CANNON COUNTY

HUMAN RESOURCES

LEGAL REFERENCE BOOK

1st Edition, Current to January, 2021

Compiled by Jonathon Fagan, County Attorney, January 2021, as a best-practices guide for Cannon County Government.

TABLE OF CONTENTS

Title i

Table of Contents ii

Federal Fair Employment Law Overview 1

Fair Labor Standards Act 27

Employment Contracts 59

Employee Handbooks 79

References 97

Employee Privacy Rights 105

Wages and Pay Periods 136

Vacation Time 151

Severance Benefits 160

Age Discrimination 172

PROPER EMPLOYEE TERMINATION 190

LAYOFFS 203

Unemployment Compensation 221

COBRA 237

FEDERAL FAIR EMPLOYMENT LAWS
An Overview

− Summary

Federal fair employment laws protect employees from discrimination based on age, race, color, sex, national origin, religion, disability, and genetic information. Federal law covers employers of 15 or more employees, except for the **Age Discrimination in Employment Act (ADEA),** which covers employers with 20 or more employees. State laws often cover employers with fewer employees and provide protection for groups not covered under federal law. Certain individuals in the workplace, such as independent contractors, are not protected by federal fair employment laws if they are not employees. Employers are liable for discriminatory acts by supervisors—in some cases, strictly liable. There are many preventive measures an employer can take to reduce the probability of being sued for discrimination. Civil rights laws also impose numerous recordkeeping requirements on employers.

━ Prohibited Practices

Federal fair employment laws prohibit employment practices that discriminate based on age, race, color, sex, national origin, religion, disability, and genetic information. The laws also prohibit employers from retaliating against employees who file discrimination complaints. In many states, sexual orientation, gender identity, and marital and familial status are also protected characteristics. Many states have separate laws that protect those who have been arrested but not convicted of a crime, individuals with human immunodeficiency virus (HIV)-related diseases, individuals who use tobacco or other lawful products while off duty, and individuals who are actively involved in politics or local unions.

The following chart lists the major federal civil rights statutes. For further details on issues specific to any of these statutes, see the subject pages referenced in the chart. Following the chart, you will find information on a number of issues relevant to most discrimination claims.

Statute	Coverage	Basic Requirements
Age Discrimination in Employment Act (ADEA) (*9 USC 621 et seq.*)	Employers with 20 or more employees	Prohibits discrimination in employment against individuals aged 40 and over
Americans with Disabilities Act (ADA) (*42 USC 1201 et seq.*)	Employers with 15 or more employees	Prohibits discrimination against applicants and employees because of an actual or perceived disability, a record of a disability, or a relationship or association with an individual with a disability
Civil Rights Act of 1866 (Section 1981) (*42 USC 1981 et seq.*)	All public and private employers, regardless of size	Prohibits discrimination based on race
Civil Rights Act, Title VII (*42 USC 2000 et seq.*)	All public employers and private employers with 15 or more employees	Prohibits discrimination in employment (including harassment) based on race, color, sex, religion, and national origin

Equal Pay Act (EPA) (*42 USC 206d*)	Employers engaged in interstate commerce	Prohibits pay discrimination based on sex for equal work
Genetic Information Nondiscrimination Act (GINA) (*42 USC 2000ff*)	All public employers and private employers with 15 or more employees	Prohibits employment discrimination based on genetic information of employee, applicant, or family members
Executive Order 11246	Government contractors	Requires nondiscriminatory employment practices of all contractors; requires contractors with 50 or more employees and contracts of $50,000 or more to implement written affirmative action plans for women and minorities
Social Security Act (*42 USC 706, 791*)	Government contractors and employers that receive federal financial assistance	Prohibits discrimination in employment against individuals with disabilities

— Who Should Be Counted as an Employee?

Partners and Directors

The U.S. Supreme Court has created a framework to analyze whether partners, major shareholders, directors, and other similar parties should be counted as employees for purposes of determining the required threshold number of employees for coverage under the ADA (*Clackamas Gastroenterology Associates, P.C. v. Wells,* 123 S.Ct. 1673 (2003)). The Court based its decision on factors established by Equal Employment Opportunity Commission (EEOC) guidelines; therefore, it is very likely that the analysis will apply to claims brought under Title VII and the ADEA, to which the guidelines also apply. The Court held that six factors are relevant when determining who is an employee for purposes of federal antidiscrimination statutes. The six determining factors are:

- Whether the organization can hire or fire the individual or set rules and regulations of

the individual's work;

• Whether the organization supervised the individual's work and to what extent;

• Whether the individual reports to someone higher in the organization;

• Whether the individual can influence the organization's policy and to what extent;

• Whether the organization intended the individual to be an employee as expressed in written agreements and contracts; *and*

• Whether the individual shares in profits, losses, and liabilities of the organization.

The Court also advised that no one factor is a deciding factor but that “all of the incidents of the relationship” must be considered. In addition, the Court noted that a mere title, such as partner, director, or vice president, should not be used as the determining factor. Generally, if an individual has a position in a company that gives him or her the right to exercise control over the company, the individual is likely to be classified as an employer rather than an employee. Conversely, if an individual is subject to the company's control, the individual is likely to be classified as an employee. The Court's ruling in *Clackamas* has been extended to apply to closely held corporations (*De Jesus v. LTT Card Services, Inc.,* 474 F.3d 16 (1st Cir. 2007)).

Tip: Be sure that your employment agreements are clearly written and that no ambiguity exists when an individual is hired with a specified status.

Independent Contractors

Assuming that the independent contractor relationship is legally valid, independent contractors are not counted as employees. Employers should be cautioned, however, that these relationships are scrutinized closely by the government and that there can be legal and tax consequences if an employer uses independent contractor agreements to avoid employer obligations in situations that more closely resemble employment than independent contracting. Please see the national Independent Contractors section.

Contingent Workers

Temporary and leased employees provided by a staffing firm or employment agency *do* sometimes need to be counted as employees for purposes of civil rights statutes. According to EEOC guidelines on contingent workers, employers may be responsible for discrimination against workers supplied (and paid) by an agency if the employer controls the means and manner of work performance. If both the agency and the employer share control, *both* can be treated as employers. Therefore, the

employee would have the right to bring civil rights claims against either the agency or the employer (or both). Furthermore, both the agency and the employer would be obligated to count the employee for purposes of determining the applicability of antidiscrimination statutes.

Ministerial Exception

The U.S. Supreme Court unanimously ruled that there is a ministerial exception to federal fair employment laws that bars employment discrimination suits against a religious organization by a minister (*Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC,* 132 S.Ct. 694 (2012)). In this case, the employee was a called teacher in an elementary school operated by the church. The school employed both "lay" teachers, who were not commissioned for religious service, and "called" teachers, who were required to take courses in theological studies and pass an exam before they were eligible to be "called" to service by the congregation. Called teachers received the title "Minister of Religion, Commissioned." The employee developed a disability and went on disability leave. Her employer filled her position with a lay teacher for the school year and refused her request to return to her job midyear. The employee threatened to file a discrimination claim and was subsequently fired. The EEOC brought a lawsuit on her behalf, alleging discrimination under the ADA. The employer claimed that the ministerial exception to the ADA applied because the employee was a minister. The 6th Circuit Court of Appeals ruled that the employee was not a minister and allowed the case to proceed. The case was ultimately heard by the U.S. Supreme Court.

The Court agreed with the employer that the First Amendment of the Constitution prohibits employment discrimination lawsuits when the employer is a religious organization and the employee is a minister. In finding that the employee fell within the ministerial exception, the Court pointed to evidence that the church held her out as a minister, that she had undergone significant religious training followed by a formal commissioning process, that the employee had held herself out as a minister by accepting the formal call to religious service in teaching, and that her job duties reflected a role in conveying the church's message and carrying out its mission. Although the Court found that the employee was a minister in this case, it declined to adopt a "rigid formula" for deciding when an employee qualifies as a minister.

In 2020, the U.S. Supreme Court held that two elementary school teachers at religious schools fell within the ministerial exception and were, therefore, precluded from bringing employment discrimination claims (*Our Lady of Guadalupe Sch. v. Morrissey-Berru,* 140 S. Ct. 2049 (2020)). In concluding that the ministerial exception applied to the teachers, the Court noted that the factors it relied on in its *Hosanna-*

Tabor decision were not required to be met in every case and that what matters “is what an employee does.” The Court pointed to evidence that the teachers performed “vital religious duties, such as educating their students in the Catholic faith and guiding students to live their lives in accordance with that faith” and that their employer “expressly saw them as playing a vital role in carrying out the church’s mission.”

Does not bar harassment claims. The 7th Circuit Court of Appeals held that the ministerial exception does not apply when an employee brings a hostile environment harassment claim under Title VII (*Demkovich v. St. Andrew the Apostle Par.,* 973 F.3d 718 (7th Cir. 2020)). In this case, a church’s musical director alleged that his supervisor harassed him based on his sexual orientation and disabilities. The court recognized the ministerial exception but held that the right balance between the freedom of religion and employees’ rights is to bar claims challenging tangible employment actions (e.g., hiring, firing) but to allow hostile environment claims that do not challenge tangible employment actions.

− National Origin Discrimination

Title VII prohibits employment practices that discriminate based on national origin. The law protects applicants and employees regardless of citizenship status or work authorization. According to the EEOC’s guidelines, unlawful employment action includes discrimination that is based on:

- An individual's place of origin or ancestor's place of origin
- The employer's perception that an individual is of a particular national origin
- Physical, cultural, or linguistic characteristics of a national origin group
- Marriage to or association with persons, membership in organizations, or attendance at schools or churches associated with a national origin group
- A name or spouse's name associated with a national origin group
- Aptitude or other employment tests, unless such requirements are applied equally to all applicants and relate to successful job performance
- An accent or manner of speaking, unless there is a legitimate, nondiscriminatory reason for the action

Hiring and Recruiting

When reviewing or developing hiring practices, employers should consider the following points:

• Relying exclusively on word-of-mouth recruitment through current employees generally replicates the composition of the existing workforce. Unless an employer's workforce is already diverse, a variety of recruitment resources targeted at diverse applicant pools should be used.

• Height or weight requirements that tend to exclude candidates based on national origin should be avoided.

• Language fluency may be required only if it is necessary to perform the duties of a specific job.

• If language fluency is required, do not require a greater degree of fluency than actually required to perform the job effectively.

• Use several interviewers to minimize the impact of conscious or unconscious discrimination by any single interviewer.

• Ask open-ended questions that relate to the applicant's qualifications and experience.

• Avoid personal questions, particularly those regarding the applicant's marital or family status.

• Unless needed to perform the job, avoid training or education requirements that tend to exclude applicants with foreign training or education or that require foreign training or education.

• Require review of each proposed hire preoffer to spot possible discriminatory trends in job and salary offers.

English-Only Policies

An employer may require that an employee be able to speak and understand English if the requirement is based on a business necessity. For example, a retail establishment that sells its products to English-speaking customers may require that its salespeople be able to speak and understand English while on the retail floor. However, a policy requiring that only English be spoken at lunch, on breaks, or outside the workplace will be considered unlawful.

Guidelines issued by the EEOC provide examples of a business necessity that would justify an English-only policy:

• For communications with customers, coworkers, or supervisors who speak only English

• In emergencies or other situations in which workers must speak a common language to promote safety

• For cooperative work assignments in which the English-only rule is needed to promote efficiency

• To enable a supervisor who speaks only English to monitor the performance of an employee whose job duties require communication with coworkers or customers

In addition, employers should:

• Meet with employees to explain the policy requirements and the consequences for violating the policy.

• Limit the English-only policy to times when it is justified by a business necessity (communications in an employee's primary language should not be prohibited during breaks or meal periods).

• Enforce the rule consistently and fairly (e.g., don't allow some employees to speak in their primary language and not others).

Undocumented Workers

The EEOC has taken the position that Title VII makes it unlawful for covered employers to discriminate against *any* employee or applicant based on national origin, regardless of the individual's immigration status. The EEOC has also directed its field offices to process claims for all forms of relief, other than reinstatement and back pay for periods after discharge or failure to hire, without regard to an individual's immigration status. In other words, employers are still required to make every effort to protect all workers from discrimination based on national origin.

− Race Discrimination

Title VII prohibits employment discrimination based on race or color. Employers are prohibited from basing employment decisions on racial stereotypes or assumptions about abilities, traits, or performance of members of a particular race. Segregating or classifying employees based on race or color is also prohibited under Title VII. For example, an employer may not assign primarily African-American employees to predominantly African-American establishments or geographic areas. Both intentional discrimination and discrimination resulting from seemingly neutral job policies are prohibited.

Section 1981 of the Civil Rights Act of 1866

The Civil Rights Act of 1866 (*42 USC 1981 et seq.*) was enacted shortly after the end of the Civil War and was subsequently amended by the **Civil Rights Act of**

1991. Commonly referred to as "Section 1981," the law prohibits discrimination based on race in the making of private and public contracts, including employment at will. Section 1981 applies to all public and private employers, regardless of size.

Individual liability. Unlike Title VII, Section 1981 permits lawsuits against an individual who discriminates against an employee based on race. Employees are not required to file a charge with the EEOC before bringing a lawsuit against an employer.

− Religious Discrimination

Under Title VII, it is unlawful to discharge or otherwise discriminate against or harass applicants or employees based on religion. In addition, Title VII requires that an employer provide reasonable accommodation for an employee's religious beliefs or practices, unless it would cause the employer an undue hardship.

Employers are also prohibited from discriminating against an individual based on his or her association with a person of a particular religion. For example, it is unlawful to discriminate against an employee because of his or her spouse's religious beliefs.

Exemptions

Title VII permits religious corporations, associations, educational institutions, or societies to hire only individuals of a particular religion to perform work connected with the organization's activities. It is not unlawful for a school, college, university, or other educational institution to hire and employ employees of a particular religion if the school is owned, supported, controlled, or managed by a particular religion or religious entity or if the curriculum of the school is directed toward the growth of a particular religion. For example, a school or university owned by the Catholic church can require that all the teachers it hires be Catholic.

Religious Practices

According to EEOC guidelines, religious practices include traditional religious beliefs, moral and ethical beliefs, and beliefs that individuals hold "with the strength of traditional religious views" (*29 CFR 1605.1*). Religious discrimination also includes discrimination against an individual because he or she is an atheist.

The fact that an individual's beliefs are not espoused by any religious group or are not accepted by the religious group to which the individual professes to belong will not determine whether the belief is a religious belief. However, beliefs are not protected merely because they are sincerely held (e.g., many individuals adhere to a

vegetarian diet for purely secular reasons). According to the EEOC, religion typically includes ultimate ideas about “life, purpose, and death.”

Prohibited Inquiries

The EEOC guidelines state that an employer's use of inquiries that tend to reveal an employee's or applicant's religious beliefs violate Title VII, unless the employer can show there was no discriminatory effect or that the inquiries were justified by business necessity. Therefore, employers should not ask applicants or employees whether they are available for work on a specific date or time. The guidelines suggest that an employer state the normal work hours for a job and—after making it clear to the applicant that there is no requirement to disclose religion-related absences needed during the scheduled hours—ask the applicant whether he or she is otherwise available to work those hours. Then, after a job offer is made, but before the applicant is hired, the employer can inquire about the need for a religious accommodation (*29 CFR 1605.3*). Where the employee is unable to work the normal hours for the job because of religious beliefs, the employer must offer a reasonable accommodation, unless it would cause the employer an undue hardship.

Reasonable Accommodation Required

Under Title VII, employers are required to accommodate the religious practices of an employee or job applicant unless the accommodation would cause an “undue hardship” on the employer's business (*29 CFR 1605*). Undue hardship may be claimed by an employer in situations where accommodating an employee's religious practices would require more than ordinary administrative costs. Undue hardship also may be shown if changing a bona fide seniority system to accommodate one employee's religious practices denies another employee the job or shift preference guaranteed by the seniority system.

Employers need not incur more than minimal costs to accommodate an employee's religious practices. For example, infrequent or temporary overtime payments or administrative costs would not be considered undue hardships, while having to make regular payment of premium wages to a substitute worker might be. Similarly, it might be an undue hardship if an accommodation operated to deny another employee his or her job or shift preference in violation of a bona fide seniority system.

Factors to be considered in determining whether an accommodation is an undue hardship include the size and nature of the business, the type and cost of the accommodation required, and notice of the requested accommodation. An assumption that many more people with the same religious practices as the person

being accommodated may also need accommodation is not evidence of undue hardship (*29 CFR 1605.2*).

Options for reasonable accommodation include flexible arrival and departure times, floating or optional holidays, flexible work breaks, use of lunch time in exchange for early departure, staggered work hours, and permitting an employee to make up time lost due to the observance of religious practices.

Alternatives for accommodation might also include substituting workers, exchanging employee hours, planning flexible work schedules, transferring employees, and changing job assignments. In order to facilitate accommodation, an employer should consider publicizing its policies regarding accommodation and voluntary substitution; promoting an atmosphere in which such substitutions are favorably regarded; or providing a central file, bulletin board, or other means for matching voluntary substitutes with positions for which substitutes are needed.

The U.S. Supreme Court has ruled that an employer may be liable for religious discrimination if the employer takes an adverse employment action against an individual because the employer thinks the individual would need a religious accommodation (*EEOC v. Abercrombie & Fitch Stores, Inc.,* 135 S.Ct. 2028 (2015)). In the case, a job applicant interviewed for a job at the employer's retail store. In keeping with her Muslim faith, she wore a head scarf. She did not discuss and was not asked about the head scarf during the interview. She was not hired, and her friend, who was a company employee, told her it was because of her head scarf. The applicant complained to the EEOC, which brought a lawsuit on her behalf. The employer argued that it needed "actual knowledge" that the head scarf was part of the applicant's religious practices, but the Court disagreed, ruling that a plaintiff needs to show only that her need for an accommodation was a "motivating factor" for the adverse employment action.

