



ZASHIN & RICH

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Money Matters –

Avoiding Lawsuits and Costs

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Jonathan J. Downes

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



About Zashin and Rich

Zashin & Rich Co., L.P.A. (“Z&R”) has over 25 attorneys who specialize in labor and employment law with offices in Columbus and Cleveland, representing both private and public employers.

Z&R represents its clients in labor negotiations, human resources matters, and civil service. Attorneys of Z&R have collectively negotiated over 1000 contracts and have represented private and public employers in arbitrations, impasse proceedings and litigation.

Attorneys represent private employers, universities and colleges, state agencies, special districts, cities, counties, townships, housing authorities, hospitals and others. Attorneys handle matters at the National Labor Relations Board, the State Employment Relations Board, State Personnel Board of Review, and local civil service commissions.



Money Matters – Avoiding Lawsuits and Costs

AGENDA

Separation Agreements

FLSA Litigation

Health Insurance

Janus and Litigation

Risk Management



Severance and Separation Agreements

Elements:

Resignation and effective date of resignation

Letter of resignation

Paid Leaves, Conversion of Balance

Return of Property

Consideration to Employee

Receipt of all compensation

No legal proceedings



Severance and Separation Agreements

Elements:

Response to information requests

No reemployment

Release of claims

Dismissal of charges and legal actions

Waiver of claims and enforcement of Agreement

Entire agreement

Severability and Performance



Severance and Separation Agreements

Elements:

Opportunity to consult with Attorney or Union

After known information

No admission of wrongdoing

Misc: headings; counterparts; entire agreement

OWBPA: Older Workers' Protection Act with 7 day
and 21 day revocation provisions



Severance and Separation Agreements

Immunity for Performance Disclosures

4113.71 Immunity of employer as to job performance information disclosures

An employer who is requested by an employee or a prospective employer of an employee to disclose to a prospective employer of that employee information pertaining to the job performance of that employee for the employer and who discloses the requested information to the prospective employer is not liable in damages in a civil action to that employee, the prospective employer, or any other person for any harm sustained as a proximate result of making the disclosure or of any information disclosed, unless the plaintiff in a civil action establishes.....



FLSA - Included in Regular Rate

- **Commonly Neglected CBA Pay Supplements:**

- Shift differentials
- Retroactive pay increases
- Education incentive pay
- “Controlled standby” pay
- Awards for job performance, merit pay
- Hazard Pay
- Shooting / Firearm Proficiency pay
- Bilingual pay
- Longevity Pay
- Special Assignment Pay (FTO)
- Acting Pay (OIC)





FLSA - Excluded from Regular Rate

- Sums paid as gifts (e.g., Christmas bonus), the amounts of which are not measured by or dependent on hours worked, production, or efficiency;
- Payments for time not worked (vacation, holiday, sick time) or because work was not available.
- Reimbursement for expenses
- Discretionary bonuses
- Profit sharing plans
- Contributions to third-party life, retirement, or health insurance plans
- Stock options



Wage Settlement Trends

State Employment Relations Board Fact Finding/Conciliation Report Statistics

Calendar Year	2016				2017				2018				2019			
	1st Quarter	2nd Quarter	3rd Quarter	4th Quarter	1st Quarter	2nd Quarter	3rd Quarter	4th Quarter	1st Quarter	2nd Quarter	3rd Quarter	4th Quarter	1st Quarter	2nd Quarter	3rd Quarter	4th Quarter
Fact-Finding Hearings	20	22	27	15	14	31	16	16	21	25	15	24	25			
Recommendations Rejected	7	12	15	4	4	11	10	8	7	13	3	7	8			
Mediation Attempt Reported	75.0%	45.5%	74.1%	60.0%	57.1%	54.8%	71.0%	56.0%	79.2%	50.0%	73.3%	65.2%	44.0%			
Wages as an Issue	90.0%	86.4%	81.5%	100.0%	71.4%	90.3%	100.0%	100.0%	85.7%	100.0%	93.3%	90.9%	88.0%			
Employer Average Wage Offer	1.40%	1.61%	1.18%	1.28%	1.13%	1.54%	2.01%	1.69%	1.78%	2.08%	2.00%	1.72%	1.67%			
Employee Organization Average Wage Request	2.81%	3.07%	2.98%	3.36%	2.98%	2.87%	3.50%	2.89%	3.51%	3.39%	3.33%	3.34%	2.75%			
Wage Award - Annual Average	1.97%	2.05%	2.07%	2.07%	1.84%	2.40%	2.44%	2.09%	2.43%	2.52%	2.37%	2.23%	2.09%			
Wage Award - 1st Year Average	2.05%	1.96%	2.18%	1.75%	1.88%	2.41%	2.36%	2.03%	2.70%	2.59%	2.18%	2.28%	2.05%			
Wage Award - 2d Year Average	1.96%	2.05%	2.16%	2.27%	1.77%	2.45%	2.33%	2.03%	2.24%	2.42%	2.41%	2.23%	2.09%			
Wage Award - 3d Year Average	1.90%	2.16%	1.87%	2.19%	1.86%	2.34%	2.62%	2.23%	2.35%	2.57%	2.53%	2.18%	2.11%			
Conciliation Hearings	8	4	8	6	3	4	9	3	3	5	2	7	2			
Conciliation Average Wage Award	2.16%	2.00%	1.91%	1.28%	2.50%	2.73%	2.21%	2.50%	1.75%	2.93%	2.00%	2.44%	2.33%			

Based on Percentage Increases recommended by Fact-Finders and Conciliators. Reopeners and CBAs less than three years in duration are included in years one and/or two. Does not include lump sum payments, pay range modifications, shift differentials, rank differentials or across the board increases to individual classifications or pay ranges that can also be awarded in addition to percentage increases.

