work until 9:00 a.m. or is done with work by 5:00 p.m.), the county does not have to provide additional time off for voting.[116]

Leave for Jury Duty and Court Proceedings

Employees who are summoned to jury duty or served with a subpoena or court order requiring their attendance at a judicial proceeding may not be terminated, disciplined, or otherwise penalized because they are absent from work.[117]

Employee Benefits

The Employment Retirement Income Security Act (ERISA) is the primary statutory scheme governing employee welfare and pension plans. However, ERISA does not apply to government plans such as health and retirement plans established or maintained by local governments.[118] Accordingly, most disputes concerning employee benefits for county employees are governed by state law and the application of general principles of contract and tort law. In this regard, Georgia courts have consistently held that ordinances conferring benefits to government employees create a contractual relationship.[119]

Retirement Benefits

Counties may establish and maintain retirement or pension systems for their employees.[120] Counties are authorized by state law to set up deferred compensation plans for their employees[121] that must not reduce any retirement, pension, or benefit available to them.[122]

Georgia courts have consistently held that plan administrators may correct errors resulting in overpayment of retirement benefits.[123] Local governments may modify or terminate retirement plans—even in the absence of an error—when the plan itself reserves the right to do so.[124] The Court of Appeals has held that an inadvertent clerical error does not modify an existing contract to pay retirement benefits pursuant to a retirement plan.[125] In this case, the court rejected the employee's negligence claim because the employee did not justifiably rely on the oral estimate allegedly given to him, explaining that the plaintiff did not request a

written explanation or calculation of his retirement benefits or a written confirmation of the retirement plan's benefits. The court added that if it ruled otherwise, "every retiree would be free to deny having received the written notice of benefits and to contend that [he or she] had been orally advised of a higher benefit."[126]

Social security benefits are also available to county employees.[127]

Medical and Disability Benefits

Counties may provide insurance and hospitalization benefits for their employees.[128] Georgia courts have held that government plans may amend or terminate disability plans if the original legislation reserved the right to do so.[129] Although ERISA does not apply to government plans, counties still must comply with the continuation of medical insurance coverage and notice requirements provided for in the Consolidated Omnibus Budget Reconciliation Act (COBRA). COBRA amended not only ERISA but also the Public Health Services Act (PHSA),[130] which does apply to local governments. Thus, for example, the PHSA provides that local governments must offer to terminated employees continued health plan coverage for a maximum period of 18 months (and in limited circumstances, up to 36 months) after their termination.[131] The PHSA also requires that the plan administrator notify the employee in writing of the employee's right to elect continuing coverage within 14 days of receiving notification of the employee's termination (or other qualifying events).[132] The employee has 60 days after medical coverage otherwise would terminate due to a qualifying event to elect continuation of coverage.[133]

Workers' Compensation Benefits

Georgia's workers' compensation statute applies to county employees.[134] The law specifically encompasses "[a]ll firefighters, law enforcement personnel, and personnel of emergency management . . . agencies, emergency medical services, and rescue organizations whose compensation is paid by . . . any county . . . regardless of the method of appointment, and all full-time county employees and employees of elected salaried county officials." In addition, elected county officers and certain volunteer personnel can be covered if the governing authority adopts the appropriate resolution.[135]

Indemnification and Defense Benefits

Counties have the authority and the discretion to provide legal defense and indemnification to employees.[136] Georgia courts have recognized

that a county's enactment of such indemnification and defense ordinances is a form of employee benefit.[137] One court held that by enacting the ordinance, "the county has agreed to indemnify its employees; that is, the county's obligation is like that of a liability insurance company using its attorney to defend the covered employee and cannot renege on that obligation.[138] However, counties are given "considerable latitude in determining what actions will be defended."[139] Absent an abuse of discretion, Georgia courts will not interfere with a county's determination that an employee is not entitled to indemnification based on a provision in the ordinance.[140]

Garnishment

Salaries of county officials and employees are subject to garnishment. However, an employee may not be discharged because his or her earnings have been subjected to garnishment for any one debt obligation, even though more than one summons of garnishment is served.[141]