Dress Codes

Sometimes, an employee dresses in a manner that does not comport with the look that the employer wants to convey to the public. In order to comply with religious beliefs, a male employee may want to wear a beard or a female employee may want to cover her head. Employers may need to accommodate the dress and grooming habits based on a religious practice or belief, unless the employer has a policy against the dress or grooming habits that is justified by a business necessity. For example, an employer is not required to accommodate long robes or skirts in an industrial plant, where loose clothing may get caught in moving machinery. Similarly, an employer need not accommodate untrimmed beards or flowing hair if the business is a

restaurant or hospital and it can be proven that the employee's practice presents a health or safety risk.

The 1st Circuit Court of Appeals has ruled that an employer did not have to provide the accommodation preferred by an employee because it created an undue hardship for the employer (*Cloutier v. Costco Wholesale,* 390 F.3d 126 (1st Cir. 2004)). The employee, who had a pierced eyebrow, was a cashier who frequently interacted with customers. She claimed that her religious belief required her to wear her body piercings. The employer's neutral dress code had been implemented to cultivate a "neat, clean, and professional image," which was a business determination within the employer's discretion, according to the court. The employer accommodated another cashier's religious beliefs by allowing her to use clear plastic retainers in place of her eyebrow jewelry. However, the employee in this case refused to accept any accommodation from the employer other than a complete exemption from the employer's policy prohibiting facial jewelry. The court reasoned that the exemption she demanded was an undue hardship because it would adversely affect the employer's public image.

In contrast, a federal district court in Washington state ruled that an employee could proceed to trial with his claim that his employer's requirement to cover his tattoos constituted religious discrimination (*EEOC v. Red Robin Gourmet Burgers, Inc.,* No. C04-1291 (W.D. Wash. 2005)). The employee claimed he had sincere religious beliefs that prevented him from covering up the tattoos to conform to the employer's dress code barring visible tattoos. Although the employer in this case claimed that allowing employees to show their tattoos would adversely affect its public image, the court noted that no customers had complained about any employees' tattoos and that the size of the wrist tattoos in question suggested that few customers had noticed the tattoos. The court noted that this was in contrast to the facial piercings in the *Cloutier* case that were "imminently visible." The employer subsequently agreed to settle the case.

Sabbath Day and Religious Holidays

Sabbath day. An employer has a duty to accommodate its employees' religious beliefs and practices, including letting employees observe their Sabbath day, regardless of the day of the week on which it falls. Most religious discrimination problems involve accommodation of employees seeking to observe their Sabbaths. Several U.S. Supreme Court decisions provide additional guidance for employers researching Sabbath observances:

- Employers need not incur overtime costs to replace an employee who will not work on

Saturday.

• The complaints of fellow employees about having to work on Saturday in place of an employee who observes a Saturday Sabbath do not constitute undue hardship.

• In accommodating an employee's religious practices, employers are not required to choose the option the employee prefers, as long as the accommodation the employer offers is reasonable.

• Employers are not required to take steps inconsistent with a valid seniority system or collective bargaining agreement to accommodate an employee's religious practices.

Religious holidays. It is important for employers to be sensitive to an individual employee's religious obligations regarding holiday observances. Employers should accommodate an employee's request for time off for a holiday observance if the accommodation does not require more than a *de minimis* cost or burden to business operations (i.e., does not create an undue hardship). Some courts have ruled that requiring employees to take paid or unpaid leave on days they wish to observe as personal religious holidays meets the test of reasonable accommodation. Many employers grant all employees one or two paid personal days or floating holidays each year for this purpose.

Proselytizing

Employers are not required to allow employees time to spread the "good word," thereby imposing their religious beliefs on others or taking advantage of the workplace to carry out their religious mission. Some employees may perceive proselytizing or other religious expression as unwelcome harassment based on their own religious beliefs and observances or lack thereof. An employer has the right to limit conduct that interferes with work but almost never has the right to entirely ban discussions relating to religion because Title VII requires employers to accommodate employees' sincerely held religious practices as long as no undue hardship is posed.

An employer may establish a legitimate nondiscriminatory policy that requires employees to refrain from discussing non-work-related issues that their coworkers find offensive. The standard for this policy should be similar to the standard imposed for sexual harassment (e.g., the non-work-related discussion may not interfere with an individual's work performance or create an intimidating, hostile, or offensive working environment).

━ Sex Discrimination

Employment practices that discriminate based on sex are prohibited by Title VII. Unlawful practices include sex-based discrimination in hiring, advancement, or any other term or condition of employment. Title VII covers all public employers and private employers with 15 or more employees. Many states have similar laws that apply to employers with fewer than 15 employees. Some state laws and local ordinances also prohibit discrimination based on sexual orientation, gender identity, marital status, and parental status.

Sexual harassment. Sexual harassment is a form of sex discrimination under Title VII. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other types of conduct that affect a person's employment, interfere with work performance, or create a hostile work environment. Please see the national Sexual Harassment section.

Maternity and pregnancy. The **Pregnancy Discrimination Act of 1978** amended Title VII to include pregnancy, childbirth, and associated medical conditions within the definition of "sex." As a result, discrimination based on pregnancy is prohibited under Title VII.

Sexual Orientation and Gender Identity

On June 15, 2020, the U.S. Supreme Court ruled that employment discrimination based on an individual's sexual orientation or transgender status is sex discrimination that violates Title VII (*Bostock v. Clayton Cty.,*140 S. Ct. 1731 (2020)). The decision resolved a split that had developed in between the federal circuit courts of appeal on the issue because Title VII does not expressly prohibit discrimination based on sexual orientation or gender identity.

Because of the Court's decision, all employers covered under Title VII are prohibited from discriminating against applicants or employees based on sexual orientation or transgender status.

Twenty-one states, the District of Columbia, and many counties and cities have laws or ordinances that prohibit employers from discriminating based on sexual orientation or gender identity. Employers should review applicable laws, regulations, and ordinances to ensure they are complying with legal requirements.

Gender Stereotyping

Under Title VII, it is unlawful for an employer to base employment decisions on stereotypes or assumptions about the abilities, traits, or performance of individuals of a certain sex. The U.S. Supreme Court has ruled that an individual whose employer took adverse employment action against her because she did not match the gender

stereotypes her employer associated with females had an actionable claim under Title VII (*Price Waterhouse v. Hopkins,* 109 S. Ct. 1775 (1989)).

Parents of young children. At least one federal court has ruled that unlawful sex discrimination occurs when an employer takes an adverse job action on the assumption that a woman, because she is a woman, will neglect her job duties in favor of her presumed childcare responsibilities (*Chadwick v. WellPoint, Inc.,* 561 F.3d 38 (1st Cir. 2009)). In this case, the employee was the mother of 6-year-old triplets and an older child. The court allowed her to proceed to trial based on evidence that she was significantly more qualified for a promotion than the woman who got the job, along with evidence of statements by management indicating its assumption that she would be unable to handle the demands of work and home.

Equal Pay Act

The federal **Equal Pay Act** specifically addresses gender discrimination in pay and requires employers to pay men and women equally for substantially equal work.

Retaliation Claims

Federal fair employment laws prohibit employers from retaliating against an individual for filing a charge of discrimination, participating in a discrimination proceeding, or otherwise opposing discrimination. The same laws that prohibit discrimination based on race, color, sex, religion, national origin, age, and disability, as well as wage differences between men and women performing substantially equal work, also prohibit retaliation.

Title VII. The U.S. Supreme Court has ruled that an employee must prove a retaliation claim under Title VII by using the more restrictive “but for” causation standard and not the less demanding “motivating factor” standard (*Univ. of Texas Sw. Med. Ctr. v. Nassar,* 133 S.Ct. 2517 (2013)). The question in the case was whether an employee must prove that the only reason the employer retaliated against him was that he engaged in protected activity (such as reporting harassment or filing a discrimination charge) or whether he must prove that the protected activity was simply a motivating factor in the retaliation. The Court's ruling that an employee must prove that the protected activity was the determining factor in an adverse employment action makes it more difficult for an employee to prove unlawful retaliation.

Section 1981. The U.S. Supreme Court has ruled that retaliation claims may be brought under Section 1981, which prohibits discrimination based on race or color (*CBOCS West, Inc. v. Humphries,* 128 S.Ct. 1951 (2008)). In this case, a former employee claimed he was fired because he complained to his employer about alleged racist remarks made by a supervisor and about the firing of an African-American employee. The employee brought a lawsuit under Section 1981, but his employer appealed, claiming that Section 1981 does not provide a cause of action for retaliation. In its analysis, the Court reviewed its prior decisions and concluded that Section 1981 protects employees from retaliation. The decision is significant because Section 1981:

- Does not provide a cap on punitive or compensatory damages
- Has a 4-year statute of limitations
- Does not require claimants to exhaust administrative remedies before filing a lawsuit
- Applies to all employers regardless of size

Federal sector ADEA. The U.S. Supreme Court also has ruled that a public employee can bring a retaliation claim under the federal sector provision of the ADEA (*Gomez-Perez v. Potter,* 128 S.Ct. 1931 (2008)). Although the section of the ADEA that applies to federal employees does not expressly prohibit retaliation, the Court ruled that retaliation is covered under the law's antidiscrimination provision. **Note:** The ADEA does expressly prohibit retaliation by *private* employers.

If an employee engages in protected activity, it is important for the employer to avoid any actions that are or might be perceived to be retaliatory. Such actions could result in an additional claim by the employee for retaliation. Retaliation claims can cause big headaches for employers because employees can maintain retaliation claims and recover damages *even if they do not prevail* on the underlying discrimination claims. This means that an employer that did not discriminate against an employee may nonetheless be liable if it retaliates against an employee for filing a discrimination claim.

Protected Activity

Under EEOC guidelines, employers may not retaliate against employees for engaging in a "protected activity," which is defined as either:

- Opposing a discriminatory practice by the employer; *or*
- Participating as a witness or a party in the investigation, processing, or hearing of an EEOC charge.

Opposing discriminatory practices by the employer is considered protected activity, regardless of whether the employee is opposing discrimination against himself or herself or against a fellow employee. Opposition to a discriminatory practice can take the form of a written or verbal threat to file an EEOC charge, written or verbal advice to the employer that the employer is engaged in a discriminatory practice, the filing of a union grievance, picketing, or any other reasonable opposition.

Protection expanded. The U.S. Supreme Court has ruled that an employee is also protected from retaliation for speaking out about discrimination when questioned as a witness during an employer's internal investigation of another employee's discrimination complaint (*Crawford v. Metro. Gov't of Nashville and Davidson County,* 129 S.Ct. 846 (2009)). In this case, the employee did not disclose that she had been sexually harassed until her employer questioned her about a coworker's sexual harassment complaint. The employee revealed that the alleged harasser had also sexually harassed her in the past. Subsequently, the employee was fired and brought a lawsuit against the employer claiming she was fired in retaliation for her disclosure. The employer argued that the employee was not protected from retaliation because she had not initiated the harassment complaint, and Title VII's opposition clause required “active, consistent” activities. The trial court agreed, and the appeals court affirmed the ruling. However, the Supreme Court reversed the decision, concluding that the opposition clause of Title VII protects employees who report discrimination during the course of an investigation.

Practical tip: Employers should update their policies, procedures, and training to clarify that retaliation is prohibited against anyone who discloses discriminatory conduct while participating in any investigation.

Exception. Examples of opposition that have been found to be *unreasonable* include copying and disseminating confidential documents, bypassing the chain of command in making complaints, making overwhelming numbers of complaints without factual basis, badgering coworkers to support an EEOC charge, committing or threatening acts of violence or property destruction, or refusing to perform work duties (although an employee can legitimately refuse to follow an employer's instructions if they involve engaging in illegal or discriminatory behavior).

Retaliation Against Third Parties

The U.S. Supreme Court has ruled that an “aggrieved person” under Title VII is anyone with an interest intended to be protected under the statute, including employees who have a relationship to another employee who has brought a Title VII discrimination charge against the employer (*Thompson v. N. Am. Stainless, LP,* 131

S.Ct. 863 (2011)). In this case, the plaintiff and his fiancée worked for the same employer. Shortly after the employer learned that his fiancée had filed a discrimination charge with the EEOC, the employer fired the plaintiff. The plaintiff brought a lawsuit under Title VII claiming unlawful retaliation, but the 6th Circuit Court of Appeals ruled that the plaintiff could not pursue his claim because he had not engaged in protected activity himself. The Supreme Court reversed and ruled that the firing could constitute unlawful retaliation against the fiancée and that the plaintiff, by virtue of his relationship with her, was an aggrieved person under Title VII who fell within the zone of interests protected under the law. The Court concluded that the plaintiff was entitled to bring his lawsuit claiming unlawful retaliation against him by the employer.

Practical tip: The Court declined to specify a "fixed class of relationships" that would qualify an individual for third-party protection, other than to state that firing a close family member would almost always meet the standard and inflicting a milder reprisal on a mere acquaintance probably would not. As always, employers should carefully document the legitimate, nondiscriminatory reasons leading to a decision to take an adverse action against an employee.

What Constitutes Improper Retaliation?

The U.S. Supreme Court has ruled that retaliation includes *any* action by an employer, whether job-related or not, that is "materially adverse" and could dissuade a reasonable employee or job applicant from exercising protected rights (*Burlington Northern and Santa Fe Ry. Co. v. White,* 126 S.Ct. 2405 (2006)). Under the Court's decision, retaliatory actions are not limited to actions that are employment-related (i.e., that affect the terms and conditions of employment or that occur in the workplace) but include any action by an employer that has a materially adverse effect and could reasonably deter a person from engaging in activity protected by Title VII.

In addition, an alleged retaliatory action will be examined in light of the context in which it occurred so that an action may be retaliatory for an employee in one circumstance and nonretaliatory for another employee. In an example provided by the Court, a work schedule change might have little adverse effect on many employees, but in the context of an employee with school-age children, the schedule change might have a materially adverse effect and, therefore, be considered retaliatory.

Federal courts have applied the Supreme Court's standard to retaliation claims under other statutes, such as the federal Family and Medical Leave Act (*Foraker v. Apollo Group, Inc.,* 427 F.Supp.2d 936 (D. Ariz. 2006)). In this case, the court ruled that

an employer’s action in placing an employee on administrative leave and prohibiting him from entering the workplace was a materially adverse action under the “reasonable employee” standard, despite the fact that the employer provided full compensation and benefits to the employee during the administrative leave.

These court decisions make it more important than ever for employers to implement policies that prohibit retaliation and to take steps to ensure enforcement of the policies when employees or applicants complain of discrimination. Training supervisors about actions that may be considered retaliatory and creating a review process for actions taken after an employee has filed a complaint may help employers avoid retaliation claims.

How Can Retaliation Claims Be Avoided?

There are steps employers can take to be proactive in avoiding retaliation claims, including the following:

- Implement antidiscrimination and antiharassment policies that include a strong prohibition of retaliation.
- Make sure employees are aware of the employer's procedures for reporting discrimination, harassment, and retaliation.
- Train supervisors regarding the wide range of actions that may be considered retaliatory.
- Limit information regarding a discrimination claim to Human Resources (HR) managers or direct supervisors with a need to know.
- Objectively and thoroughly investigate all discrimination claims, and analyze the results of the investigation with an open mind.
- During investigations, remind all parties of the employer's antiretaliation policy and reporting procedures.
- Create a review process for actions taken after an employee has engaged in a protected activity.
- If it appears that retaliation has occurred, take prompt, effective action to correct the situation.

− Pay Discrimination Claims

Time limits for filing claims. Claims of pay discrimination under Title VII must be

filed with the EEOC within 180 days after the alleged discriminatory conduct occurs (300 days if the charge is also covered by state or local fair employment laws). The EPA allows a 2-year period for an individual to bring a civil action in federal court and 3 years for suits alleging an intentional violation by an employer (*29 USC Sec. 255*).

Under the **Lilly Ledbetter Fair Pay Act of 2009 (Ledbetter Act),** an employer violates federal fair employment laws, with respect to compensation discrimination, when:

- A discriminatory compensation decision or other practice is adopted;
- An individual becomes subject to a discriminatory compensation decision or practice; *or*
- An individual is affected by the application of a discriminatory compensation decision or practice, including each payment of wages, benefits, or compensation that resulted, in whole or in part, from the decision or practice.

This means that every paycheck affected by a discriminatory pay decision constitutes an unlawful discriminatory act, and the issuance of each paycheck restarts the time limit for filing a charge of pay discrimination.

Under the Ledbetter Act, the time period for filing a charge of discrimination begins *each time* an employee receives *any* compensation or benefits (e.g., a paycheck) resulting from an employer's past discriminatory pay practice or decision, regardless of how far in the past the discriminatory practice occurred. Once an alleged discriminatory paycheck is received, an employee has 180 days (300 days if the charge is also covered by state or local fair employment laws) to file a pay discrimination charge with the EEOC. The Ledbetter Act applies to Title VII, the ADEA, the ADA, and the Rehabilitation Act of 1973, which prohibit compensation discrimination based on race, color, national origin, religion, sex, age, or disability.

Note: The EPA is a separate law, and although it is enforced by the EEOC, individuals alleging violations of the EPA are not required to exhaust administrative remedies (i.e., file a pay discrimination charge with the EEOC) before filing a private lawsuit in court.

– What Happens When a Discrimination Charge Is Filed?