Health Insurance

Sample language for Health Insurance

Section 29.2. Hospitalization

Bargaining unit employees shall be offered the same level of benefits at the same contribution rates as Engineer non-bargaining unit employees.

Available programs and benefits thereunder shall be as determined from time to time by the Board of County Commissioners of Montgomery County.



Health Insurance Comparisons

1. Employer expenditures – monthly and annual
2. Single and family breakdown
 1. Employer contribution
 2. Employee contribution
 3. Total monthly cost
3. Co-insurance and deductible amounts (% and cap)
4. Out of pocket net (OOP)
5. Network and out of network costs
6. Life Insurance



Health Insurance

Montgomery County Engineer and IBT - August 7, 2019 Health Insurance Data

Employer	Single ER Cont.	Family ER Cont.	Single EE Cont.	Family EE Cont.	Single Monthly Premium Total	Family Monthly Premium Total	Co-Ins. (Net.)	Single Net. Ded.	Family Net. Ded.	Single Non-Net. Ded.	Family Non-Net. Ded.	Single Net. Out of Pocket	Family Net. Out of Pocket	Single Non-Net. Out of Pocket	Family Non-Net. Out of Pocket	Life Ins. Face Value
Montgomery Co. #1	\$506.31	\$1,611.93	\$40.00	\$65.00	\$546.31	\$1,676.93	70.00%	\$1,600.00	\$3,200.00	\$3,200.00	\$6,400.00	\$4,000.00	\$8,000.00	\$8,000.00	\$16,000.00	N/A
Montgomery Co. #2	\$345.03	\$1,408.89	\$195.00	\$330.00	\$540.03	\$1,738.89	80.00%	\$1,000.00	\$2,000.00	\$2,000.00	\$4,000.00	\$4,000.00	\$8,000.00	\$8,000.00	\$16,000.00	N/A
Montgomery Co. #3	\$523.55	\$1,634.93	\$25.00	\$45.00	\$548.55	\$1,679.93	70.00%	\$2,000.00	\$4,000.00	\$4,000.00	\$8,000.00	\$5,000.00	\$10,000.00	\$10,000.00	\$20,000.00	N/A



Janus – Supreme Court

“Neither an agency fee nor any other payment to the union may be deducted from a nonmember’s wages, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay. By agreeing to pay, nonmembers are waiving their First Amendment rights, and such a waiver cannot be presumed. “



Post Janus - Union Proposals

Examples of union proposals in response to Janus:

- Delete all “Fair Share” language
- Maintain “fair share” language with an automatic ‘resurrection’ provision in the event *Janus* is ever reversed
- Tighten the restrictions about revoking dues authorizations / checkoff; continued obligation (“irrespective of my membership in the Union”).
- Add provision that any employee who votes on the union contract must remain a member of the Union for the term of the CBA (i.e. ‘maintenance of membership’)
- “Welcome Wagon” provision securing union’s right to attend new hire orientation and talk about union membership - ‘reverse ***captive audience?***
- Requirement that employer provide contact information of all new hires.



Post Janus - Employer Proposals

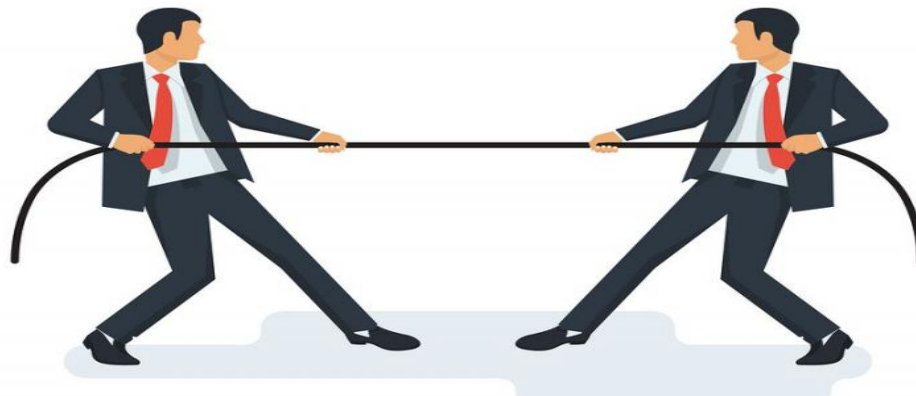
Examples of employer proposals in response to Janus:

- Delete all “Fair Share” language
- Strengthen union indemnification language.
- Eliminate maintenance of membership language
- Eliminate or shorten the duration of membership and dues revocation window periods. Move to annual revocation window rather than window that opens at the end of the contract period.
- Negotiate over the terms of the union’s dues deduction authorization cards (problem- employer participation goes beyond “ministerial act” defense.