NOTES

1. For further information on executive recruitment and selection, see David N. Ammons, *Recruiting Local Government Executives* (San Francisco: Jossey-Bass Publishers, 1989).
2. Official Code of Georgia Annotated (O.C.G.A.) §50-14-3(6).
3. O.C.G.A. §50-18-72(a)(7).
4. Boards of assessors O.C.G.A. §§48-5-291, 48-5-294; boards of equalization O.C.G.A. §48-5-311(b)(2), (k); bomb technicians, explosive ordinance disposal technicians, and animal handlers O.C.G.A. §35-8-25; communications officers O.C.G.A. §35-8-23; coroner and deputy coroners O.C.G.A. §45-16-6; county clerks O.C.G.A. §36-1-24; county commissioners O.C.G.A. §36-20-4; elections staff O.C.G.A. §21-2-100; EMA director and deputy directors O.C.G.A. §38-3-27; EMS O.C.G.A. §35-5-3 et seq.; firefighters O.C.G.A. §§25-4-9–25-4-11; jail officers and juvenile correction officers O.C.G.A. §35-8-24; juvenile court clerks O.C.G.A. §15-11-25; magistrate judges O.C.G.A. §§15-10-25, 15-10-137; peace officers O.C.G.A. §§35-8-9, 35-8-12, 35-8-26; police chaplains O.C.G.A. §35-8-13; police chiefs and department heads O.C.G.A. §§35-8-20, 35-8-20.1, 35-8-9; probate judges O.C.G.A. §15-9-1.1; public defenders O.C.G.A. §§17-12-6(3), 17-12-9; sheriffs O.C.G.A. §15-16-3; judges O.C.G.A. §§15-7-26, 15-1-11; superior court clerks O.C.G.A. §15-6-50; tax commissioners O.C.G.A. §48-5-126.1.
5. For a thorough discussion concerning performance appraisal practices, see Dennis Daley, "Designing Effective Performance Appraisal Systems," in *Handbook of Human Resource Management in Government*, 3rd ed., ed. Stephen E. Condrey (San Francisco: Jossey-Bass, 2010).
6. For an excellent discussion on the prospects of pay-for-performance compensation systems, see Christine B. Ledvinka, "The Enduring Importance of Public

Sector Compensation Special Issue Introduction," *Review of Public Personnel Administration* 28 (December 2008): 304–7.

7. See O.C.G.A. §34-7-1.
8. See Newsome v. Richmond County, 246 Ga. 300, 271 S.E.2d 203, 204 (1980).
9. Warren v. Crawford, 927 F.2d 559 (11th Cir. 1991); Dixon v. Metropolitan Atlanta Rapid Transit Authority, 242 Ga. App. 262, 529 S.E.2d 398 (2000).
10. O.C.G.A. §36-1-21(d)(1)(A); Hill v. Watkins, 280 Ga. 278, 627 S.E.2d 3 (2006); Ferdinand v. Board of Commissioners of Fulton County, 281 Ga. 643, 641 S.E.2d 87 (2007).
11. O.C.G.A. §36-1-21(b); Brett v. Jefferson County, 123 F.3d 1429 (11th Cir. 1997).
12. Brett v. Jefferson County, 123 F.3d 1429 (11th Cir. 1997); Hill v. Watkins, 280 Ga. 278, 627 S.E.2d 3 (2006).
13. O.C.G.A. §36-1-21(b).
14. See O.C.G.A. §34-7-1; Mail Advertising Systems, Inc. v. Shroka, 249 Ga. App. 484, 485–86, 548 S.E.2d 461 (2001); Wojcik v. Lewis, 204 Ga. App. 301, 419 S.E.2d 135 (1992).
15. Pickle Logging, Inc. v. Georgia Pacific Corp., 276 Ga. App. 398, 623 S.E.2d 227 (2005); Gunn v. Hawaiian Airlines, Inc., 162 Ga. App. 474, 291 S.E.2d 779 (1982).
16. Wofford v. Glynn Brunswick Memorial Hospital, 864 F.2d 117 (11th Cir. 1989).
17. DeClue v. City of Clayton, 246 Ga. App. 487, 540 S.E.2d 675 (2001), *cert. denied*, (March 19, 2001).
18. See also Peterson v. Atlanta Housing Authority, 998 F.2d 904 (11th Cir. 1993).
19. Hargray v. City of Hallandale, 57 F.3d 1560 (11th Cir. 1995).
20. Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985).
21. Lalvani v. Cook County, 396 F.3d 911(7th Cir. 2005); Washington Teachers' Union Local No. 6 v. Board of Education, 109 F.3d 774 (D.C. Cir. 1997).
22. Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985).
23. Kelly v. Smith, 764 F.2d 1412 (11th Cir. 1985) overruled on other grounds; Jones v. City of East Point, 795 F.Supp. 408 (N.D. Ga. 1992).
24. Gilbert v. Homar, 520 U.S. 924 (1997).
25. See Hatcher v. Board of Public Education and Orphanage for Bibb County, 809 F.2d 1546 (11th Cir. 1987) overruled on other grounds.
26. Ibid.
27. Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985).
28. Adams v. Sewell, 946 F.2d 757 (11th Cir. 1991) overruled on other grounds; McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994) (en banc); Kelly v. Smith, 764 F.2d 1412 (11th Cir. 1985) overruled on other grounds; Winkler v. County of DeKalb, 648 F.2d 411 (5th Cir. Unit B 1981).
29. Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985).
30. Hatcher v. Board of Public Education and Orphanage for Bibb County, 809 F.2d 1546 (11th Cir. 1987) overruled on other grounds.
31. See Schweiker v. McClure, 456 U.S. 188 (1982) overruled on other grounds; McKinney v. Pate 20 F.3d 1550 (11th Cir. 1994) (en banc), *cert. denied*, 513

