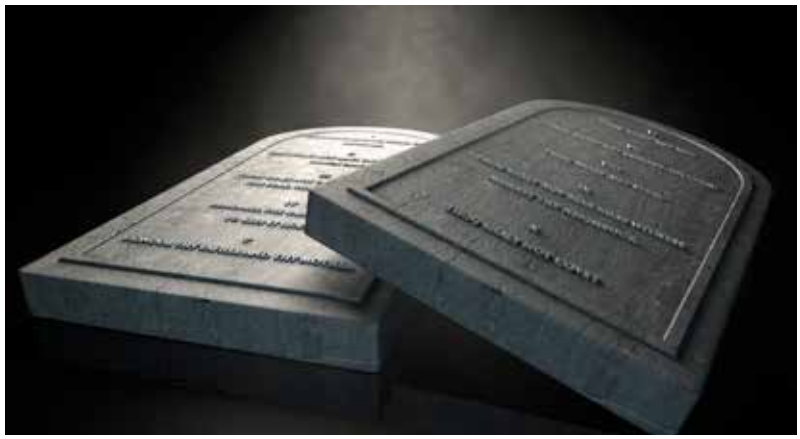
by Ivan L. Schraeder

The Ten Commandments Of Personnel Law

This article is not intended to be a comprehensive treatment of the subject matters presented, but is intended to highlight areas of potential liability for municipalities if they are not aware of and attentive to the risks associated with the applicable federal and state employment and labor laws.

#1. Thou shalt know what the "right to work" law means for public employers.



As this article was going to print, the U.S. Supreme Court issued its decision in *Janus v. AFSCME Council 31*. This case determined that forced payment of dues or fees by public employees to their collective bargaining representative is a violation of the public employees' First Amendment rights of free speech. The impact of this decision is that no public employer can legally negotiate a mandatory dues or fees payment to be taken involuntarily from public employees to be paid to the bargaining agent as a condition of employment. Only voluntary acts by employees are permitted if carefully drafted. There are more principles in this 5-4 court decision, but this is the primary takeaway. Any public entity that has a mandatory membership or fee provision needs to remove such provisions from the collective bargaining agreements and policies immediately.

> "The question is not if you will have a personnel/ employment problem, but when you will have one."
> ~ *Ivan Schraeder*

In Missouri, no public employee can be forced to pay membership dues to any labor organization as a condition of employment that includes provisions in collective bargaining agreements. Employees can make voluntary payments consistent with the public employer's policies as to voluntary payroll deductions, but not as a mandatory requirement. This provision will not be affected by the August 2018 election related to the right-to-work laws subject to be challenged from last year's legislative enactment.

#2. Thou shalt conduct thorough background checks.

One of the larger exposures for liability are employees of a local governmental entity. In any employment situation when persons are being considered for employment, it is important to conduct a thorough background check to verify what appears on resumes and application forms. What is represented by applicants may not always be accurate. What certifications and licenses may be claimed to support an application may not always be issued. While Missouri is not a state that has fully accepted the concept of "negligent hiring," it is a minority in that regard.

In conducting background checks, it is appropriate to inquire as to convictions for crimes and under some circumstances as to financial dealings. However, caution must be taken in using what is discovered. Generally, what may be used must be considered in light of the job to be performed so as not to have a disparate impact on some protected classes. Also, when using financial information for employment decisions, there are regulations that relate to protections of

applicants and procedures for a rejected candidate to challenge the decision. While caution is urged, it should not create an excuse not to conduct a background check. All employees should be subject to the same process for screening so as not to create a discriminatory system allowing for litigation and recovery.

#3. Thou shalt not discriminate for illegal reasons.

When engaging in the process of screening candidates and for making employment decisions related to current employees, a public employer needs to take care not to discriminate against an applicant or employee for illegal reasons. These protections are set out in the state and federal anti-discrimination laws, as well as some of the employee benefit laws. Missouri recently adopted statutory changes related to discrimination that changed the standard for assessing discriminatory conduct from that of a "contributing" factor to that of a "motivating" factor effective as of Aug. 28, 2017. This change makes Missouri law consistent with the federal law standards. The new standard makes the discriminatory conduct as the primary motivator for an employment action rather than as one of a number of conduct measures to be considered including the discriminatory conduct.

The new amendments to the Missouri law also change available award levels for employee recovery and relieves individual supervisors from liability, but not the employing agency.

#4. Thou shalt not have sex in the work place.

This specific discriminatory standard, sex or gender discrimination, has had greater exposure in recent years because of the "Me Too" movement, but gender discrimination has been illegal for decades. Employers should not be making employment decisions or allowing any employment conduct to impact employees that is based on sex. There are two types of sex discrimination – quid pro quo (supervisory/managerial pressures on an employee based on sex) and harassment (based on conditions created in the work place by persons relating to sex that are not addressed by the employer). Current law requires specific policies to be implemented by employers related to protections against sex discrimination and for providing special processes for employees to make claims for relief.

Evolving trends in other jurisdictions have addressed sexual preferences and sexual identification as being protected, but Missouri has not officially adopted such protections. Employers, though, would be wise to consider all types of discriminatory activities for protections so as to avoid being the test case in areas where the evolution continues to expand how sex discrimination is defined.

#5. Thou shalt take care when limiting employee speech and use of social media.