If an employee or job applicant files a charge with the EEOC, the EEOC will follow these steps:

- A copy of the charge will be provided to the employer.

• Charges that raise no legal claim under any EEOC-enforceable law will be immediately dismissed (and all parties notified). The EEOC will issue a “right to sue” letter to the employee, who may then bring a lawsuit against the employer.

• If both parties opt for mediation, the EEOC will work with them to reach a settlement. If mediation is unsuccessful, the investigation process resumes.

• The EEOC will investigate any charges that appear to raise a valid claim. At this stage in the process, the EEOC will request that the employer provide information on the matters raised in the charge. The EEOC may also review the employer's records and interview key parties.

• If the evidence shows that discrimination *did not* occur, the EEOC will issue a “right to sue” letter to the employee and notify the employer.

• If evidence indicates that discrimination *did* occur, the EEOC will attempt to reach a settlement with the employer.

• If a settlement is not reached, the claim may then be litigated by the EEOC, or it will issue a “right to sue” letter to the employee.

Preserving evidence. When an employer receives notice that a claim has been filed, it should take steps to ensure that all relevant documents and records, including electronic records such as e-mails, are preserved until the claim has been fully resolved. If an employee has received a “right to sue” letter, the employer must keep all relevant documents and records until after the 90-day statutory period has expired. If the employee files a lawsuit, the claim is not considered fully resolved until the litigation ends, including any appeals of court decisions.

− Can an Employer Limit or Control the Filing of Claims?

Mandatory Arbitration Clauses

Some employers attempt to limit employees' rights to file a charge or participate in an EEOC proceeding by requiring them to sign an agreement in which they relinquish those rights. This language may appear in alternative dispute resolution (ADR) agreements, waivers, employee handbooks, benefit plans, or noncompete agreements. In *Circuit City v. Adams,* the U.S. Supreme Court held that employment disputes can be subject to mandatory arbitration (*Circuit City v. Adams,* 121 S.Ct. 1302 (2001)).

The U.S. Supreme Court has also held that a private arbitration agreement between an individual and that individual's employer does not prevent the EEOC from filing a

court action in its own name and recovering monetary damages for the individual (*EEOC v. Waffle House, Inc.,* 122 S.Ct. 754 (2002)).

The EEOC has generally opposed efforts by employers to make the arbitration of discrimination claims mandatory. However, mandatory arbitration agreements have been upheld by some courts where they are sufficiently clear and explicit and the employee received something of value in return for limiting his or her access to the courts. Employers attempting to implement an arbitration program for discrimination claims should consider the following steps to increase the likelihood that the arbitration program will be enforceable:

• Obtain a signed arbitration agreement. Do not “bury” the arbitration clause in an employee handbook.

• Clearly define the scope of claims subject to arbitration, perhaps eliminating federal discrimination claims.

• Do not attempt to limit the employee's access to agencies such as the EEOC.

• Do not attempt to cap damages or to bar recovery of punitive damages.

• Apportion costs and fees in a fair and evenhanded manner.

• Avoid one-sided coverage that limits the applicability of the agreement to claims brought by the employee while imposing no similar restriction on the employer.

Tip: Because arbitration agreements can be tricky, and perhaps unenforceable if drafted improperly, employers should always consult with an attorney before requiring employees to sign arbitration agreements.

− The After-Acquired Evidence Rule

Occasionally, *after* an employee has filed a civil rights claim alleging a discriminatory and/or retaliatory discharge, the employer will discover evidence that would have justified firing the employee, had it been known at the time of the discharge. Often, this “after-acquired evidence” comes to light during the investigation or litigation of the civil rights claim, and its proper treatment can be a source of confusion for employers and the courts. As a general rule, courts will not absolve an employer from liability for a discriminatory or retaliatory discharge based on after-acquired evidence. However, the court may use the evidence to limit damages to back pay from the date of the wrongful termination to the date the after-acquired evidence was discovered.

For example, assume that *XYZ* corporation engaged in age discrimination in its termination of employee *A* and was sued by *A.* During the course of preparing for a trial of the lawsuit, *XYZ* discovered that *A* had been embezzling funds from *XYZ* for years. *XYZ* presented this evidence at trial. The court might well find *XYZ* liable for age discrimination but only until such time as *XYZ* discovered legitimate grounds to terminate *A.* Therefore, the court might award *A* back pay from the date of the wrongful termination to the date the embezzlement was discovered. However, the court would probably deny *A's* claims for reinstatement or front pay.

— Strategies to Prevent Discrimination Claims

In order to reduce the likelihood that they will be charged with discrimination, employers should take the following precautionary measures in managing their workforce.

Posting Notices

Employers subject to Title VII are required to post conspicuous notice regarding the employer's prohibition of discrimination.

.

Training

Establish a diversity training program to raise awareness of diversity issues in the workplace. In the event of a discrimination lawsuit, evidence of a mandatory diversity training program is an excellent means of establishing an employer's good-faith efforts to prevent discrimination in the workplace.

Discipline

Apply disciplinary policies consistently, regardless of race, sex, religion, or other protected classification, and maintain thorough documentation of any disciplinary measures taken. Ensure that all supervisors and managers comply with and consistently apply established policies and procedures regarding discipline; failure to do so can be used as evidence of discrimination. Please see the national Discipline section.

Take immediate and reasonable steps to stop any discriminatory conduct by supervisors or other employees. For example, speak directly with the individuals who are engaging in discriminatory conduct; warn them that such conduct is unacceptable; and, if the discriminatory conduct is severe, consider taking formal disciplinary action.

Cat's paw liability. The U.S. Supreme Court has ruled that an employer may be held liable for an adverse employment action taken by an unbiased HR manager when the action is based on the recommendation of a supervisor who had discriminatory intent (*Staub v. Proctor Hosp.,* 131 S.Ct. 1186 (2011)). In this case, the vice president of HR terminated employment following a report by the employee's supervisor that the employee had violated the terms of a disciplinary warning. The vice president of HR reviewed the disciplinary documents in the employee's personnel file and decided to fire the employee. However, the disciplinary documents in the file were put there by the employee's supervisors, both of whom were hostile to the employee's military obligations that were protected under the **Uniformed Services Employment and Reemployment Rights Act (USERRA).** The vice president of HR did not investigate the supervisor's report nor whether the disciplinary documents were based on legitimate, nondiscriminatory factors. The fired employee subsequently brought a lawsuit under USERRA. Even though the vice president of HR had no discriminatory motive, the Court ruled that the employer could be liable. Under the standards established by the Court, an employer may be liable if *all* of the following are established:

- A supervisor performs an act motivated by unlawful bias.
- The act is intended to cause an adverse employment action.
- The act is the proximate cause of the ultimate employment action.

This case demonstrates the importance of having a process in place to effectively review disciplinary actions. Although this case was brought under USERRA, the Court noted that USERRA's language regarding a “motivating factor” is very similar to Title VII. The cat's paw theory of liability has subsequently been applied by courts in cases brought under Title VII, the ADA, and Section 1981.

− Employment Practices Liability Insurance

Sometimes, despite the best efforts of the employer to avoid discriminatory practices, discrimination claims will be made. Employment Practices Liability Insurance (EPLI) may help employers to minimize the financial impact of those claims

that cannot be avoided altogether. Generally, EPLI coverage is triggered when the employer is sued for discrimination and covers legal defense fees and any award that might be made in favor of the employee (subject to the limitations and deductible set forth in the policy). Employers that do not yet carry EPLI may want to consider adding it to their insurance package because most commercial liability policies exclude coverage for claims arising from discriminatory employment practices.

− Report and Recordkeeping Requirements

EEO-1 Report. A number of fair employment laws require employers to make periodic reports. The most widely required report is the EEO-1 form, which summarizes employees by job category, race, gender, and color.

Other Recordkeeping Requirements

In general, covered employers are required to keep all personnel and employment records for 1 year. Additional requirements apply to certain payroll records. If a discrimination claim is filed, the employer is obligated to retain all relevant records until after the claim has been resolved.

Failure to adhere to these requirements can have severe negative results for the employer if a civil rights claim goes to court. Several district courts have found that an employer's loss of or destruction of records while a civil rights claim is pending justifi es an inference that the lost or destroyed documents would have supported the discrimination claim and that the employee is, therefore, entitled to a recovery.

− Enforcement

Title VII is enforced by the EEOC. The EEOC has, in many states, entered into agreements with various state human rights commissions and state agencies whereby the state agency or commission is authorized to receive complaints filed under Title VII, investigate complaints, and refer valid claims to the EEOC for litigation or enforcement.

Title VII provides for damages in the form of back pay, reinstatement, front pay, attorneys' fees and costs, and compensatory and punitive damages, including damages for emotional pain and suffering.

Section 1981 is enforced by private lawsuit brought in federal court. Remedies include back pay, injunctive relief, compensatory and punitive damages, and attorneys' fees. The law does not require claimants to exhaust administrative remedies and has a 4-year statute of limitations. Remedies include compensatory and punitive damages that are not subject to the caps found under Title VII.

FAIR LABOR STANDARDS ACT

(FEDERAL WAGE AND HOUR LAW)

— Summary

The **Fair Labor Standards Act (FLSA),** also known as the federal Wage and Hour Law, regulates minimum wage, overtime, equal pay, recordkeeping, and child labor for employees of enterprises engaged in interstate or foreign commerce and employees of state and local governments. The FLSA is enforced by the Wage and Hour Division of the U.S. Department of Labor (DOL). The FLSA applies in all states, but states are permitted to develop their own laws and regulations to provide even greater protection for their workers than is provided under federal law. In cases in which the two laws conflict, the law most beneficial to the employee prevails. Therefore, it is essential that employers understand both the state and federal laws.

— What the Law Covers

The **Fair Labor Standards Act (FLSA),**also known as the federal Wage and Hour

Law, regulates minimum wage, overtime, equal pay, recordkeeping, and child labor for employees of enterprises engaged in interstate or foreign commerce and employees of state and local governments. Please see the national Child Labor, national Equal Pay/Comparable Worth, national Records sections. The FLSA is enforced by the Wage and Hour Division (WHD) of the U.S. Department of Labor (DOL). Although the FLSA applies in all states, it permits states to regulate areas not covered by the FLSA and to afford workers greater protections. Where state law and the FLSA conflict, employers must follow the provision that is more favorable to the employee. There are a number of employment practices that the FLSA does not regulate. For example, it does not require vacation, holiday, severance, or sick pay; meal or rest periods; time off for holidays or vacations; premium pay for weekend or holiday work; pay raises or fringe benefits; and a discharge notice, reason for discharge, or immediate payment of final wages to terminated employees.

━ Pandemic Planning Under the FLSA

Employers faced with a pandemic need to know how to manage a variety of wage and hour issues. Federal law has addressed many of the factors to consider when preparing for or working through a pandemic, as outlined below. Keep in mind that individual state laws or collective bargaining agreements may apply as well.

Inability To Pay Employee Wages

There is no federal law that sets out how often or in what form employers must pay wages to employees. Virtually all states regulate how frequently employers must pay employees their wages. State laws also specify the length of time that may elapse between the end of the pay period and payday. Even in the case of a pandemic, employers must pay employers their wages due for hours worked in a timely fashion. Employers may face fines and penalties for the late payment or nonpayment of wages. If there is a dispute about wages, the employer must pay the employee what it concedes is due. The employee may file a wage claim with the commissioner of Labor to collect any remaining wages he or she believes are owed.

Final Paychecks

It is important for employers to understand their state laws on final paychecks because many states have enacted laws regarding the payment of wages upon the termination of employment, including accrued vacation. These rules often differ depending on whether the termination is voluntary or involuntary. There is no federal

law that sets out how often or in what form employers must pay wages to the employee, but state laws do regulate how frequently employees must be paid. If there is a dispute about wages, the employer must pay the employee what it concedes is due. The employee may file a wage claim with the commissioner of Labor to collect any remaining wages the employee believes are owed.

States often distinguish between voluntary and involuntary termination. Under the most common state provision, employees who are fired or laid off must be paid just after termination; employees who resign must wait until the next regular payday. However, some state laws provide that employees who give their employers sufficient advance notice of their intention to resign are entitled to receive their pay on their final day of work. Some states require that, in addition to wages, employers pay terminating employees for accrued vacation time.

Volunteers During a Pandemic

During a pandemic, a company may be looking for assistance in the form of volunteers. Keep in mind that there are strict laws around volunteering under the FLSA.

Private, for-profit companies. According to the federal Department of Labor, in general, covered, nonexempt workers working for private, for-profit employers have to be paid at least the minimum wage and cannot volunteer their services. Due to the possibility of coercion to perform unpaid services, paid employees may not volunteer to perform the same type of services for their employer that they are normally employed to perform. Time spent in work for public or charitable purposes at the employer’s request, under the employer's direction or control, or while the employee is required to be on premises is working time. However, time spent voluntarily in such activities outside of the employee’s normal working hours is not hours worked, as long as the volunteer activities are not the same or similar to the activities the employee is employed to perform. Therefore, the employer must compensate employees for the hours spent volunteering during their normal working hours or when the volunteer work performed is similar to their regular duties. As for those employees who perform duties that are not similar to their regular duties and that are voluntarily performed after their normal working hours, those volunteer activities are not considered hours worked for the purpose of the FLSA.

Religious, charitable, civic, humanitarian, or similar nonprofit organizations. The FLSA recognizes the generosity and public benefits of volunteering and allows individuals to freely volunteer time to religious, charitable, civic, humanitarian, or similar nonprofit organizations as a public service. Volunteers

will ordinarily not be considered employees for FLSA purposes if the individuals volunteer for these types of organizations without contemplation or receipt of compensation. Additionally, the volunteer services must be given freely without coercion or undue pressure. According to the federal Department of Labor, individuals who volunteer their services in an emergency relief capacity to private not-for-profit organizations for civic, religious, or humanitarian objectives, without contemplation or receipt of compensation, are not considered employees due compensation under the FLSA. However, employees of such organizations may not volunteer to perform on an uncompensated basis the same services they are employed to perform. Where employers are requested to furnish their services, including their employees, in emergency circumstances under federal, state, or local general police powers, the employer's employees will be considered employees of the government while rendering such services. No hours spent on the disaster relief services are counted as hours worked for the employer under the FLSA.

Public employees who volunteer. Employees of public agencies may wish to volunteer for the same organization for which they work. That is allowed but only in very limited situations. To preserve employees' volunteer status, the line between volunteer work and paid work should be clearly defined. When an employee of a public agency wishes to perform volunteer work for his or her employer, the rules are strict. Unlike private employers, public and not-for-profit employers can allow their employees to volunteer their services to the employer as long as they are doing it for "civic, charitable, or humanitarian reasons."

Volunteer work performed by public employees must also meet the same additional requirements as employees of private companies for determining volunteer work status.

To volunteer legally for their own employers, employees of public agencies must perform a service that is distinctly different from their ordinary work activities. The challenge is to determine whether the work the employee wishes to do may be treated as noncompensable and, if so, to determine when the employee is wearing his or her "employee hat" versus his or her "volunteer hat."

Here are some examples of volunteer work that is and is not allowed: A paid city police officer cannot perform police or related duties for the city on a volunteer basis; however, he or she may volunteer as a part-time referee in a basketball league sponsored by the city; an employee of the city Parks Department may also serve as a volunteer city firefighter; an office employee of a city hospital may volunteer to spend time with a disabled or elderly person in the same institution during off-duty hours.

Public employees who wish to volunteer services identical to those they normally

provide in exchange for salary may offer their services only to a different public agency than their employer. For example, a receptionist at a county tax office could offer telephone answering services at a fundraising event run by a state agency, but a nurse at a state hospital might not be able to volunteer his or her nursing services at a state-run neighborhood health clinic because both the hospital and clinic could be considered parts of the same public agency.

Partial Workweeks Because a Business Closes

Exempt employees. Except for a few narrow exceptions, when an exempt employee works for any part of a week, the employee should be paid for a full week. No pay is required when an employee does not work at all during a workweek. No deductions may be made from the employee's compensation for time lost caused by the employer or by the operating requirements of the business. During office closures due to pandemics, inclement weather, disasters, or by the operating requirements of the business, a private employer may direct exempt staff to take vacation or leave bank deductions without jeopardizing the employees' exempt status. There is no prohibition on an employer giving vacation time and later requiring that the vacation time be taken on specific days. However, an employee will not be considered a salaried employee if the employer deducts from the employee's pay for absences caused by the employer or by the operating requirements of the business. If an employee is ready, willing, and able to work, deductions from pay may not be made for time when work is not available. Therefore, if an employer closes the office because of a pandemic for less than a full workweek, the employer must pay the employee's full salary even if the employer does not have a bona fide benefits plan; the employee has no accrued benefits in the leave bank; the employee has limited accrued leave benefits, and reducing that accrued leave will result in a negative balance; or the employee already has a negative balance in the accrued leave bank.

Exempt employees should not be docked for less than a full day because to do so would require calculating an hourly wage.

Nonexempt employees. If an employer is unable to provide work to a nonexempt employee during hours that the employee would usually have worked, the employer is not required to pay the employee. Employers only need to pay nonexempt employees for hours worked.

Pay Deductions for Sickness

Exempt Employees. Deductions may be made for absences of a full day or more occasioned by sickness or disability if the deduction is made under a bona fide plan, policy, or practice of providing compensation for loss of salary caused by both

sickness and disability. Similarly, if the employer operates under a state or private sickness and disability insurance law, deductions may be made for a day or longer if benefits are provided under the particular law or plan.

