

## LABOR AND EMPLOYMENT ALERT

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### **GOVERNOR SIGNS ACT 43 INTO LAW. USHERING IN FIRST MAJOR AMENDMENTS TO BOROUGH CODE IN 45 YEARS**

On May 17, 2012, Governor Corbett signed into law Act 43, which marks the first major revision and restatement to the Borough Code in approximately 45 years. Although Act 43 restates the Borough Code, it also provides some significant amendments, bringing the Borough Code in line with the First and Second Class Township Codes on numerous issues. The amendments themselves take effect in sixty (60) days. Of particular importance from a labor and employment law perspective, Act 43 makes the following changes and clarifications:

- **Incompatibility of Offices** – A police officer or firefighter may not hold elective office in a borough in which he is employed. In the case of a police officer or firefighter employed in a regional department, council of government, or other cooperative venture, the officer may not hold elective office in any municipality which forms a part of the regional department, council of government or cooperative venture. The amendment takes into account the fact that many boroughs are members of regional police departments, councils of government or cooperative ventures.
- **Agreements for Employment for Borough Managers** – Incorporates the previous amendments from Act 54 of 2011 which provided for employment agreements for borough managers within certain restrictions. Act 43 further provides that any such employment agreement executed on or after a municipal election but before the first meeting in January following the municipal election shall be void. Thus, it expressly prohibits lame duck agreements with an outgoing borough council and manager. Previously, the Borough Code did not address the issue of employment agreements for borough managers.
- **Alternate Civil Service Commissioners Quorum Requirements**– The amendments bring the Borough Code in line with the First Class Township Code in authorizing the appointment and usage of civil service alternates. Usage of alternative commissioners is to be on a case-by-case basis and alternates are to be selected in order of declining seniority. Once selected, alternate civil service commission members shall continue to participate on the commission in all proceedings relating to the case or matter on which he or she was initially appointed as an alternate participating member. In addition, quorum for a civil service commission is increased from two to three members. Likewise, no action of the commission is valid without the vote of two of the three members.

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- **Appointment of Commission Solicitor** – The commission may select a solicitor, paid for by the borough. The borough council shall have the ability to place a reasonable limit on the annual amount spent on a commission solicitor. .
- **Oaths of Applicants** – Applicants for original appointment must provide the following information: (1) full name and residence or post office box; (2) citizenship and place of birth; (3) condition of health and physical capacity for public service; (4) business or employment and his residence for the past five years.
- **Deadline for Requesting Hearing Upon Rejection or Refusal to Test** – Upon rejection or refusal to test by the commission, an applicant has ten (10) days to request a hearing. At such hearing, the rejected candidate can appear with or without counsel. Previously, the Borough Code contained no deadline for requesting a hearing under this section.
- **Deliberations of the Commission** - Deliberations of the commission on evidentiary rulings or procedural issues may be addressed in executive session. The decision of the commission on a case is official action and the vote on a case must be made in public at a properly advertised public meeting.
- **Probationary Employees** – Probationary employees may be removed or suspended and such decision shall be final and shall not trigger a hearing before the commission pursuant to section 1191 of the Borough Code.
- **Clarification of Grounds for Removal, Suspension or Reduction in Rank** - Ground number six for suspension without pay, reduction in rank or removal is clarified to provide that engaging in political activity an election campaign while on duty or in uniform or while utilizing borough property. In addition, a seventh statutory reason has been added: engaging or participating in a political or election campaign for an office for which the officer is not compatible under the borough code. The above amendments appear to expand the scope of permitted activity by limiting the grounds to being on duty or in uniform or using borough property. Thus, an officer may now engage in political activity, so long as it is not for an incompatible office, while off duty and out of uniform. However, a borough now has the protection that officers will be prohibited from seeking or participating in a campaign regarding a borough office.
- **Timing for Requesting a Hearing** – a person suspended, reduced in rank or terminated has ten (10) days from the date of receiving the notice of discipline to request a civil service hearing before the commission. As with the deadline for

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requesting a hearing by a rejected applicant, the Borough Code previously contained no deadline for requesting a hearing before the civil service commission.

- **Time for Holding a Hearing** – Under the prior provisions of the Borough Code, the commission had ten days from the date of filing of the charges to hold a hearing unless such hearing was continued at the request of the parties or by the commission. Previously, the Borough Code contained a provision that required a hearing to be held within ten (10) days from the date on which the charges were filed against the employee, unless continued by the commission at the request of either the borough or the employee. Although no language in the Borough Code which set forth the consequence if the hearing was not held within ten days, several employee advocates argued before commission’s that the failure to hold a timely hearing resulted in the dismissal of the charges. Act 43 clarifies this point by providing that the failure to hold a hearing within ten days from the date on which the charges were filed does *not* result in the dismissal of the charges.
- **Status of Hearing as Open or Closed** – the amendment provides that, unless either the borough or the aggrieved party requests an open hearing, the hearing will be closed to the public. In addition, any request for a public hearing must be made before the hearing before the commission commences. This amendment may be in response to the Day v. Civil Service Commission of Borough of Carlisle, 887 A.2d 793 (Pa. Cmwlth. 2005), rev’d, 593 Pa. 448, 931 A.2d 646 (2007), case which examined the issue of a civil service commission’s failure to honor the request of an employee for an open hearing. The amendment suggests that, if either the borough or the aggrieved party requests an open hearing, the commission must provide one. In the absence of a request, the hearing is closed to the public.
- **Sequence of Furloughing** – The General Assembly also addressed the issue of the sequence of furloughing in a reduction in force within the police department. Previously, the borough code required furloughs to first include existing officers who were retirement eligible, a process which would violate both Title VII and the Pennsylvania Human Relations Act. Under the new legislation, furloughs follow the “last in, first out” sequence under which the officers who were the most recently appointed are furloughed first, beginning with any officers in their probationary period.

Obviously, the amendments represent many changes for borough officials. Some of them are certain welcome clarifications, such as the timing of the holding of the hearing and the coordination of the usage of alternate commission members between the First Class Township and Borough Codes. Others, such as the apparent expansion of the times during which a police

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officer or firefighter may engage in political activity will present new challenges to boroughs, but the General Assembly has provided some other protections as well. Regardless of how the amendments are characterized, the amendments will require action by each borough to amend their rules to bring them in compliance. Accordingly, boroughs should consult with their solicitor and labor counsel to discuss necessary amendments. Between this round of amendments and the ones which occurred within the last two years, careful review of the rules will be necessary to ensure that they are updated appropriately. As always, amendments to the rules must first be made by the commission and approved by borough council.

*The Labor & Employment Alert is intended to keep readers current on matters affecting labor & employment, and is not intended to be legal advice. If you have any questions, please call **Scott Blissman** at 215.851.8485, **Ryan Cassidy** at 215.851.8531, **Michael Miller** at 717.237.7174 or any other attorney with whom you have been working.*

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