U.S. 1110 (1995); Kelly v. Smith, 764 F.2d 1412 (11th Cir. 1985) overruled on other grounds.

32. See Carter v. Western Reserve Psychiatric Habilitation Center, 767 F.2d 270 (6th Cir. 1985).
33. Paul v. Davis, 424 U.S. 693 (1975).
34. Patterson v. City of Utica, 370 F.3d 322 (2d Cir. 2004); Cox v. Roskelley, 359 F.3d 1105 (9th Cir.), *cert. denied*, 125 S. Ct. 309 (2004); Quinn v. Shirey, 293 F.3d 315 (6th Cir. 2002), *cert. denied*, 537 U.S. 1019 (2002); Wojcik v. Massachusetts State Lottery Commission 300 F.3d 92 (1st Cir. 2002); Cotton v. Jackson, 216 F.3d 1328 (11th Cir. 2000); Hughes v. City of Garland, 204 F.3d 223 (5th Cir. 2000); Strasburger v. Bd. of Ed., Hardin County Community School District No. 1, 143 F.3d 351 (7th Cir. 1998), *cert. denied*, 525 U.S. 1069 (1999).
35. Campbell v. Pierce County, 741 F.2d 1342 (11th Cir. 1984).
36. Harrison v. Wille, 132 F.3d 679 (11th Cir. 1998).
37. Hammer v. City of Osage Beach, 318 F.3d 832 (8th Cir. 2003); Campbell v. Pierce County, 741 F.2d 1342 (11th Cir. 1984).
38. Campbell v. Pierce County, 741 F.2d 1342 (11th Cir. 1984).
39. Ibid.
40. O.C.G.A. §50-18-72(a).
41. O.C.G.A. §50-18-72(a)(5).
42. O.C.G.A. §50-14-3(6).
43. O.C.G.A. §45-1-5.
44. 42 U.S.C.A. §1983 is the federal statute that allows a person to sue the government when he or she has been deprived of a constitutional or statutory right under "color of law."
45. Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977) overruled on other grounds; Sonoda v. Cabrera, 255 F.3d 1035 (9th Cir. 2001); Hennessy v. City of Melrose, 194 F.3d 237 (1st Cir. 1999).
46. Perry v. Sindermann, 408 U.S. 593 (1972).
47. See, e.g., Cook v. Gwinnett County School District, 414 F.3d 1313 (11th Cir. 2005) overruled on other grounds; Jackson v. State of Alabama State Tenure Commission 405 F.3d 1276 (11th Cir. 2005); Brochu v. City of Riviera Beach, 304 F.3d 1144 (11th Cir. 2002) overruled on other grounds.
48. Connick v. Myers, 461 U.S. 138 (1983).
49. Fikes v. City of Daphne, 79 F.3d 1079 (11th Cir. 1996).
50. City of San Diego, California v. Roe, 125 S.Ct. 521 (2004); Connick v. Myers, 461 U.S. 138 (1983).
51. Boyce v. Andrew, 510 F.3d 1333 (11th Cir. 2007); Pickering v. Board of Education, 391 U.S. 563 (1968).
52. Connick v. Myers, 461 U.S. 138 (1983).
53. Rankin v. McPherson, 483 U.S. 378 (1987).
54. Mitchell v. Hillsborough County, 468 F.3d 1276 (11th Cir. 2006).
55. Hansen v. Soldenwagner, 19 F.3d 573 (11th Cir. 1994).
56. Kelly v. Johnson, 425 U.S. 238 (1976); Oladeinde v. City of Birmingham, 230 F.3d 1275 (11th Cir. 2000).
57. Board of County Commissioners v. Umbehr, 518 U.S. 668 (1996).
58. Elrod v. Burns, 427 U.S. 347 (1976); Rutan v. Republican Party, 497 U.S. 62 (1990).