Janus – Court Battles

Court Battles re: Fee Refunds, Dues Revocations, Membership and Exclusive Representation, Union and Employer Bargaining Proposals Post-Janus, Resignations from Union, and Dues Revocations Arbitration/ Fact Finding/ Conciliation Awards re Janus Union Attempts to charge fee payors for services



Janus - Union Membership Authorization

Membership Authorization: “I accept membership in the (Union) and authorize (union) to represent me in negotiating wages, hours and terms and conditions of employment.”

Maintenance of Membership:

- CBA: Employees who become members of the union shall maintain their membership for the duration of this Agreement.
- Card: I agree that I may only revoke my union membership by providing written notice of revocation to the union and employer 30 to 45 days prior to the expiration of the CBA. (Or other window period).



Janus -Dues Checkoff Authorization/Revocation

Dues Checkoff Authorization: “I hereby authorize my employer to deduct from my wages my membership fees, initiation fees or assessments and remit them to (union).

Dues Checkoff Authorization Revocation: “I agree that this dues checkoff authorization may only be revoked by me by my giving written notice of revocation to the union and my employer during the 30 to 45 day period prior to the expiration of the CBA. (Or other window period)

- Private Sector: NLRB/Federal Courts have upheld the validity of an annual revocation period as reasonable.
- SERB upheld the validity of one dues revocation period prior to the expiration of the collective bargaining agreement (could be as long as three years) in *SERB v. United Steelworkers of America*, SERB 89-009 (5-4-89).



Janus – Indemnification Provisions

Don't rely on *indemnification* clauses in CBA:

E.g., "It is specifically agreed that the Employer assumes no obligation, financial or otherwise, arising out of the provisions of this Article regarding the deduction of Union dues and fair share fees. The Union agrees that it will protect, indemnify and hold the Employer harmless from any claims, actions or proceedings by an employee arising from deductions made by the Employer pursuant to this Article"

Weaver v. Univ. of Cincinnati, 970 F.2d 1523 (1992)
(violation of public policy)

Dealing with Medical Marijuana

- **Drug-free workplace policies are still permitted**
 - Should revise nonetheless to make it clear that marijuana still prohibited regardless of Ohio marijuana law.
- **Still permitted to remove employees for violating drug-free workplace policy (even for possession or distribution)**
 - Will still be deemed “just cause” under Ohio Unemployment Compensation Law.
- **Workers Compensation still denied if injury due to use of marijuana.**
 - Safe workplace/workplace injury policy should specify this.



Purple Haze: Ohio's Med Marijuana Law

Patients may qualify in Ohio for a medical marijuana license to treat various conditions, e.g.,

- AIDS

- Alzheimer's
- Cancer
- Crohn's Disease
- Fibromyalgia
- Glaucoma
- Hepatitis C
- Inflammatory Bowel

- Syndrome
- Parkinson's Disease
- Chronic, severe pain
- Traumatic brain injury
- Ulcerative colitis



Purple Haze

Ohio's Med Marijuana Law

- Key Takeaways from Ohio's Medical Marijuana Law's list of Rights of Employers, R.C. 3796.28
 - Employers may refuse to hire, discharge, discipline, or take other adverse action based on employee participation in the program
 - Employers may test for marijuana
 - Employers may terminate for “off duty” use of marijuana even with no evidence of on-the-job impairment
 - Employers may establish drug-free workplaces



Hashing it out: Case Law Examples

- *Garcia v. Tractor Supply Company*
 - D.New Mexico Jan. 7, 2016
 - No implied right of action under New Mexico’s medical marijuana law, and no employer obligation to accommodate cardholders.
- *Casias v. Wal-Mart Stores, Inc.*
 - 6th Cir. 2012, no implied right of action against employer for termination of employee who tested positive for marijuana.
 - Employers are not required to accommodate cardholders under Michigan law.



Risk Management Overview

RISK MANAGEMENT

What is the role of supervision?

What is risk management?

What steps do you use today for risk management?

What is performance data?

What is successful risk management?

GOAL of this Session : Translate law enforcement to effective risk management.



Primary Areas of Risk and Liability

- 1. Law Enforcement – criminal procedure and citizen rights**
- 2. Employees – employment laws**
- 3. Operation of motor vehicles**
- 4. Line of duty injuries to Officers**

Liability starts with the actions of Employees



Risk Management Overview

Deadly Dozen

1. Prisoners
2. Arrest/field interrogations
3. Sexual harassment
4. Secondary employment
5. Domestic violence
6. Search warrant execution
7. Use of force
8. Firearms
9. Emergency response
10. Patrol driving
11. Vehicle stops
12. Canine



THANK YOU AND GOOD LUCK

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