Sickness and disability deductions are an area of confusion for some employers. It is important to distinguish between deducting from an exempt employee's paycheck and deducting from an employee's allotted sick time. The employer may not deduct from an employee's pay for less than a day's absence for sickness or disability. But, if an employer, for example, provides an employee with 2 weeks of paid sick time by company policy and the employee has used up all of his or her sick time, an employer may deduct from the employee's paycheck in full-day increments if the employee is out for a day or more. If the employee works for any part of a day, though, and is out sick the remainder of the day, the employer may not deduct from the employee's paycheck.

On the other hand, employers may deduct from an employee's allotted sick time under the company's leave plan in increments of less than a day as long as the employee has not used up his or her paid sick time.

Nonexempt employees. Employers only need to pay nonexempt employees for hours worked. Nonexempt employees may have earned sick time or paid time off they can use during a pandemic.

Long Term Pay Reductions

Exempt employees. An employer is not prohibited from prospectively reducing the salary of an exempt employee during a business or economic slowdown, provided the change is bona fide and not used to evade the salary basis requirements. This type of salary reduction, not related to the quantity or quality of work performed, will not result in a loss of exempt status, as long as the employee still receives on a salary basis at least $684 per week. On the other hand, deductions from predetermined pay occasioned by day-to-day or week-to-week determinations of the operating requirements of the business constitute impermissible deductions and would result in loss of the overtime exemption. The difference is that the first instance involves long-term business needs, rather than a short-term day-to-day or week-to-week deduction from the fixed salary for absences from scheduled work occasioned by the employer or its business operations.

Nonexempt employees. An employer is not prohibited from prospectively reducing the pay of a nonexempt employee during a business or economic slowdown, provided nonexempt employees are paid at least minimum wage and overtime for all hours worked.

Furloughs

Weeklong furlough for exempt employees. If an employer sets up a weeklong furlough and doesn't pay exempt employees, there is no risk of losing the employees' exempt status because the FLSA regulations provide that exempt employees need not be paid for any workweek in which they perform no work.

Partial-week furlough deducting exempt employee pay. If an employee sets up a partial-week furlough and deducts the pay of exempt employees for the furlough days, the employees are at risk of losing their exempt status and may be entitled to overtime.

Partial-week furlough of exempt employees using vacation time. If an employer sets up a partial-week furlough and uses vacation time for the furlough time so that the employees receive their usual salary, there is no risk of losing the exemption. But this requires that every employee on furlough has enough vacation time to cover the furlough.

Permanent furlough arrangement for exempt employees. Employers may set up a permanent change in an employee's usual weekly schedule, such as changing the weekly work schedule from 5 days to 4 days, and altering the employee's salary to match. As long as the exempt employees receive at least the $684 weekly salary required by the FLSA for exempt status, they will remain exempt.

Furloughs for nonexempt employees. Furloughs may be used for nonexempt employees by an employer during pandemics. Employers only need to pay nonexempt employees for hours worked. Employers may reduce nonexempt workers' hours per week in order to reduce costs during a pandemic.

If an employee is on-call during a furlough day. On-call time must be counted as hours worked when the employee is required to remain on call so that his or her time is so restricted that the employee cannot use it effectively for personal purposes. If, in the case of standby or on-call status, the restrictions placed on the time of the employee are such that the employee is unable effectively to engage in private pursuits, the time is subject to the control of the employer and constitutes hours worked. Factors to consider include the terms of the employment agreement, if any; physical restrictions placed on an employee while on call; the maximum period allowed by the employer between the time the employee was called and the time he or she reports back to work (response time); the percentage of calls expected to be returned by the on-call employee; the frequency of actual calls during on-call periods; the actual uses of the on-call time by the employee; and the disciplinary action, if any, taken by the employer against employees who fail to answer calls. Some minor restrictions on freedom do not trigger compensation requirements. The more

restrictive the on-call policy is, the more likely that a court will conclude the on-call time is compensable working time.

Quarantines

According to the Department of Labor, employers should "be accommodating and flexible with workers impacted by government-imposed quarantines. Employers may offer alternative work arrangements, such as teleworking and additional paid time off to such employees."

Asking Employees To Work Longer Hours

As long as an employee is 16 years old or older, federal law does not limit the number of hours employees can be asked to work. Keep in mind that nonexempt employees must be paid at least minimum wage and overtime for all hours worked. While there are no federal limits on working hours for 16- and 17-year-old workers, many state laws do restrict working hours for these young workers, however, with stricter requirements applicable to employment on school days or evenings before school days. State laws that are more restrictive than federal laws must be followed.

Asking Employees to Perform Job Functions Different Than Their Usual Work

As long as an employee is 18 years old or older, federal law does not limit the type of work employees can be asked to do. The child labor provisions of the FLSA prohibit employers from hiring minors (individuals under the age of 18) to work at dangerous occupations. States also have child labor laws and when state and federal laws differ, the stricter law applies.

Telecommuting

In pandemic situations, based on information from public health authorities, employers can require telecommuting. Employers covered by FLSA must monitor hours of work by nonexempt employees and maintain records recording total hours worked each day and workweek. Nonexempt employees are covered by the FLSA's restrictions on minimum wage and overtime regardless of where they perform their jobs, including home offices. Therefore, a telecommuting agreement should require the telecommuter to report hours worked on a daily and weekly basis. Employees may keep timecards, but computer or telephone tracking systems that generate logs of hours worked are more reliable. Covered employers are required to pay employees for all hours worked, regardless of whether they have issued rules prohibiting work beyond a prescribed number of hours. Nonetheless, an agreement should include a provision advising the employee not to work more than a specified number of hours a

week without prior approval.

If a workplace closes, there may be some employees who are unable to work from home. Employers only need to pay nonexempt employees for hours worked. If nonexempt employees cannot perform their work from home, then they do not need to be paid. Exempt employees should be paid for any week in which they perform work, with a few very narrow exceptions.

If it is possible, an employer can consider requiring those employees who can work from home to do so. Then, if the government allows, for those employees who cannot perform their work from home, there may be a way to stagger work shifts or space out the few employees who still need to be at the workplace in order to achieve physical distancing in a pandemic situation.

Setting employees up to work at home during a pandemic may require additional costs for the employer, such as computers and tools. Employers may not deduct the cost of these business expenses from an employee’s pay and other material necessary for carrying out the employer's business if the deduction reduces the employee's pay below the minimum wage. Note that employers generally absorb the cost of providing computers to telecommuting employees, rather than passing that cost to their employees.

− Covered Employers

Employers subject to the FLSA include:

1. All enterprises engaged in interstate commerce or the production of goods for interstate commerce
2. All hospitals, schools, and public agencies, regardless of size

Small businesses that are not engaged in interstate commerce and have an annual gross volume under $500,000 are not covered.

Employees of firms that are not covered by the FLSA may still be subject to its provisions if they are individually engaged in interstate commerce or in the production of goods for interstate commerce. This includes employees who work in communications or transportation; regularly use the mail, telephones, or telegraph for interstate communication, or keep records of interstate transactions; handle, ship, or receive goods moving in interstate commerce; regularly cross state lines in the course of employment; or work for independent employers that contract to do

clerical, custodial, maintenance, or other work for firms engaged in interstate commerce or in the production of goods for interstate commerce.

− Nonexempt Employees

Nonexempt employees are those who are covered by the FLSA minimum wage and overtime pay provisions. An employee who is paid on an hourly basis is usually considered to be nonexempt, regardless of the hourly rate paid. (There is an exception: Computer programmers, systems analysts, and similar employees may be exempt if they are paid at an hourly rate of $27.63 or more.) Employees are also nonexempt if they do not qualify for one of several "white-collar" exemptions. Employees generally classified as nonexempt include, but are not limited to, clerical, blue-collar, maintenance, construction, and semiskilled workers, as well as technicians and laborers.

DOL regulations make it clear that manual laborers or other employees who perform work involving repetitive operations with their hands, physical skill, and energy are nonexempt. Thus, nonmanagement employees in production, maintenance, construction, and similar occupations are nonexempt no matter how highly paid they might be. The regulations also make it clear that police officers, firefighters, paramedics, and other so-called "first responders," such as detectives, deputy sheriffs, and state troopers, are not exempt employees and are entitled to overtime pay.

− Exempt Employees

The FLSA exempts broad categories of "white-collar" jobs from minimum wage and overtime requirements if they meet certain tests regarding job duties and responsibilities and are paid a certain minimum salary. These categories include executives, administrative employees, professional employees, outside and certain retail sales personnel, and highly compensated individuals. Please see the national Exempt Personnel section.

Employers should periodically review the classification of exempt employees to ensure that they still qualify for exempt status, especially if the company has undergone restructuring or downsizing.

Motor Carrier Act (MCA) exemption. Under the MCA exemption to the FLSA, the overtime provisions of the FLSA do not apply to motor carriers, such as truck drivers and their helpers, operating in interstate commerce. The exemption is not limited to those who ship large amounts of property or ship property as their principal business. A U.S. appellate court has held that the exemption extends to field engineers who carry tools, parts, and equipment in their private cars on interstate trips to install, maintain, and repair computers (*Friedrich v. CableData,* 974 F.2d 409 (CA-3, 1992)). However, such personnel are still covered by the equal pay, minimum wage, and recordkeeping requirements of the FLSA.

Thus, the MCA overtime exemption applies to employees who are:

- Employed by a motor carrier or motor private carrier;
- Drivers, driver's helpers, loaders, or mechanics whose duties affect the safety of operation of motor vehicles in transportation on public highways in interstate or foreign commerce;*or*
- Not covered by the small vehicle exception.

Motor carrier or motor private carrier. Motor carriers are persons providing motor vehicle transportation for compensation. Motor private carriers are persons other than motor carriers transporting property by motor vehicle if the person is the owner, lessee, or bailee of the property being transported, and the property is being transported for sale, lease, rent, or bailment, or to further a commercial enterprise.

Employee's duties. The employee's duties must include the performance, either regularly or from time to time, of safety affecting activities on a motor vehicle used in transportation on public highways in interstate or foreign commerce. Employees must perform their duties as a driver, driver's helper, loader, or mechanic. Employees performing these duties meet the duties requirement of the exemption, regardless of the proportion of "safety affecting activities" performed, except where the continuing duties have no substantial direct effect on "safety of operation," or where such safety affecting activities are so trivial, casual, and insignificant as to be *de minimis*, so long as there is no change in the duties. Transportation involved in the employee's duties must be in interstate commerce (across state or international lines) or connect with an intrastate terminal (rail, air, water, or land) to continue an interstate journey of goods that have not come to rest at a final destination. Safety affecting employees who have not made an actual interstate trip may still meet the duties requirement of the exemption if the employer is shown to have an involvement in interstate commerce and the employee could, in the regular course of employment, reasonably have been expected to make an interstate journey or could have worked on the motor vehicle in

such a way as to be safety affecting.

The overtime provisions of the FLSA **will** apply to an employee of a motor carrier or motor private carrier in any workweek that the employee performs duties on motor vehicles weighing 10,000 pounds (lb) or less and the employee’s work, in whole or in part, is that of a driver, driver's helper, loader, or mechanic affecting the safety of operation of motor vehicles weighing 10,000 lb or less in transportation on public highways in interstate or foreign commerce, except vehicles:

• Designed or used to transport more than 8 passengers, including the driver, for compensation; *or*

• Designed or used to transport more than 15 passengers, including the driver, and not used to transport passengers for compensation; *or*

• Used in transporting hazardous material, requiring placarding under regulations prescribed by the secretary of Transportation.

Miscellaneous Exemptions

The FLSA provides for a number of miscellaneous exemptions from either the minimum wage or overtime requirements or from both.

Minimum wage and overtime exemptions. Among the occupations exempt from both the FLSA minimum wage and overtime provisions are:

• Employees of certain seasonal amusement or recreational establishments

• Employees in fishing operations and in initial processing of seafood

• Agricultural workers employed by employers using less than 500 man-days in any quarter of the previous year

• Agricultural workers who are members of the employer's immediate family

• Locally based hand harvest workers traditionally paid a piece rate who worked less than 13 weeks in agriculture during the preceding calendar year

• Certain local seasonal harvesters under the age of 17

• Employees who principally work in the range production of livestock

• Seafarers on foreign vessels

• Newspaper carriers who deliver to consumers

• Persons employed outside the United States for the entire workweek

• Employees of gas stations with annual sales of less than $250,000

Overtime exemptions. Among the occupations exempt from overtime requirements are:

- Employees of interstate motor carriers, airlines, and railroads
- Outside buyers of poultry and dairy products
- Any employee employed as a seaman
- Motor vehicle sales and service personnel
- Trailer, boat, or aircraft salespersons not working for manufacturers
- Certain drivers and helpers on local delivery
- Agricultural employees, including employees working for nonprofit or cooperative agricultural water storage or suppliers
- Employees engaged in the initial transportation of fruits and vegetables from a farm
- Taxi drivers
- Employees of police and fire departments with fewer than five employees
- Movie theater employees

Partial overtime exemptions. A few categories of workers have partial exemptions from the FLSA overtime requirements. These include:

- Certain employees of amusement and recreational establishments located in national parks and similar facilities if paid overtime for hours after 56 hours in a workweek
- Bulk or wholesale petroleum distributors if paid overtime for hours after 56 hours in a workweek
- Employees receiving literacy training for 10 hours per workweek
- Hospital and nursing home employees if paid overtime after 8 hours per day or 80 hours during 2-week periods

Retaliation

The FLSA states that it is a violation for any person to discharge or in any other manner discriminate against any employee because the employee has filed any complaint or instituted or caused to be instituted any proceeding under the FLSA, has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.

Employees are protected regardless of whether the complaint is made orally or in writing. Complaints made to the WHD are protected, and most courts have ruled that

internal complaints to an employer are also protected.

Because the law prohibits *any* person from retaliating against *any* employee, the protection applies to all employees of an employer even if the employee's work and the employer are not covered by the FLSA. The law also applies in situations where there is no current employment relationship between the parties; for example, it protects an employee from retaliation by a former employer.

Any employee who is discharged or in any other manner discriminated against may file a retaliation complaint with the WHD or may file a suit seeking remedies, including, but not limited to, employment, reinstatement, lost wages, and an additional equal amount as liquidated damages.

Interns

The FLSA requires for-profit employers to pay employees for their work. Interns and students, however, may not be employees under the FLSA, in which case the FLSA does not require compensation for their work. Interns who qualify as employees rather than trainees, typically must be paid at least the minimum wage and overtime compensation for hours worked over 40 in a workweek. Courts have used the "primary beneficiary test" to determine whether an intern or student is, in fact, an employee under the FLSA. In short, this test allows courts to examine the economic reality of the intern-employer relationship to determine which party is the primary beneficiary of the relationship. Courts have identified the following seven factors as part of the test:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee, and vice versa.

2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.

3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.

4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.

5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.

6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.*and*

7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

Courts have described the “primary beneficiary test” as a flexible test, and no single factor is determinative. Accordingly, whether an intern or student is an employee under the FLSA necessarily depends on the unique circumstances of each case. If analysis of these circumstances reveals that an intern or student is actually an employee, he or she is entitled to both minimum wage and overtime pay under the FLSA. On the other hand, if the analysis confirms that the intern or student is not an employee, he or she is not entitled to either minimum wage or overtime pay under the FLSA.

Nonprofit Organizations

Nonprofit organizations are not automatically exempt from the FLSA. There are basically two types of nonprofits. First are nonprofits that engage solely in charitable activities and do not engage in commerce. These nonprofit organizations would be exempt from the FLSA. Second are nonprofits that have a charitable purpose but do engage in commerce whether to reach their ultimate goal of charity or to entertain their target audience. These nonprofits are not exempt.

Religious Institutions

Religious institutions are not automatically exempt from the FLSA. Many religious organizations do operate businesses. The FLSA does cover the ordinary commercial activities of religious organizations. If a religious organization runs a hospital, school, or residential care institution, it will be covered by the FLSA. Enterprise coverage, however, is not applicable to employees who are engaged exclusively in the operation of a religious organization because their activities are not performed for a business purpose.

DOL's *Field Operations Handbook(Handbook)*states that there is no provision in the FLSA that prohibits an employer-employee relationship between a religious, charitable, or nonprofit organization and people who perform work for the organization. For example, a church or religious institution may operate an establishment to print books and employ a regular staff who do this work as a means of livelihood. In such cases, an employer-employee relationship would exist under the FLSA.

The *Handbook* also states that "persons such as nuns, monks, priests, lay brothers, ministers, deacons, and other members of religious orders who serve pursuant to their religious obligations in the schools, hospitals, and other institutions operated by

their church or religious order shall not be considered to be 'employees.'" However, the *Handbook* also states that the fact that such a person is a member of a religious order does not automatically preclude an employer-employee relationship. This rule is rather ambiguous, and an employer should consider consulting an attorney to determine whether an employer-employee relationship exists in this situation.

State and Local Government Agencies

State and local government employers, defined as public agencies by the FLSA, are covered by the Act. "Public agencies" are the federal government, the government of a state or political subdivision of a state, any state or federal agency, or any interstate governmental agency. The public agency definition does not extend to private companies that are engaged in work activities normally performed by public employees.

Certain employees of a public agency who, solely at their own option, occasionally or sporadically work on a part-time basis for the same public agency in a capacity other than the one in which they are primarily employed may be exempt from the overtime requirements of the FLSA.

Police and Firefighters

Police. Public law enforcement personnel are covered by the FLSA. Law enforcement personnel are employees who are empowered by state or local ordinance to enforce laws designed to maintain peace and order, protect life and property, and to prevent and detect crimes; who have the power to arrest; and who have undergone training in law enforcement.