59. Terry v. Cook, 866 F.2d 373 (11th Cir. 1989).
60. Silva v. Bieluch, 351 F.3d 1045 (11th Cir. 2003).
61. 5 United States Code Annotated (U.S.C.A.) §1501 et seq.
62. 5 U.S.C.A. §1502(a).
63. 5 U.S.C.A. §1503.
64. 42 U.S.C.A. §2000 et seq.
65. 42 U.S.C.A. §2000e-2.
66. 42 U.S.C.A. §2000e-2(a).
67. 42 U.S.C.A. §2000e(j).
68. Clark County v. Breeden, 532 U.S. 268 (2001).
69. 42 U.S.C.A. §2000e-3(a).
70. Clover v. Total Sys. Services, Inc., 176 F.3d 1346 (11th Cir. 1999).
71. 29 U.S.C.A. §621 et seq.
72. 29 U.S.C.A. §206(d).
73. 42 U.S.C.A. §12101 et seq.
74. O.C.G.A. §45-19-29.
75. O'Connor v. Ortega, 480 U.S. 709 (1987).
76. 18 U.S.C.A. §§2510–2522.
77. Awbrey v. Great Atlantic & Pacific Tea Co., 505 F. Supp. 604 (N.D. Ga. 1980).
78. 18 U.S.C.A. §2510(6).
79. 18 U.S.C.A. §2511(2)(d).
80. 18 U.S.C.A. §2510(5).
81. Epps v. St. Mary's Hospital of Athens, Inc., 802 F.2d 412 (11th Cir. 1986).
82. 18 U.S.C.A. §§2701–2712.
83. Ontario v. Quon, 130 S. Ct. 2619 (2010).
84. See Everett v. Napper, 833 F.2d 1507 (11th Cir. 1987).
85. O.C.G.A. §45-20-91. See also O.C.G.A. §20-2-1121; Mayo v. Fulton County, 220 Ga. App. 825, 470 S.E.2d 258 (1996).
86. See O.C.G.A. §45-1-4.
87. 31 U.S.C.A. §3729(a).
88. 31 U.S.C.A. §3730(h).
89. See Firefighters Local 349 v. City of Rome, 682 F.Supp. 522 (N.D. Ga. 1988).
90. See Avery v. City of Talladega, 24 F.3d 1337 (11th Cir. 1994).
91. 29 U.S.C.A. §207(k).
92. 29 Code of Federal Regulations (C.F.R.) §§553.210(c), 553.211(g).
93. 29 C.F.R. §§553.210(a), 553.211(a), (b).
94. See O'Neal v. Barrow County Board of Commissioners, 743 F.Supp. 859 (N.D. Ga. 1990) overruled on other grounds and vacated and remanded by 980 F.2d 674 (11th Cir. 1993).
95. Reich v. New York Transit Authority, 45 F.3d 646 (2d Cir. 1995); Levering v. District of Columbia, 869 F. Supp. 24 (D.D.C. 1994).
96. 29 U.S.C.A. §213(b)(20).
97. 29 C.F.R. §553.200(b).