Public employers are encouraged to adopt policies related to the use of employer equipment and the transmission of information through the employer's electronic systems and employees' use of social media related to the work place or while in the work place or in duty related activities. Public employers can regulate employee use and conduct provided it is related to the terms and conditions of the employee's duties and responsibilities. Public employees have protectable First Amendment rights of free speech and association under both the U.S. and Missouri Constitutions, but these are not unlimited protections. Use and access to an employer's electronic systems needs to be restricted to performance of official duties and not permitted for personal or private use. Anything that is put on the employer's system is subject to the Missouri Sunshine Law unless specifically determined to be a closed record under the Sunshine Law requirements. Employees often mistakenly believe that their personal devices are not subject to control or access by employers. U. S. Supreme Court case law says otherwise.

Employees can be prohibited from using an employer's equipment and systems to disparage elected officials and other persons. Employees can be prohibited from criticizing

public employer decisions and issues under consideration without violating employee rights.

To avoid liability, clear policies should be considered and adopted managing the electronic systems' access and use, as well as distribution of closed records and other protected information. This is another field evolving from discovery activities associated with litigation, as well as scrutiny of public officials and employees for the misuse of electronic communications.

#6. Thou shalt pay overtime when it is due.

Public employers are covered by the Fair Labor Standards Act that requires payment for overtime to employees who work in excess of their regular schedules that can be a 40-hour work week or up to a 28-day cycle for law enforcement and fire service employees. When overtime is reached, a public employer is required to compensate an employee with either pay at time and a half the regular hourly rate of pay for the employee or to allocate compensatory time at the rate of time and a half for each overtime period worked in excess of the designated work period. Employees have a maximum amount of compensatory time that can be accumulated depending upon the type of employee to be considered.

Accurate time records must be maintained by the employer. In the absence of properly kept records, an employee's records will serve to determine what overtime was worked and what the employer's liability is. Employers also need to determine by policy what "time worked" means for reaching overtime payment eligibility. The penalties for non-payment of overtime are significant at double the unpaid amounts plus attorney fees of the employee if litigation is undertaken. It should also be noted that when the federal agency comes in to inspect overtime records, it is not limited to just looking at overtime records, but it may also look at all other records related to employment matters under its jurisdiction. A public employer is better protected from liability to work in advance to have its records and overtime systems created properly and with its policies in place for employee viewing.

#7. Thou shalt know that the Sunshine Law sometimes applies to personnel matters.

Public employers often believe that their personnel records and employee personnel actions are automatically closed records under the Sunshine Law. This is an incorrect belief. The Sunshine Law requires governmental bodies to take specific actions to close records that can be closed but are not closed without such actions. If the municipality has not taken actions to close records, those records are presumed to be open. Caution is urged when dealing with employee personnel records and actions so as not to expose the jurisdiction to successful litigation for access to such records or for consequences from employees whose records were not protected.

#8. Thou shalt know that loose lips create personnel lawsuits.

Disgruntled employees are regularly looking for ways to obtain recovery from employers when they are not pleased with their work environments and conditions created by supervisors, managers and elected officials. This is especially true when discriminatory allegations are possible. All employer representatives should be cautioned not to discuss employee-related issues and concerns except with persons who have a "need to know." Often there is a tendency to share more than is needed and to share with persons who have no need to know. Supervisors, managers and elected officials should never discuss personnel matters in open sessions or with anyone who is not involved in the decision-making process. There should be no exceptions to this rule. Litigation for defamation is a potential cause of action that can be coupled with other causes of action by employees who seek recovery for real or imagined wrongs engaged by their employer or its supervisors, managers and elected officials. In short, supervisors and managers speak as if they are the employer regardless of the relative position in the employer's hierarchy.

#9. Thou shalt take care to comply with ADA and FMLA and workers' compensation laws.

Employers are reminded that workers' compensation laws, the Americans With Disabilities Act, the Missouri Human Rights Act, and the Family Medical Leave Act provisions are interrelated and often intertwined in employment decisions that relate to health care questions and decisions impacting employees for health-related concerns, whether physical or mental in nature. To insure that a public employer has properly addressed each of the concerns of these laws and employee rights under each, clear policies should be considered and adopted to avoid later legal problems and/or the inability to properly address employee requests for relief.

Employers have multiple options for decision making when it comes to employee problems associated with health-related needs for absence from work. This applies whether such absence is occasioned by work–related injury or illness, or for non-work-related considerations, and for whom such leave may be taken for what periods of time and what records are required/desired to address requests. Consideration may also be made for health insurance coverage, pension benefits, long- and short-term disability program eligibility, and other employee benefits controlled by decisions made under each or all of the above noted laws. Protections for employees are also available for retaliation when an employee seeks benefits under each of these laws and the employer takes negative employment action that appears to be in response to the request made.

#10. Thou shalt keep your attorney's phone number close at hand.

This commandment is not made to increase your counsel's income, but rather to reduce a community's potential liability for wrong decisions or the absence of policies that could have prevented the liability from arising in the first place. Your city attorney will either know how to help you in creating preventative measures or will know where to find the qualified talent to do so. Your city attorney will either know how to mitigate exposure that has been incurred or know where to get the help you may need. Keep the telephone number handy. The question is not if you will have a personnel/employment problem, but when you will have one.

If your city attorney is not a member of the Missouri Municipal Attorneys Association, a municipality should require the membership and encourage/direct the city attorney to attend the annual MMAA conference to obtain current updates on employment/labor law, as well as on other timely topics of municipal concern specific to Missouri local governments.

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