Firefighters. Public firefighters are covered by the FLSA. Fire protection personnel employed by a fire department include firefighters, paramedics, emergency medical technicians, rescue workers, ambulance personnel, or hazardous materials workers who are:

- Trained in fire suppression;
- Have the legal authority and responsibility to engage in fire suppression; *and*
- Are engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk.

The FLSA provides that employees engaged in fire protection or law enforcement may be paid overtime on a work period basis. A "work period" may be from 7 to 28 consecutive days. For example, fire protection personnel are due overtime under such a plan after 212 hours worked during a 28-day period, while law enforcement

personnel must receive overtime after 171 hours worked during a 28-day period. For work periods of at least 7 but fewer than 28 days, overtime pay is required when the number of hours worked exceeds the number of hours that bears the same relationship to 212 (fire) or 171 (police) as the number of days in the work period compares to 28.

Exception. The FLSA provides an overtime exemption to law enforcement or fire protection employees of a public agency that employs fewer than five employees in law enforcement or fire protection activities.

− Volunteers

Under the FLSA, an employer must pay minimum wage and overtime, but the Supreme Court has made it clear that the FLSA was not intended to stamp out volunteering. The FLSA recognizes the generosity and public benefits of volunteering and allows individuals to freely volunteer time to religious, charitable, civic, humanitarian, or similar nonprofit organizations as a public service. Volunteers will ordinarily not be considered employees for FLSA purposes if the individuals volunteer for organizations without contemplation or receipt of compensation. Additionally, the volunteer services must be given freely without coercion or undue pressure.

Due to the possibility of coercion to perform unpaid services, paid employees may not volunteer to perform the same type of services for their employer that they are normally employed to perform. Time spent in work for public or charitable purposes at the employer's request, under the employer's direction or control, or while the employee is required to be on premises is working time. However, time spent voluntarily in such activities outside of the employee's normal working hours is not hours worked, as long as the volunteer activities are not the same or similar to the activities the employee is employed to perform. Therefore, the employer must compensate employees for the hours spent volunteering during their normal working hours or when the volunteer work performed is similar to their regular duties. As for those employees who perform duties that are not similar to their regular duties and that are voluntarily performed after their normal working hours, those volunteer activities are not considered hours worked for the purpose of the FLSA.

Public employees who volunteer. Employees of public agencies may wish to volunteer for the same organization for which they work. That is allowed but only in very limited situations. To preserve employees' volunteer status, the line between volunteer work and paid work should be clearly defined. When an employee of a

public agency wishes to perform volunteer work for his or her employer, the rules are strict. Unlike private employers, public and not-for-profit employers can allow their employees to volunteer their services to the employer as long as they are doing it for "civic, charitable, or humanitarian reasons."

Volunteer work performed by public employees must also meet the same additional requirements as employees of private companies for determining volunteer work status.

To volunteer legally for their own employers, employees of public agencies must perform a service that is distinctly different from their ordinary work activities. The challenge is to determine whether the work the employee wishes to do may be treated as noncompensable and, if so, to determine when the employee is wearing his or her "employee hat" versus his or her "volunteer hat."

Here are some examples of volunteer work that is and is not allowed: A paid city police officer cannot perform police or related duties for the city on a volunteer basis; however, he or she may volunteer as a part-time referee in a basketball league sponsored by the city; an employee of the city Parks Department may also serve as a volunteer city firefighter; an office employee of a city hospital may volunteer to spend time with a disabled or elderly person in the same institution during off-duty hours.

Public employees who wish to volunteer services identical to those they normally provide in exchange for salary may offer their services only to a different public agency than their employer. For example, a receptionist at a county tax office could offer telephone answering services at a fund-raising event run by a state agency, but a nurse at a state hospital might not be able to volunteer his or her nursing services at a state-run neighborhood health clinic because both the hospital and clinic could be considered parts of the same public agency.

− Workweek

A workweek is a period of 168 hours during 7 consecutive 24-hour periods. A workweek may begin on any day of the week and at any hour of the day established by the employer. Generally, for purposes of computing minimum wage and overtime, each workweek stands alone, regardless of whether employees are paid on a weekly, biweekly, monthly, or semimonthly basis. Two or more workweeks cannot be averaged.

An employer must generally pay an exempt employee the full salary for any

workweek in which the employee performs any work without regard to the number of days or hours worked. An exempt employee's salary may be reduced when the employee is absent from work for 1 day or more for personal reasons, when an employee is absent 1 day or more because of sickness or disability if the deduction is made under a bona fide sick pay or disability pay plan, for absence due to an unpaid disciplinary suspension for violation of workplace conduct rules, for any time interval in which an employee is on leave under the federal **Family and Medical Leave Act (FMLA),** and for absence due to an unpaid disciplinary suspension for violation of a major safety rule.

— Hours Worked

"Hours worked" includes all time an employee must be on duty, on the employer's premises, or at any other prescribed place of work, as well as any additional time the employee is permitted to work.

— Minimum Wage

The current federal minimum wage is $7.25 per hour. The FLSA does not supersede any state or local laws that are more favorable to employees. Therefore, if a state has a minimum wage that is higher than the federal minimum, employers subject to the state minimum wage law are obligated to pay the higher rate to employees working in that state.

An employer may pay four groups of employees below the minimum wage: people with mental or physical disabilities, full-time students, certain employees under the age of 20, and certain employees who receive tips.

Covered employers must post notices outlining the federal minimum wage requirements. The notices must be posted conspicuously and in enough places so employees can see them as they enter and exit the workplace. Posters are available from the U.S. DOL, WHD, and may be downloaded from its website at http://www.dol.gov (http://www.dol.gov).

Exceptions

Opportunity wage. New hires under the age of 20 may be paid an "opportunity

wage" of $4.25 per hour during the first 90 calendar days of employment. Employers may not displace any current employee in order to hire a worker at the opportunity wage.

Students. Full-time students may be employed at 85 percent of the minimum rate by retail stores and some service establishments upon obtaining a certificate from the federal wage and hour administrator.

Tipped employees. An employer may apply an employee's tips as a credit toward the minimum hourly wage, up to $5.12 per hour (i.e., the employer must pay at least $2.13 per hour in direct wages). This applies only to employees who customarily earn more than $30 per month in tips and who actually receive tips equal to or greater than the amount of the credit. Many states have stricter rules for tip credits. When the minimum wage rate increases, the tip credit will increase by the difference between $2.13 and the new minimum wage amount.

FLSA regulations require employers to inform an employee before implementing a tip credit. Unless an employer gives proper notice, the employer will not be eligible to use a tip credit. According to the final rule, the notice must include the following explanation:

- The amount of the cash wage the employer pays the employee, which cannot be less than $2.13 per hour;
- The additional amount the employer is using as a credit against tips received, which cannot exceed the difference between the minimum wage ($7.25) and the actual cash wage paid by the employer to the employee;
- That the additional amount claimed by the employer on account of tips as the tip credit may not exceed the value of the tips actually received by the employee;
- That the tip credit cannot be applied to any tipped employee unless the employee has been informed of the tip credit provisions of the FLSA; *and*
- That all tips received by the tipped employee must be retained by the employee, except for valid pooling of tips.

Employers must also notify employees of any required tip pool contribution amount.

Tip pools. Under provisions included in a recent spending bill, employers may require their tipped employees to contribute to a tip pool to be shared with nontipped employees but only if all employees are paid the full minimum wage, not just the tipped minimum wage. The provisions in the spending bill, which will become part of a

new final rule from the DOL, represent a change from the old regulation on tip pools. That regulation, put out in 2011, requires that pooled tips be distributed only to tipped employees, such as restaurant servers. Nontipped employees, such as cooks and dishwashers, couldn't be paid out of tip pools and, therefore, had to be paid at least the full minimum wage.

In December 2017, the DOL proposed a regulation to change the Obama-era rule so that employers would be able to distribute pooled tips to nontipped workers as well as tipped workers. That proposed rule ran into opposition from critics, who claimed it would have allowed employers to use workers' tips to subsidize nontipped employees' wages and even would have allowed owners to pocket money from the tip pool. The provision in the newly signed law allows money from tip pools to be shared with nontipped employees but prohibits owners, managers, and supervisors from receiving any of the tip pool.

Under the new law, employers that pay a tipped minimum wage still have to share any tip pool only with tipped employees, just like under the 2011 regulation. But if no tip credit is taken, employers can require that tips be shared with the nontipped back-of-house workers. Employers deciding to use tip pooling first must make sure they're paying every employee at least the full minimum wage, but they also must carefully think about who can participate in the pool. The new law says managers and supervisors can't receive payout of a tip pool, but it doesn't define "manager" and "supervisor." Even though provisions in the spending bill cover how tip pools can be used, the DOL still will have to finalize a regulation.

− Overtime

The FLSA requires that overtime must be paid at a rate of $1^1/_2$ times a covered (nonexempt) employee's regular rate of pay for each hour worked in excess of 40 hours in a workweek (or the maximum allowable in a given type of employment). The FLSA does *not* require that overtime be paid for hours worked in excess of 8 hours per day or on weekends or holidays. (Some states require overtime to be computed on a daily hour basis.)

Please see the state Overtime section.

Only hours worked count in the overtime calculation. Therefore, holidays not worked, vacation days, sick days, etc., are not counted. The fact that an employee receives holiday pay, vacation pay, or sick pay is of no consequence for overtime purposes. The test is hours worked rather than hours paid.

Although overtime must be computed weekly, the FLSA does not require that it be paid on a weekly basis; it only requires that overtime be paid in the next regular pay period following the period in which the overtime is earned.

An employer may require an exempt employee to work more than 40 hours in a workweek without having to pay a premium for overtime hours.

− Foreign Application of the FLSA

The FLSA does not apply to any employee whose services during the workweek are performed in a workplace within a foreign country (*9 USC Sec. 213(f)*). Therefore, the FLSA would not apply to a U.S. citizen (or non-U.S. citizen) working in China for an American company.

− Notices (Posting)

Covered employers must post notices outlining the federal minimum wage and overtime regulations. The notices must be posted conspicuously and in enough places so that employees can see them as they enter and exit the workplace. Posters are available from the DOL WHD.

− Wage and Hour Investigations

DOL's WHD is responsible for administering and enforcing a number of federal laws that set basic labor standards. The WHD conducts investigations for a number of reasons, all having to do with enforcement of the laws and ensuring an employer's compliance. An investigator from the WHD may conduct an investigation to determine whether the laws it enforces apply to an employer. If the employer is subject to these laws, the investigator will verify that workers are paid and employed properly according to the laws administered and that youths under the age of 18 are employed as provided by the child labor provisions. The WHD does not require an investigator to previously announce the scheduling of an investigation, although in many instances,

the investigator will advise an employer before opening the investigation. The investigator has sufficient latitude to initiate unannounced investigations in many cases in order to directly observe normal business operations and quickly develop factual information . An investigator may also visit an employer to provide information about the application of, and compliance with, the labor laws administered by the WHD.

The WHD does not typically disclose the reason for an investigation. Many are initiated by complaints. All complaints are confidential, so the name of the worker, the nature of the complaint, and whether a complaint exists may not be disclosed. In addition to complaints, the WHD selects certain types of businesses or industries for investigation. The WHD often targets low-wage industries because of high rates of violations or egregious violations, the employment of vulnerable workers, or rapid changes, such as growth or decline, in an industry. Occasionally, a number of businesses in a specific geographic area are examined. The objective of targeted investigations is to improve compliance with the laws in those businesses, industries, or localities. Regardless of the particular reason that prompted the investigation, all investigations are conducted in accordance with established policies and procedures.

The WHD has stated that it will focus on fissured industries. These are industries where employers often employ people through various relationships, including employment agencies, contractors and subcontractors, and franchises.

During an investigation, DOL representatives visit a business and gather data on wages, hours, and other employment conditions or practices in order to determine compliance with the law. The WHD does not require an investigator to previously announce the scheduling of an investigation, although investigators will often advise an employer before opening the investigation. The investigator has sufficient latitude to initiate unannounced investigations in many cases in order to directly observe normal business operations and develop factual information quickly. If violations are found, the employer may owe back pay, face penalties, and be advised by the DOL to make changes in employment practices in order to avoid future violations.

What Happens When an Investigation Occurs?

Section 11(a) of the FLSA authorizes representatives of the DOL to investigate and gather data concerning wages, hours, and other employment practices; enter and inspect an employer's premises and records; and question employees to determine whether any person has violated any provision of the FLSA. The WHD investigator will identify himself or herself and present official credentials. The investigator will explain the investigation process and the types of records required during the review. An

investigation consists of the following steps:

- Visitation and inspection of the business under investigation.
- Examination of up to 3 years of records to determine which laws or exemptions apply. These records include those showing the employer's annual dollar volume of business transactions, involvement in interstate commerce, and work on government contracts. Information from an employer's records will not be revealed to unauthorized persons.
- Examination of payroll and time records, and taking notes or making transcriptions or photocopies essential to the investigation.
- Interviews with certain employees in private to verify the employer's payroll and time records; to identify workers' particular duties in sufficient detail to decide which exemptions apply, if any; and to confirm that minors are legally employed. Interviews are normally conducted on the employer's premises. In some instances, present and former employees may be interviewed at their homes or by mail or telephone.
- When all the fact-finding steps have been completed, the investigator will ask to meet with the employer or a representative who has authority to reach decisions and commit the employer to corrective actions if violations have occurred. The employer will be told whether violations have occurred, what they are, and how to correct them. If back wages are owed to employees because of minimum wage or overtime violations, the investigator will request payment of back wages and may ask the employer to compute the amount due.

The DOL looks for complete, accurate, and unambiguous pay records for every employee for each pay period from the past 3 years. As a result, it is imperative that employers strive to keep accurate, well-organized wage and hour records that can be produced quickly.

In general, employers in the following categories must comply with the wage and hour requirements of the FLSA:

- Employers engaged in interstate commerce or the production of goods for interstate commerce
- All hospitals, schools, and public agencies

Employees in firms not covered by the FLSA might still be protected under the Act if their individual work involves interstate commerce or the production of goods for interstate commerce.

Tip: If an employer believes that it may have wage and hour issues, it should contact an attorney experienced in wage and hour investigations as soon as possible. An experienced attorney can provide details about the employer's rights and

responsibilities from the outset.

Retaliation Prohibited

The FLSA prohibits employers from discharging or discriminating against any employee who files a wage and hour complaint or who provides information during a DOL investigation. As a result, employers should be cautious not to discourage employee cooperation with wage and hour investigations or to respond negatively to any employee who files a wage and hour complaint.

How to Prepare for an Investigation

In order to prepare for a wage and hour investigation, consider taking the following steps:

- Appoint a company representative or legal counsel to interact with the DOL investigator.
- Before providing information or documents to the DOL, the representative or attorney should determine the scope of the investigation and review all documents before handing them over to the DOL.
- Prepare a legal and factual “position statement” for the investigator, outlining any compliance steps taken by the organization.
- Provide managers with relevant information, and interview employees in advance so that everyone is better prepared to respond to the investigator's questions.
- Do not discourage employee cooperation with wage and hour investigations or respond negatively to any employee who files a wage and hour complaint.

Cooperation is key. Employers should demonstrate their willingness to cooperate with DOL investigators and to adjust their procedures and policies as necessary to avoid violations in the future.

How to Prevent an Investigation

The following are some strategies to prevent a wage and hour investigation:

Avoid unfair compensation practices. Make sure employees are compensated in a consistent manner. If an employer's pay practices are consistent, complaints are less likely to arise, and the employer will be in a better situation if the DOL does launch an investigation.

Understand the regulations. It is important that employers take the time and make a concerted effort to understand and familiarize themselves with the FLSA. It is the law, and if employers fail to follow the law, they may face litigation or a DOL audit.

Training. Train managers so they are fluent in the language of the FLSA.

Analyze state versus federal law. Determine whether the state's wage and hour laws conflict with federal law, and then follow the law that is most beneficial to the employee.

Pay past overtime due. If it is determined that an employee is wrongly classified as exempt, the employer should determine how many overtime hours the employee has worked in the past 2 years, and then pay the employee the overtime due. The employer should also have the employee sign a release to free the employer from further liability. Paying past overtime due to employees now will be far less expensive than paying them in a DOL settlement.

Respond to internal complaints expeditiously. If an employee files a wage and hour complaint internally, the employer should take it seriously. Since many investigations are prompted by an employee's complaint, employers might be able to prevent an investigation by addressing an employee's initial internal complaint.

Seek compliance assistance from the DOL. Various compliance tools and information are available on DOL's website at http://www.dol.gov (http://www.dol.gov).

Conduct a self-audit. Employers can hire attorneys to audit their companies—or they can do it themselves before the DOL initiates an investigation. Conducting a self-audit helps ensure compliance with federal and state laws. As part of an audit, employers should:

- Review job descriptions to determine whether they are still accurate, reflect the jobs being performed, and reflect the skills necessary to perform the job.
- Review employees' actual job duties to ensure that they still fall within the administrative, executive, professional, computer, or outside sales exemptions.
- Make sure overtime for nonexempt employees has been properly calculated. For instance, bonuses and shift premiums should be included in the calculation of the regular rate of pay.
- Make sure the required posters have been hung in the appropriate places in the workplace.

Fines and Penalties for Noncompliance

There are a variety of fines and penalties an employer may face for violating the law:

- An employee may file suit to recover back wages and overtime and an equal amount in liquidated damages, plus attorneys' fees and court costs.
- The secretary of Labor may file suit on behalf of employees for back wages and an equal

amount in liquidated damages.

• The secretary may obtain a court injunction to restrain any person from violating the law, including unlawfully withholding proper minimum wage and overtime pay.

• Civil money penalties may be assessed for child labor violations and violations of FLSA’s minimum wage or overtime requirements.