98. See Christensen v. Harris County, 529 U.S. 576 (2000); 29 U.S.C.A. §207(o)(5).
99. See 29 C.F.R. §825.126.
100. 29 C.F.R. §825.127.
101. 29 U.S.C.A. §2601 et seq.
102. 38 U.S.C.A. §4301 et seq.
103. See 38 U.S.C.A. §4303; O.C.G.A. §38-2-279 (b).
104. 38 U.S.C.A. §4312(a)(1).
105. O.C.G.A. §38-2-279(d).
106. 38 U.S.C.A. §4311.
107. O.C.G.A. §38-2-279(e).
108. Ibid.
109. 38 U.S.C.A. §4316(d).
110. 38 U.S.C.A. §4317.
111. 38 U.S.C.A. §§4312 (f)(3)(B), 4318; O.C.G.A.§38-2-279(f).
112. 38 U.S.C.A. §4312(e).
113. 38 U.S.C.A. §4316(a).
114. 38 U.S.C.A. §4316(b).
115. 38 U.S.C.A. §4313.
116. O.C.G.A. §21-2-404.
117. O.C.G.A. §34-1-3.
118. 29 U.S.C.A. §§1002(32), 1003(b)(1).
119. See, e.g., Strickland v. City of Albany, 270 Ga. 31, 504 S.E.2d 666 (1998); Pulliam v. Ga. Firemen's Fund, 262 Ga. 411, 419 S.E.2d 918 (1992); DeClue v. City of Clayton, 246 Ga. App. 487, 540 S.E.2d 675 (2000); City of East Point v. Seagraves, 240 Ga. App. 852, 524 S.E.2d 755 (1999).
120. Ga. Const. art. IX, §2, ¶1(f). See O.C.G.A. §36-1-11.1.
121. O.C.G.A. §45-18-31.
122. O.C.G.A. §45-18-34.
123. Withers v. Register, 246 Ga. 158, 269 S.E.2d 431 (1980); O.C.G.A. §47-4-121(b); Tate v. Teachers' Retirement System of Georgia, 257 Ga. 365, 359 S.E.2d 649 (1987).
124. Murray County School District v. Adams, 218 Ga. App. 220, 461 S.E.2d 228 (1995).
125. Dodd v. City of Gainesville, 268 Ga. App. 43, 601 S.E.2d 352 (2004).
126. Ibid.
127. O.C.G.A. tit. 47, ch. 18.
128. Ga. Const. art. IX, §2, ¶1(f). See O.C.G.A. §§36-1-11.1, 36-21-1 et seq.
129. Pulliam v. Georgia Firemen's Pension Fund, 262 Ga. 411, 419 S.E.2d 918 (1992).
130. 42 U.S.C.A. §300bb-1 et seq.
131. 42 U.S.C.A. §§300bb-1–300bb-3.
132. 42 U.S.C.A. §300bb-6.
133. 42 U.S.C.A. §300bb-5(a).
134. O.C.G.A. §34-9-1.

135. Ibid.
136. O.C.G.A. §§45-9-21, 45-9-22.
137. Gwinnett County v. Blaney, 275 Ga. 696, 702–703, 572 S.E.2d 553 (2002); Hendon v. DeKalb County, 203 Ga. App. 750, 755(1), 417 S.E.2d 705 (1992).
138. Chatham County Commissioners v. Clark, 253 Ga. 687, 324 S.E.2d 448 (1985).
139. Haywood v. Hughes, 238 Ga. 668, 669, 235 S.E.2d 2 (1977). See O.C.G.A. §45-9-21(a).
140. See Baker v. Gwinnett County, 267 Ga. App. 839, 600 S.E.2d 819 (2004). See also Cleveland v. Skandalakis, 268 Ga. 133, 133–34, 485 S.E.2d 777 (1997); Prayor v. Fulton County, 2009 WL 981996 (N.D. Ga. April 13, 2009).
141. O.C.G.A. §§18-4-7, 18-4-21.