• Employers that have willfully violated the law may face criminal penalties, including fines and imprisonment.

• Employees who have filed complaints or provided information during an investigation are protected under the law. They may not be discriminated against or discharged for having done so. If they are, they may file a suit or the secretary of Labor may file a suit on their behalf for relief, including reinstatement to their jobs and payment of wages lost plus monetary damages.

Some of these penalties are found in other laws administered by the WHD, such as the **Migrant and Seasonal Agricultural Worker Protection Act,** which also provides for the assessment of civil money penalties, criminal sanctions, fines, and imprisonment.

In the case of the government contracts, the statutes provide that contract funds may be withheld for violations under the **Walsh-Healey Public Contracts Act,McNamara-O’Hara Service Contract Act,Davis-Bacon and Related Acts,** and **Contract Work Hours and Safety Standards Act.** Administrative hearings or court action may be initiated to recover back pay under these laws. In addition, liquidated damages may be assessed for certain violations. Violators of these laws may also lose their federal contracts and be declared ineligible for future contracts for a specified period.

The amount of the penalty generally depends on the size of the business and the seriousness of the violation. In some cases, however, the DOL may also consider:

• Whether the employer made a good-faith effort to comply with the FLSA

• Whether the violations were the result of a bona fide dispute of doubtful legal certainty

• Whether the employer is subject to injunction against violations of the FLSA

• The employer's commitment to future compliance

• The interval between violations

• The number of employees affected

• Whether there is any pattern to the violations

Disagreeing with a penalty. If an employer disagrees with the amount of a penalty, the employer must take exception to it within 15 days after receipt of the notice of determination and request a hearing. Otherwise, the administrative determination is considered final.

Collection of penalties. Once a final determination is made, the penalty is immediately due and payable via a check or money order made payable to DOL's WHD. The penalty must be delivered or mailed to the regional office for the area in which the violations occurred.

━ Private Actions Under the FLSA

An employee may sue an employer, in federal or state court, for violating the minimum wage or overtime provisions of the FLSA or for retaliating against an employee for exercising rights under the FLSA. And remember, individual owners, managers, and directors may be sued individually under the FLSA. However, an employee may not personally bring a suit for recordkeeping violations.

Time limits. Suits to enforce nonwillful violations of the FLSA must be brought within 2 years after the accrual of the cause of action. Typically this means that an employer's period of exposure is measured by counting backward 2 years from the date the lawsuit is filed. The limitations period for willful violations is 3 years.

Damages. The damages available to employees in FLSA actions are potentially huge. The available civil remedies include all unpaid compensation for time worked but not paid, or time paid at an incorrect rate, mandatory liquidated damages (equal to the amount of the unpaid compensation), equitable relief (such as reinstatement), and attorneys' fees. Employers that have not kept accurate time records (such as in cases of employees misclassified as exempt) face even greater exposure. In such cases, an employee can basically testify to any number of hours worked per week, and the burden is on the employer to prove that a different (lesser) number of hours was actually worked by the employee.

Employees suing under the FLSA cannot recover compensatory or consequential damages (such as for emotional distress, loss of enjoyment of life, or lost opportunities). Nor are punitive damages generally available. However, some courts have held that punitive damages are available for violations of FLSA's antiretaliation provisions. This is because although the FLSA limits damage claims for minimum wage and overtime reimbursement claims to unpaid compensation and an additional equal amount as liquidated damages, the damage provision for retaliation claims is open-

ended and allows "such legal or equitable relief as may be appropriate to effectuate the purposes of [the Act]...." Given the open-ended nature of this provision, plaintiffs have attempted to seek punitive damages by filing retaliation claims, and the courts have been quite receptive. However, other courts have rejected such attempts.

Employers should also be aware that, unlike in other forms of employment litigation, calculation of damages is almost totally objective and based on a set formula. There are generally no mitigating factors or offsets available against back wages owed an employee.

Arbitration of FLSA claims. Employees covered by a collective bargaining agreement are entitled to bring FLSA lawsuits in federal court without exhausting the grievance procedure.

Releases. Employers attempting to negotiate settlement of a potential FLSA claim with an employee before litigation or during the course of litigation must exercise extreme caution, since releases of FLSA claims for back wages have generally been held to be unenforceable.

Defenses. There are several affirmative defenses available to employers. (An "affirmative" defense is one that the employer has the burden of proving.) Statutory defenses include statute of limitations defense and two good-faith defenses.

An employer should assert the statute of limitations defense when it appears that the employee bringing the suit was employed for a longer period of time than covered by the applicable 2- or 3-year period.

Good-faith defenses. An employer will be completely relieved of liability "if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation" issued by the administrator of the Wage and Hour Division of the DOL. In other words, an employer is protected from liability if it, in good faith, relies on the agency's interpretation that is subsequently held to be wrong.

An employer may avoid otherwise mandatory liquidated damages if it demonstrates that its compensation practices were undertaken in good faith. At the most, an employer's showing of good faith with reasonable grounds for believing that it was not in violation of the act will allow a judge to exercise discretion to deny or reduce liquidated damages. This does not affect attorneys' fees and costs. To prevail under this defense, an employer must show that:

- The act or failure to act must have been in good faith, *and*
- It had reasonable grounds for believing that the act or omission was not in violation of the Act.

Collective Actions

In a collective action under the FLSA, a named plaintiff sues on behalf of himself and “other employees similarly situated.” No employee may be a party plaintiff to such an action “unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.” This is very different from a class action under Fed. R. Civ. P. 23(b)(3) in which the consent of class members is not required where class members instead have a right to be notified of the class action and to opt out of it and seek their own remedies. Under the FLSA, on the other hand, if an individual has not given written consent to join the suit, or if the individual has given consent but has not filed the consent with the court, that individual cannot be a party. Conversely, a similarly situated plaintiff who decides not to join a pending collective action is not bound by the outcome of that case—he or she retains his or her own claim and can sue the employer later, individually, or even bring a separate collective action against the employer, rounding up similarly situated employees who failed to join up previously.

Process. The fact that a collective action has been filed does not toll the limitation periods for potential plaintiffs. Rather, the statute of limitations for each opt-in plaintiff’s FLSA claim continues to run until an individual files his or her signed statement with the court. District courts have discretionary power to authorize the sending of notice to potential class members in a collective action brought pursuant to *FLSA Sec. 216(b)*. In determining if the named plaintiff is similarly situated to the presumed members of a collective action, the majority of courts use a two-step approach. Under this approach, two levels of review are utilized, depending on the procedural stage of the case.

The first tier, which typically occurs very early in the litigation before any discovery has taken place, is known as the notice-stage determination and typically results in conditional certification of a representative class. At the notice stage, courts typically require nothing more than substantial allegations that the presumed class members were together the victims of a single decision, policy, or plan infected by discrimination. To establish that employees are similarly situated, a plaintiff must show that they are similarly situated with respect to their job requirements and with regard to their pay provisions. The positions need not be identical, but similar.

The second tier involves a more strict level of scrutiny and typically follows a defendant's motion for decertification of the collective action at or near the close of

discovery. In this phase of the inquiry, the court reviews several factors, including:

- Disparate factual and employment settings of the individual plaintiffs;
- The various defenses available to the defendant that appear to be individual to each plaintiff; *and*
- Fairness and procedural questions.

The U.S. Supreme Court has ruled that an employer's offer to settle an employee's unpaid wage claim effectively cut off her lawsuit even though she never accepted the offer (*Genesis Healthcare Corp. v. Symczyk, S. CT. No. 11–1059 (2013)*). A registered nurse in Pennsylvania filed a collective action against her former employer, Genesis Healthcare, claiming it violated the FLSA by automatically deducting half an hour of pay from her daily wages for meal breaks. Rather than litigating the issue of how many times the plaintiff worked through her meal breaks, Genesis made an "offer of judgment," which is a type of settlement offer to a plaintiff. She never responded to the offer. The Supreme Court stated that Genesis' offer of judgment rendered the plaintiff's individual claims moot and that the collective action couldn't continue. The Court explained that once her entire claim was satisfied, the plaintiff couldn't adequately represent the interests of the unidentified coworkers who would have been members of her collective action. Employers facing collective actions under the FLSA can consider using offers of judgment as a tool for expeditiously resolving such lawsuits. If you offer an amount that fully satisfies the lead plaintiff's claim and no other employees have opted into the collective action, the lawsuit will likely be dismissed under the Supreme Court's ruling.

− Address

To obtain additional information from the WHD, including how to contact a regional or district office of the WHD, contact:

U.S. Department of Labor Wage and Hour Division

200 Constitution Avenue, NW

Washington, DC 20210

866-487-9243

http://www.dol.gov (http://www.dol.gov)

— No State Minimum Wage or Overtime Requirement

The state of Tennessee does not have a minimum wage or overtime law. Because the federal Fair Labor Standards Act (FLSA) applies to virtually all enterprises involved in interstate activities, most Tennessee employers are covered by the federal law. Employers that are not covered by the federal law are not required to pay the federal minimum wage. In these cases, wages are determined by agreement (either written or oral) between the employer and the employee at the time of hiring.

— Address

For additional information, contact:

Department of Labor and Workforce Development

220 French Landing Drive

Nashville, TN 37243

844-224-5818

https://www.tn.gov/workforce (https://www.tn.gov/workforce)

EMPLOYMENT CONTRACTS

(and *Implied Contracts*)

Summary

The employment relationship is, by its very nature, a contractual one. Even in the absence of a written contract between the employer and the employee, both are still bound by an oral agreement for at-will employment. Courts in most states, however, have carved out exceptions to the at-will doctrine.

For instance, courts have held that, under certain circumstances, offer letters, personnel policies, and other statements by employers can create implied contracts that alter the at-will nature of the employment relationship. In addition, where employees are represented by a union, the employment relationship is governed by a collective bargaining agreement.

When an employer does choose to enter into a formal contract with an employee, there are certain provisions that should be included to protect the employer's interests and ensure its enforceability.

– What Is an Employment Contract and When Is It Useful?

An employment contract is a written, binding agreement between an employer and a prospective or current employee that, when properly drafted, can be a highly effective way of protecting a company's financial and intellectual resources.

Not every employment relationship will require a contract. Rather, employers most often require an employment contract as a condition of employment when the employee holds a position that is highly influential (*e.g.,* chief executive officer), involves sensitive trade secrets or client information (*e.g.,* sales positions, engineers, and computer programmers), or requires a significant amount of "front-end" cost (*e.g.,* relocation packages, extensive or specialized training, sign-on bonus).

In addition, employers may use a separation or severance agreement at the end of the employment relationship or may enter into agreements that deal with a limited subject or scope, such as arbitration agreements or noncompete agreements.

All employment agreements are legally binding on the employer and, therefore, employers are best served by having them drafted and reviewed by an experienced employment law attorney.

Important Note About Legal Counsel

Contract law is a particularly complex discipline that relies largely on common law, which is law as developed by judges and court cases. Contracts must generally be interpreted on a case-by-case basis that can change significantly depending on the facts of the particular agreement between parties.

Because of the variability and nuance involved, and the risk that comes with an improperly drafted contract of any type, it cannot be overemphasized how important it is for employers to seek the assistance of legal counsel when drafting and reviewing contracts of any type, including employment agreements.

This section will provide ***general*** guidance and information on the various elements and types of employment agreements and the provisions most commonly required by them, but any individual employment contract *must* be reviewed (if not completely drafted) by competent legal counsel in order to ensure its effectiveness.

– Basic Elements of a Contract

In order for any contract to be enforceable in a court of law, certain basic requirements must be met. There must be an offer, acceptance of the offer, and

adequate consideration (*i.e.,* something of value) exchanged.

In employment contracts, the offer and acceptance are relatively straightforward. The employer offers the employee a job under certain terms and conditions, and the employee accepts the offer, perhaps after some negotiation.

Adequate consideration can be somewhat trickier. In initial employment contracts, the requirement for consideration is usually satisfied when the employee agrees to provide services to the employer and the employer agrees to pay the employee for the services. Thus, when an employment agreement is entered into at the commencement of employment as a condition of that employment, adequate consideration is generally not an issue.

However, in some states and contractual matters, additional consideration (beyond merely continuing employment) may be required when additional services or certain restrictions are requested of employees.

In particular, additional consideration may be required when employers seek to have employees enter into new or modified employment agreements during the course of employment.

Provisions that *must* be in every contract. To be enforceable, every contract must include the following:

- Identification of the parties to the contract;
- An offer and acceptance clause (*e.g.,* the employer offers employment and the individual accepts the offer under the terms and conditions set forth in the agreement);
- A statement of consideration (*e.g.,* the salary and/or benefits the employee will be granted);
- The duration of the agreement (when the contract starts and ends); *and*
- The signatures of all parties to the contract.

Provisions that *should* be in every contract.

- A final integration or “zipper” clause (a statement that the written document is the entire agreement between the parties on the subject matter therein and that the agreement supersedes any prior oral or written agreement);
- A statement providing that any amendments or modifications to the terms of the agreement will only be effective if agreed to in writing and signed by both parties;
- A “no conflicts” clause (a statement that the performance of the contract by the employee will not violate or conflict in any way with any other agreement to which the employee is bound);

• A statement setting forth the form of any notice that may be required under the agreement (e.g., a notice of termination must be sent via certified mail, return receipt requested);

• A statement providing that the agreement is not assignable by the employee but reserving the employer's right to assign the agreement in the event of a sale, merger, or other change;

• A choice of law provision setting forth the state law under which the agreement will be interpreted; *and*

• A severability clause providing that if any part of the agreement is held to be invalid, illegal, or unenforceable for any reason, the remaining provisions of the agreement will still be enforced.

— At-Will Employment and Implied Contracts

Even if there is no written contract between an employer and employee, an oral agreement exists under which the employee agrees to provide services to the employer and the employer agrees to pay the employee for those services. This is known as at-will employment, which is the standard in a vast majority of the states.

Under the at-will doctrine, either the employer or employee may, subject to certain exceptions, terminate the employment relationship at any time, for any lawful reason (or for no reason).

Courts in many states, however, have found that, under certain circumstances, statements made in offer letters, employee handbooks or manuals, and other written statements made to employees can create an *implied* contract that alters this at-will relationship.

Avoiding implied employment contracts. The most important thing an employer can do to preserve the at-will employment relationship is include a disclaimer on its employment application, in every offer letter sent to prospective employees, and in its employee handbook.

The disclaimer should be placed prominently in the handbook, perhaps even on the first page, and should appear in large, bold type.

In addition, when a new employee receives a copy of the handbook, the employee should be asked to sign an acknowledgment stating that he or she understands and agrees that nothing in the handbook is intended to or does create a contract or alters the at-will employment relationship.

The signed acknowledgment should be kept in the employee's personnel file.

State courts have set different standards for how and when an implied contract may be created; therefore, employers must make sure that the disclaimer contains language that meets the minimum needs in their state(s) of operation.

Caution: The National Labor Relations Board (NLRB) has taken action against employers it deems to have included overly broad disclaimers in employee handbooks.

A disclaimer that may be reasonably construed by employees to restrict their right to act collectively will be in violation of the **National Labor Relations Act (NLRA).**

As noted above, employers should have legal counsel review handbook contract disclaimer language to ensure it complies with NLRB's interpretation of the NLRA.

In addition to the at-will disclaimer, employers should:

- Train all employees involved in the hiring process or in management to avoid using language or making statements that may be construed as an offer or promise of permanent employment.
- Avoid using probationary periods. Instead, simply state that a new employee's performance will be evaluated after 90 days.
- Include, as part of any disciplinary policy, language reserving the employer's right to determine what type of discipline is appropriate in any given circumstance, including the immediate termination of employment. At the end of the disciplinary policy, include a statement that the employer may deviate from the policy at any time and without notice and that the policy in no way alters the at-will employment relationship.
- Include, before any list of prohibited conduct in an employee handbook, an additional statement noting that the list is not all-inclusive and that other conduct may result in discipline, up to and including the immediate termination of employment.

– Collective Bargaining Agreements

A collective bargaining agreement (CBA) is a contract between an employer and the labor union that represents its employees.

The federal NLRA provides for and protects the activities of organized labor in the workplace. Under the NLRA, when a union has been properly recognized as the bargaining unit for a group of employees, the employer must negotiate with the union over the terms and conditions of employment.

The result of these negotiations is a CBA that generally controls the major terms of employment, including wages; benefits; hours of work; working condition; job assignments; seniority provisions; employee discipline; vacation, holiday, and sick time; and grievance procedures for handling employee complaints.

Generally speaking, a CBA does not provide for at-will employment. The CBA is a complex document, and negotiations are usually long and sometimes contentious. Employers will want an experienced labor lawyer representing them in negotiating and drafting the CBA.

Management Rights Clause

One clause employers should include in a CBA is a carefully drafted management rights clause.

A strongly worded and comprehensive management rights provision preserves management's right to unilaterally make and effect core business decisions (*e.g.,* the scheduling, transfer, or assignment of work) without the burden of consulting, advising, or obtaining approval from the union membership.

Grievance Procedures

If a union employee believes that his or her employer has violated a particular term or provision of an existing CBA, the employee may file a grievance. A grievance is either an oral or written statement that outlines an alleged violation of the CBA and demands relief.

When an employer is presented with a grievance, it must hear and investigate the complaint and either remedy the violation to both parties' satisfaction or deny the grievance based on a finding of no violation. If the grievance is denied, the union may then appeal to the next designated stage of the process.

If the grievance ultimately moves through all of the CBA's defined stages without resolution, the union may then file a demand for final and binding arbitration.

> **Practice tip:** Although most grievance and arbitration clauses seek to protect the contractual rights of organized employees, employers are advised to negotiate and

secure a mirror CBA provision in order to preserve a similar right of recourse against the union.

− Individual Employment Contracts

Executive Employment Agreements

High-level executives with complicated compensation arrangements generally have employment agreements that are more comprehensive than most standard employment contracts.

Because of their expertise and marketable skills, these employees often require additional contractual security to reduce opportunity cost—*i.e.,* the loss experienced when one option is chosen instead of another, potentially more lucrative option.

For example, high-level executives may demand assurance that they will be protected if the company is sold or it decides to terminate the executive's employment.

Similarly, employers can protect their own interests through these comprehensive agreements and ensure that they “get what they’re paying for,” while reducing the disruption to business operations that occurs when executive team members leave an organization (perhaps for a competitor).

In most cases, both the employer and the employee are represented by legal counsel who draft and negotiate the language of the contract.

In addition to the language that should be included in all employment contracts, contracts for highly placed employees or executives usually include some or all of the following provisions:

- Job title, location, and description of the employee's duties and reporting relationship
- Date on which employment begins or ends if the contract is for a specific duration
- Base salary
- Reimbursement of relocation costs, if applicable
- Signing bonus, if applicable
- Other bonus payments or incentive plans
- Benefits (if the employee will be covered under the employer's group health plans in effect for other employees, this can simply be referenced)

- Stock options or other deferred compensation (stock option plans usually require separate stock option agreements as well)
- Change-in-control provisions
- Leave benefits (paid time off (PTO) and holidays, as well as any special leave incentives such as sabbatical options)
- Automobile and/or travel allowances
- Termination provisions, which may include severance payments if the employee is terminated without cause or resigns for good reason
- Restrictive covenants (*e.g.,* noncompete, confidentiality, and nonsolicitation agreements)

Restrictive Covenants

A restrictive covenant is designed to protect an employer's interests by restricting the employee's conduct both during and after employment. The most common types of restrictive covenants are noncompete and confidentiality agreements. Employers also use nonsolicitation agreements to try to prevent former employees from soliciting their customers and other employees.

To improve the odds that a restrictive covenant will be enforced, employers should limit them to only those employees who are in a position to use confidential information or intellectual property. In addition, restrictive covenants must be consistently enforced.

Noncompete agreements. Noncompete agreements prohibit former employees from engaging in a certain type of work within a defined geographical area and period of time.

Noncompete agreements are regulated by state law, and their enforceability will vary depending on the state where the employee is located.

For instance, California law holds noncompete agreements *per se* unenforceable, as they are against public policy. Other states will enforce noncompete agreements if they serve an employer's legitimate interests and are not overly broad. Therefore, employers must review and comply with the specific requirements in their states.

As a general rule, noncompete agreements are not favored by the courts because they restrict an individual's ability to make a living. Therefore, employers must pay careful attention to the drafting of these agreements.

In order to be enforceable, noncompete agreements generally must be:

- Narrowly drafted so that they are limited to protecting the employer's legitimate

business interests;

- Reasonable in geographic scope; *and*
- Reasonable in duration.

The following paragraphs are a more detailed discussion of these concepts.

Limited to the employer's legitimate business interests. The employer's legitimate business interests may include protecting client lists, trade secrets, and other confidential information. An employee who had access to this type of information and left the company to work for a direct competitor could use the information to the detriment of his or her former employer.

The definition of "competitor" used in a noncompete agreement should be narrowly tailored to protect only legitimate interests and not as a general prohibition against working for any competitor in any capacity.

Limited in geographic scope. This concept is best explained by example: If an employee was the sales manager for the Northeast and his or her customer contacts were limited to that geographic region, a noncompete agreement should not seek to prevent him or her from working for a competitor anywhere in the country. An attempt to prohibit the employee from working for a competitor on the West Coast, for example, would likely be viewed as unreasonable.

Reasonable in duration. A noncompete agreement that restricts an employee from working for a competitor for more than a year will generally receive close scrutiny from the courts. Courts vary, however, from state to state on what they consider reasonable and enforceable.

To prepare a valid and enforceable noncompete agreement, employers should consider the following factors:

- Individual state laws and changes in the law;
- The type of restriction necessary to protect what is most important to the employer, e.g., customer relationships or reputation;
- That the agreement should be written and signed;
- How aggressively the agreement can be drafted in light of individual state court approaches to modifying an otherwise unenforceable agreement to make it enforceable; *and*
- The enforceability and value of an assignment provision, which allows the noncompete to be transferred to a subsequent owner.

Consideration required for noncompete agreements. If employees are

asked to sign a noncompete agreement once they have already begun working for the employer, the employer must ensure that there is adequate consideration for the agreement.

In some states, if an employee is at will, continued employment is sufficient consideration. In other states, the agreement will only be enforceable if the employee is given some consideration beyond continued employment, e.g., a bonus or pay increase, to which he or she would not otherwise be entitled.

Nonsolicitation agreements. Nonsolicitation agreements are usually included as part of a comprehensive employment agreement or noncompete agreement. This type of agreement prohibits the solicitation of employees and/or customers by a former employee.

As with noncompete agreements, nonsolicitation agreements must be reasonable and limited to protecting only the employer's legitimate business interests.

Confidentiality/nondisclosure agreements. These agreements are designed to protect the employer's proprietary information and intellectual property. Generally, such agreements identify the materials or types of information the employer considers to be confidential and state the employer's expectations for how such information will be used or disclosed.

These agreements also spell out the ownership rights to any inventions, technology, machines, developments, designs, processes, trade secrets, works of authorship, and related work product conceived, created, or first reduced to practice by the employee during the term of his or her employment with the employer. Employers may also require employees to agree to execute any documents necessary to protect the employer's ownership rights, such as a patent agreement or application for a patent.

A confidentiality agreement should be designed to meet an employer's specific needs. Since not all information or ideas require the same level of protection, employers should consider to what extent they need to protect certain intellectual property.

Specifically, the following categories of information should be considered:

- Patentable inventions
- Works subject to copyright
- Trade secrets

After determining which assets need to be protected, employers should consider

the following steps when drafting and implementing the agreement:

- Training employees on the policy
- Determining whether a confidentiality policy alone is enough to protect the employer's interests under applicable state law or if additional measures are necessary
- Expressly claiming ownership of intellectual property and requiring that new hires disclose any prior patents or inventions
- Controlling outsider and visitor access to all facilities
- Limiting employee access to information and records on a "need to know" basis
- Monitoring and limiting access to electronic data
- Protecting both electronic and physical information
- Establishing procedures to detect and respond to breaches
- Considering the need for confidentiality agreements with third parties, such as vendors and independent contractors

Drafting an effective and enforceable confidentiality policy can be a complex undertaking. Individual state laws must be considered in creating such an agreement. Therefore, it is advisable to seek the assistance of an attorney.

Defend Trade Secrets Act (DTSA). Effective May 11, 2016, the federal DTSA is intended to provide some uniformity and predictability to businesses' protection of their valuable trade secrets.

The DTSA created a federal claim for misappropriation of trade secrets. These claims have traditionally risen under the **Uniform Trade Secrets Act (UTSA),** which has been adopted by (and remains effective in) nearly all of the states. Yet, despite UTSA's goal of providing a uniform system of trade secret protection, the interplay of state laws and judicial interpretation led to an inconsistent patchwork of trade secret protection.

Under the DTSA, businesses have an alternative, more consistent path to recover damages for trade secret violations. Meanwhile, note that the DTSA does not preempt or overturn existing state laws or the UTSA, so businesses also have access to those remedies in the event that they are more favorable.

Companies that wish to take full advantage of DTSA protections have some policy actions to take, first.

The DTSA provides immunity to employees and individual contractors who disclose trade secret information as part of whistleblowing activity. Specifically, the Act

protects disclosures made “in confidence to a federal, state, or local government official or ... attorney” when made “solely for the purpose of reporting or investigating a suspected violation of law.” The Act also protects sealed disclosures made in a complaint or other document filed in a lawsuit or other proceeding.

Employees and individual contractors must be given notice of this whistleblower protection in any contracts or policy documents related to trade secret protection that are entered into or updated after May 11, 2016.

Businesses that fail to provide this notice will not be actively penalized and will still be able to file claims under the DTSA; however, those businesses’ recovery under the Act will not include attorneys’ fees or punitive (up to double) damages from any employee or contractor to whom the notice was not provided.

For many businesses, it may be simpler to add the whistleblower notice to any newly drafted or revised employee agreements or policies related to trade secret protection, as this at least offers the chance for full recovery, including attorneys’ fees and punitive damages, under either the federal or state acts.

Computer Fraud and Abuse Act (CFAA). The federal CFAA is primarily a criminal statute that was originally enacted to prevent unauthorized access to government computers and to deter hackers (18 U.S.C. Sec. 1130).

In recent years, and with mixed success, employers have taken advantage of a provision in the CFAA that allows a private right of action when someone "knowingly and with the intent to defraud, accesses a protected computer without authorization or exceeds authorized access, and by means of such conduct furthers the intended fraud or obtains anything of value."

The CFAA has been used in suits against employees for, among other things, breach of noncompete agreements and misappropriation of trade secrets. However, courts are split on whether the CFAA applies under these circumstances. Their analyses have hinged on the meaning of the phrase "without authorization" as used in the statute.

Practice Tip: The CFAA can be a valuable tool for employers when employees misuse company-owned computers in violation of a noncompete or other employment agreement.

However, employers considering a CFAA claim should consult with local employment counsel to determine whether such a claim is viable in their jurisdiction.

Potential employees and restrictive covenants. While hiring employees away from the competition may seem attractive, there are a number of risks employers take when recruiting and hiring such individuals. Before hiring, employers should determine whether the employee is bound by a restrictive covenant, the terms of the covenant, the likelihood of the covenant being enforced, and the costs and risks of hiring the employee.

If the decision is made to hire the employee, employers should confirm that the employee has terminated his or her employment with the former employer, obtain a copy of any applicable restrictive covenant to determine what the employee can and cannot do, prohibit the employee from using any confidential information obtained from his or her former employer, and refuse to accept any such information.

Employers may also want to consider including language in an offer letter stating that these steps have been taken.

Separation or Severance Agreements

Providing a separation or termination agreement can be an effective way to prevent litigation. The amount of compensation offered in a separation agreement is often significantly less than the employer would spend on legal fees alone to defend itself against a claim by a former employee.

Separation agreements are also useful in the context of layoffs or reductions in force, which can result in claims by multiple employees.

Whether an organization decides to offer an employee a separation agreement usually comes down to employer policy, practice, and philosophy. It is important, however, to draft an enforceable separation agreement in order to realize these benefits.

Provisions to include in a separation agreement. In addition to clearly laying out the elements of the separation package and what the employee will receive, employers also generally include the following standard provisions:

- Date of termination
- Nonadmission of liability clause
- Statement of noncoercion
- No-rehire clause, if applicable
- Confidentiality clause that covers both the terms of the agreement and proprietary information, such as trade secrets or client lists
- Noncompete agreement

- Nondisparagement agreement
- Nonsolicitation agreement
- Requirement that the employee return all company property
- A statement that the contract constitutes the entire agreement between the parties

State law requirements also must be taken into account; therefore, separation agreements should always be drafted by an attorney.

Releases/covenants not to sue. When an employer offers severance pay to a discharged employee, it should require the employee to sign a general release of claims.

Releases should detail the types of claims the employee is waiving to show that the employee understands that he or she has certain rights and is voluntarily waiving them. An employee cannot, however, waive prospective claims or ones that arise after the release is signed or effective.

In addition, the following legal issues must be considered when drafting a valid and enforceable release:

- Releases may not prohibit an employee from filing charges with administrative agencies such as the Equal Employment Opportunity Commission (EEOC). Releases also should not suggest or state that the employee cannot cooperate with a federal or state agency in connection with an investigation.

  As such, releases should clearly provide that the employee is giving up the right to sue in court for monetary damages but not waiving his or her right to file an administrative charge or to participate in an agency investigation.

- Employees cannot waive minimum wage or overtime claims under the **Fair Labor Standards Act (FLSA)** unless the release is supervised by the U.S. Department of Labor.

- Employees cannot waive their prospective rights under the federal **Family and Medical Leave Act (FMLA).** The settlement or release of FMLA claims based on *past* employer conduct is permissible (29 CFR 825.220(d)).

- Releases may not limit employees' exercise of rights under the NLRA. For example, a release may not require employees to promise not to engage in any union activity relating to the employer. As noted above, releases also may not interfere with a worker's right to cooperate with NLRB proceedings.

- Specific requirements apply to releases of age claims under the **Older Workers Benefit Protection Act (OWBPA).** The release must specifically state that the employee is waiving his or her claims under the federal **Age Discrimination in Employment Act (ADEA)** and be written in plain language. In addition, the release must provide a 21-day

consideration period, a 7-day revocation period, and advice to consult with an attorney before signing the agreement.

Additional requirements apply if the agreement covers multiple employees under a group layoff or exit incentive plan. More information is available on the Age Discrimination (https://hr.blr.com/analysis/Discrimination/Age-Discrimination/National) topical analysis page.

• In settlements related to sexual harassment, if payment of the settlement is made subject to a non-disclosure agreement, the payment will not be eligible for tax deduction as an ordinary and necessary trade or business expense. (Internal Revenue Code Section 162(q).

• State laws may also impose additional limitations on releases. For example, some states prohibit waivers of unpaid wage claims.

Consideration. As with any contract, for a separation agreement and release to be enforceable, there must be adequate consideration for the agreement.

This means that the employee must be provided with monetary compensation or something else of value to which the employee would not otherwise be entitled under the law or employer policy—for instance, accrued salary, commissions, or payments due under the employer's established severance plan would not be adequate consideration.

Examples of adequate consideration include continuation of health benefits or fringe benefits at the employer's expense, unearned vacation pay, outplacement services, continued use of a company car, vesting of unvested stock options, salary continuation, or a letter of reference.

The separation agreement should explicitly state that the receipt of any severance is conditioned on the employee signing the release.

Deferred Compensation and Employment Agreements

Internal Revenue Code (IRC) Sec. 409A sets out rules for nonqualified deferred compensation (NQDC).

Under Sec. 409A, with few exceptions, a deferral of compensation exists if an employee obtains a legally binding right to compensation in one year that is paid in a later year. A legally binding right to such compensation is created even if the compensation is conditioned on the future performance of services or other conditions established by the employer and, therefore, may be paid in a later year.

There is no deferral, however, if an employer has unrestricted right to reduce or eliminate the compensation. Deferred compensation can be granted in a variety of

ways, including by supplemental retirement plans, individual employment contracts, severance agreements, and settlement agreements.

Tax penalties. If deferred compensation covered by Sec. 409A meets the specified requirements, there is no effect on the employee's taxes. The compensation is taxed in the same manner as it would be taxed if it were not covered by Sec. 409A. If the arrangement does not meet the requirements, the compensation is subject to certain additional taxes.

What does the law require? Sec. 409A imposes several requirements on nonqualified deferred compensation plans related to documentation, elections, funding, distributions, withholding, and reporting. Relevant to employment agreements, the law requires that such plans be in writing and specify the amount and timing of distributions.

Distributions are permitted only upon separation from employment, disability, death, at a specified time before the deferral period ends in the event of an unforeseen emergency, or upon a change in control.

Plans must also delay distributions for 6 months to key employees of publicly traded companies upon separation from employment. In addition, if the plan provides for elective deferrals, Sec. 409A specifies how and when those elections may be made.

Note: Section 409A is a complex law, so employers should consult with legal counsel when drafting employment agreements with deferred compensation provisions. More information is also available at http://www.irs.gov. (http://www.irs.gov/Retirement-Plans/409A-Nonqualified-Deferred-Compensation-Plans)

− Arbitration Agreements

Employment litigation has exploded in recent years, and employers are continually faced with defending themselves against often frivolous claims in state and federal courts.

Arbitration has become increasingly attractive to employers because it is private, binding, and comparatively less expensive and time consuming than traditional litigation through the court system.

In enacting the **Federal Arbitration Act (FAA),** Congress recognized the benefits of arbitration as opposed to traditional litigation and codified a public policy favoring arbitration.

Arbitration Agreements Are Typically Favored by Courts

The U.S. Supreme Court has held that the FAA governs arbitration agreements in the employment setting (with the exception of transportation workers) (*Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001)).

The Supreme Court has also ruled that the FAA preempts state laws that would give jurisdiction to a court or administrative agency rather than the arbitrator (*Preston v. Ferrer*, 128 S.Ct. 978 (2008)). The Supreme Court has also upheld provisions in an arbitration agreement that granted the arbitrator, rather than a court, the authority to determine the enforceability of the arbitration agreement (*Rent-A-Center v. Jackson*, 130 S.Ct. 2772 (2010)).

These cases reflect the Supreme Court's favorable view of arbitration. For practical purposes, these rulings mean that well-drafted mandatory arbitration agreements between employers and employees will likely be enforced.

Also, employers may delegate extensive authority to arbitrators, including the authority to determine the validity of an arbitration agreement.

Discrimination charges. Despite its favorable view of arbitration, the Supreme Court has ruled that an agreement between a private employer and employee to arbitrate employment-related disputes does not bar the EEOC from pursuing a complaint against the employer for illegal discrimination (*EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002)). Therefore, in order to be enforceable, a carefully drafted arbitration agreement should carve out an exception for the filing of a charge with the EEOC. In addition, such agreements must not limit an employee's legal rights and remedies, *e.g.,* exclude the right to discovery or to recover certain types of damages that would be available to them in court.

The Supreme Court has also ruled that a provision in a CBA that clearly requires union members to arbitrate claims arising under the federal ADEA is enforceable (*14 Penn Plaza, LLC v. Pyett*, 129 S.Ct. 1456 (2009)).

In this case, three night lobby watchmen challenged their reassignments, claiming, among other things, violations of the ADEA. In compliance with their CBA, the workers' union requested arbitration of their claims but later removed the age discrimination claims from arbitration. The workers then filed an age discrimination suit in federal court.

Although the lower court denied a motion to compel arbitration, the Supreme Court found that neither the NLRA nor the ADEA precluded arbitration of age bias claims.

The Supreme Court rejected the argument that the arbitration clause was outside the permissible scope of the collective bargaining process because it affected the employees' individual, noneconomic statutory rights that can only be waived individually. The Court reasoned that the ability to take an age bias claim to court is not a substantive right guaranteed by the ADEA; the ADEA grants only the substantive right to be free from age discrimination. Therefore, a clear and freely negotiated age discrimination arbitration provision in a CBA is enforceable.

Class Arbitration

Class action arbitration. The U.S. Supreme Court has ruled that class arbitration is permitted only when the parties expressly agree to it (*Stolt-Nielsen S.A. v. Animalfeeds International Corp.*, 559 U.S. ____, 130 S. Ct. 1758 (2010)).

The Court ruled that allowing class arbitration when the agreement is silent on the issue would violate the FAA. The Court reasoned that an arbitrator's role is to interpret and enforce the parties' contract, not to make public policy by inferring a class arbitration agreement. The Court noted there are significant differences between bilateral (two-party) and class arbitrations.

For example, unlike bilateral arbitration, in class arbitration, the arbitrator must resolve many disputes among hundreds, or even thousands, of individuals. Also, a class arbitration may involve enormous sums of money, but arbitration rulings are subject to only limited review in the courts.

On the other hand, the U.S. Supreme Court will not disturb an arbitrator's decision finding that class action arbitration is permissible under the parties' agreement when the parties agree that the arbitrator should decide whether their contract provides for class action (*Oxford Health Plans, LLC v. Sutter*, 569 U.S. ____, 133 S. Ct. 2064 (2013)).

In such cases, as long as the arbitrator makes a good-faith effort to interpret a contract, a court will not reverse the arbitrator's decision even if it is based on serious errors of law or fact.

Class action waivers. Arbitration agreements often contain class action waivers. Though such waivers had been expressly upheld as valid by the Supreme Court in consumer agreements (*AT&T Mobility LLC v. Concepcion*, 563 U.S. ____, 131 S. Ct. 1740 (2011)), there had been significant uncertainty and debate as to whether such waivers were permissible in *employment* agreements.

This matter was finally settled in a 2018 Supreme Court decision in which the court held that such waivers *are* permitted and enforceable under the FAA (*Epic Systems Corp. v. Lewis*, No. 16–285 (May 21, 2018)).

The Supreme Court's decision in *Epic* resolved a years-long circuit split as to whether class action waivers in employment arbitration agreements violated the NLRA.

The divide arose in *D.R. Horton, Inc.* (357 NLRB No. 184 (2012)), in which the NLRB ruled that an arbitration agreement violated the NLRA when it required employees to waive their right to bring class or collective actions.

This decision was overturned by the U.S. Court of Appeals for the 5th Circuit, which disagreed with NLRB's assertion that the agreement violated covered employees' rights to protected, concerted activity. Citing the weight of the FAA, the 5th Circuit held that such arbitration agreements are valid and enforceable (*D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013)).

In spite of this ruling, the NLRB continued to apply its restrictive reasoning in several later decisions that, when reviewed, created a significant divide among federal courts: the 5th, 2nd, and 8th Circuit Courts upheld class action waivers as valid and enforceable, while the Seventh and Ninth Circuits found them in violation of the NLRA.

The matter is now succinctly settled by the Supreme Court, and employers may be certain that class action waivers in arbitration agreements are not a violation of the NLRA.

However, whether such waivers make practical sense in the business context will be a matter for each employer to decide with its employment counsel.

Federal Contractors

Restriction on arbitration for defense contractors. The **Department of Defense Appropriations Act 2010 (DDAA)** bars federal contractors with defense contracts in excess of $1 million from requiring employees to arbitrate claims arising under **Title VII of the Civil Rights Act of 1964 (Title VII)** or any tort related to sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention.

Federal contractors must certify that subcontractors with subcontracts over $1 million also comply with this law (DDAA 2010 Sec. 8116).

These restrictions on mandatory arbitration do not apply to agreements that are unenforceable in the United States. Additionally, the secretary of Defense may waive these restrictions if he or she determines that a waiver is necessary to avoid harm to national security interests.

Restriction on arbitration for federal contractors. The **Fair Pay and Safe Workplaces Executive Order,** signed into law and effective July 31, 2014, extends

similar arbitration restrictions to all federal contractors.

The Executive Order bars federal contractors with contracts in excess of $1 million from requiring employees to arbitrate claims arising under Title VII or any tort related to sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention.

Federal contractors must certify that subcontractors with subcontracts over $1 million also comply with this law.

Contracts and subcontracts for the acquisition of commercial items or commercially available off-the-shelf items are exempt from this restriction. Valid agreements to arbitrate that were entered into before the effective date of the Executive Order will not be affected unless the contractor or subcontractor is permitted to change the terms of the contract or the contract is replaced or renegotiated.

Finally, the arbitration restrictions do not apply to employees who are covered by a CBA negotiated between the contractor and a representative labor organization.

State laws

State laws. Employers interested in adopting a mandatory arbitration agreement must also pay careful attention to applicable state laws.

Because arbitration is a dynamic area of the law, employers should seek the assistance of an attorney in drafting arbitration agreements and in implementing an arbitration policy for all employees.

− Breach of Contract

If either party violates the terms of an employment agreement, the other party may sue for breach of contract.

If, for instance, an employee breaches a noncompete agreement, the employer may seek a court order to stop the employee from working for the competitor and damages.

On the other hand, if an employee was promised a bonus that was set out in an employment agreement or, in some instances, in an oral agreement or promise, and the employer refuses to pay, the employee will have a claim for breach of contract against the employer.

EMPLOYEE HANDBOOKS

(and the dangers of *Implied Contracts*)

Summary

Employee handbooks are widely used by employers as an efficient way to communicate basic information to employees about company policies and the employment relationship.

Some policies may simply provide general notice and details of employee rights as required by state and federal laws.

Other policies in the employee handbook may provide additional information about the company and its mission; discuss employee benefits such as paid time off; clarify expectations of staff, including workplace conduct, timekeeping, attendance, and other important issues; and even provide legal protections to the employer itself.

A properly drafted employee handbook can be a valuable communication tool provided that employers take steps to avoid the legal problems that can arise when the handbook is not properly drafted.

— Why Should You Have an Employee Handbook?

Though there are many laws requiring employers to notify employees of certain workplace rights, there are actually no federal or state laws specifically requiring an employer to have an *employee handbook*—and plenty of employers choose *not* to have one.

But, for a number of reasons, creating and maintaining an employee handbook is a good idea and a best practice.

A well-prepared handbook will answer many of the routine questions that would otherwise end up on the desk of the Human Resources professional or supervisor. When employees know to look in the handbook first, it saves management time.

Moreover, an employee handbook is a useful tool for providing employees with that information that, by law, must already be delivered in writing (e.g., equal employment opportunity (EEO) statements).

Rather than provide employees with a haphazard pile of mandatory written notices—and then attempt to document that those notices were received—it makes sense to collect them into an organized, easy-to-use handbook or similar document.

Finally, a legally compliant and up-to-date employee handbook may even provide legal protection if an employer's policies or practices are ever challenged in court.

— What Does an Employee Handbook Do?

While there is no one-size-fits-all employee handbook, a well-written employee handbook may start by first providing information about the company, its philosophy, and the business.

Second, the handbook may define or summarize the legal relationship between the employer and the employee.

Third, the handbook should certainly include any workplace notices or policies that are required by law, such as those related to the **Family and Medical Leave Act (FMLA),Consolidated Omnibus Budget Reconciliation Act (COBRA),** and sexual harassment.

Fourth, the employee handbook may then provide information on benefits, paid time off, and other perquisites.

Finally, the employee handbook should set out work rules, standards of conduct,

disciplinary procedures, and other information that lets employees know what is expected of them.

Convey the corporate mission or philosophy. The employee handbook is a great communication tool because it is given to all employees. Therefore, it is also a great opportunity to let employees know certain things about the company.

Depending on the message the employer wants to send, the handbook might include:

- A brief history of the company;
- An explanation of the company's philosophy, focus, or mission, e.g., customer service, continuous improvement, excellence, high ethical standards, and maximization of profits;
- A statement about the employee's role in the company's success;*and/or*
- A statement about the company's equal opportunity policy.

Define the employment relationship. The employee handbook also defines the legal relationship between the employer and the employee.

Promises made by employers in employee handbooks can sometimes be mistaken as contractual obligations. Therefore, to avoid unintentional contractual commitments, all handbooks should include a section at the very beginning that states that nothing in the handbook is intended to create a contract with the employee.

In most states (Montana is the exception), this is also a good place to include an "at-will" statement that clarifies that employment is at will and may be terminated by the employee or the employer at any time for any legal reason.

It is also a good idea to include a statement reserving the company's right to change, amend, or delete sections of the handbook at its discretion.

These statements should also be included in a separate acknowledgment to be signed by the employee when he or she receives the handbook.

More details on disclaimers are provided below.

Provide notice of rights and responsibilities as required by law. As mentioned above, most employers are already required to provide employees with certain written notices under state and federal laws. So, the employee handbook is a sensible place to do so.

In fact, though state and federal laws do not expressly require employee *handbooks*, some states *do* require that if an employee handbook *is* provided, it must include certain notices of leave, antidiscrimination, and remedial rights.

A few examples of these policies may include:

• Information on COBRA continuation rights as required by law;

• Notice of FMLA or paid sick leave rights, as required by law;

• Notice of employees' right to report workplace injuries and illnesses without fear of retaliation, as required by the **Occupational Safety and Health Act (OSH Act)**; *and*

• Details on the company's policy on sexual harassment, discrimination, and retaliation, and its complaint procedures.

Provide benefits, leave, and other information important to the employee. The employee handbook is also a good place to:

• Define part-time and full-time employees;

• Define exempt and nonexempt employees;

• Provide *basic* information about employee benefits, while also referring employees to the plan document itself for more details;

• Explain vacation, sick time, holiday, and other paid time off; *and*

• Provide any other details or information generally applicable and important to most of your employees.

Set expectations for conduct and performance. The employee handbook often includes policies that inform employees of expectations for job performance; attendance; timekeeping; workplace conduct; use of company equipment; use of the Internet, e-mail, and any other company-owned technology; and what the consequences will be for violating these rules.

Note: Handbooks are not the same as supervisors' policy manuals. A policy manual provides guidance for supervisors and managers on the administration of the company's policies.

The employee handbook provides more general information to employees. Some items might be covered in both publications, but at different levels of detail.

− What to Include in the Employee Handbook

Employee handbooks come in all shapes and sizes. However, there are certain policies that should be included in every handbook—often these are either required by law or protect an employer from legal liability.

In addition, there are policies that are included in almost every handbook because the policy is universally important to both employees and employers.

Finally, there are those policies that are tailored to the organization and focus on a message for employees. Different organizations have different communication needs.

Selecting Topics for the Employee Handbook

When selecting topics for the employee handbook, there are certain factors to keep in mind. These include the ease with which a policy can be explained and understood, the frequency with which the policy might change, the number of employees affected by the policy, and the importance of each policy.

Ease of explaining or understanding. Some items may be so complex that they can't be thoroughly explained in the employee handbook. This is especially true of topics such as group health insurance and other benefit plans where a thorough treatment would have to include eligibility requirements and details of coverage.

In addition, employers are already required to provide employees with a separate summary plan description (SPD), which is a comprehensive document describing the features of the benefit plan.

Therefore, it is usually preferable to limit benefit and health coverage information in an employee handbook to a brief listing of available benefits while referring employees to the SPD, group health plan, or other appropriate documents for details.

Other complex topics may be similarly managed by summarizing the basics in the employee handbook, then cross-referencing other documents and resources for in-depth details.

Frequency of change. If the information that will be covered by a policy changes on a regular basis, it might be a better strategy to provide a general description but avoid details.

For instance, an employee handbook might include a policy on holidays indicating how many paid holidays employees will receive each year. However, because the actual days may vary from year to year, the company may not want to list them in the employee handbook.

Number of employees affected. There are some policies that will apply only to a small group of employees, such as those related to executive perquisites or sales commission plans.

As a general rule, the employee handbook should include policies that are applicable to the majority of employees. Information on items that affect only a few employees can be distributed separately.

Importance. An employee handbook may be relatively short and cover only key topics. On the other hand, some companies have comprehensive employee handbooks that are very long.

Having a lengthy and comprehensive handbook is not necessarily a bad thing as long as the handbook is well organized and easy to understand and navigate. But if the handbook is too long or difficult to use, its purpose has been lost, and the effort put into creating it has been wasted.

Whatever form of handbook you choose, be sure to prioritize your handbook so that the most important policies are included and given proper coverage.

At-Will Employment, the Contract Disclaimer, and the Acknowledgment Form

In nearly all states, private employees are employed at will. This means that either the employee or the employer may terminate the employment relationship at any time, for any reason, with or without notice.

Exceptions to employment at will include employees covered by a collective bargaining agreement (union contract), public employees, and employees with an individual contract of employment that includes a specific term.

Unless one of these exceptions applies, employers should take steps to preserve the at-will nature of the employment relationship.

Accordingly, at the beginning of every employee handbook, there should be a statement including the following:

- Employment is at will and may be terminated at any time by either the employee or the employer.
- Nothing in the employee handbook creates or is intended to create a contract of employment.
- The at-will nature of employment may not be modified by any oral or written statement made either before or during employment.
- Policies in the handbook provide information and guidance to employees, but the company reserves the right to amend or change the policies at its discretion with or without notice to employees.

Revising a handbook to add a disclaimer. The law related to contract disclaimers and employee handbooks has developed at the state level. Organizations with older employee handbooks may need to revise their handbooks to include language related to at-will employment and to add a contract disclaimer and acknowledgment form.

Because old handbook provisions may be viewed by a court as having created a contract with employees, it is a good idea to seek the advice of experienced employment counsel about the best way to implement these changes.

Acknowledgment form. In addition to the statement at the beginning of the employee handbook, the last page of the employee handbook should include an acknowledgment.

At the time an employee receives a copy of the employee handbook, he or she should be required to sign and date an acknowledgment stating that a copy of the employee handbook was received.

In addition, an even better practice is to have the employee agree that he or she has not merely received the handbook, but also read the handbook, understood the policies within, and had the opportunity to ask questions.

The acknowledgment should also state that the employee understands that his or her employment is at will, that he or she agrees nothing in the employee handbook creates or is intended to create a contract of employment, and that the company may amend or change the policies at its discretion with or without notice to the employee.

This signed acknowledgment should then be placed in the employee's personnel file.

Additional disclaimers. In addition to including the disclaimer at the beginning of the handbook, employers may want to consider adding disclaimer language to policies related to discipline and/or workplace rules.

For instance, if an employer has a policy related to disciplinary procedures, it is a good idea to include a statement reserving the employer's right to determine what level of discipline is appropriate in any given circumstance, up to and including the immediate termination of employment.

Likewise, if there is a policy listing conduct that will not be permitted in the workplace, it should include a statement indicating that the list is not all-inclusive, but is provided as guidance about the types of behaviors that will result in discipline, up to and including the immediate termination of employment.

Caution: National Labor Relations Board (NLRB) standards. In the past, the NLRB has taken action against employers it deems to have included overly broad disclaimers in employee handbooks.

For example, in one case, an administrative law judge (ALJ) ruled that an employer engaged in an unfair labor practice when it included the following language in its employee handbook as part of the at-will employment disclaimer: “I further agree that

the at-will relationship cannot be amended, modified, or altered in any way."

According to the ALJ, the problem with this disclaimer was that it could have been interpreted by employees to mean that organizational activities would be futile and that workers could not alter their at-will status through unionization.

Therefore, the disclaimer was found to violate employees' Section 7 rights to engage in concerted activities and join a union. (*NLRB v. American Red Cross,* Case 28-A-23443).

However, in 2017, the NLRB revisited its standard for reviewing employment policies, work rules, and handbook provisions in a 3-to-2 decision (*The Boeing Company and Society of Professional Engineering Employees in Aerospace*, Cases 19-CA-090932, 19-CA-090948, and 19-CA-095926).

In *Boeing*, the NLRB established a new test:

When evaluating a facially neutral policy, rule, or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of **National Labor Relations Act (NLRA)** rights, the Board will evaluate:

1. The nature and extent of the potential impact on NLRA rights, *and*
2. Legitimate justifications associated with the rule.

The Board then set forth three new categories of rules, chosen based on their interference with NLRA rights and the weighing of the adverse impact on NLRA-protected conduct vs. the legitimate justifications associated with the rule.

In general, the *Boeing* standard should provide employers with more clarity and autonomy in developing and applying well-intentioned workplace rules, policies, and handbook provisions.

Nonetheless, because of the fact and situation-specific nature of the interpretation of the rules, employers should still have legal counsel review handbook contract disclaimer language to ensure it complies with NLRB's current interpretation of the NLRA.

(See **Union and NLRA Concerns** below for additional information on unions and employee handbooks.)

Specific Policies to Include in the Employee Handbook

In addition to statements regarding at-will employment, the following policies are included in most employee handbooks:

- EEO statement, including information on the **Americans' with Disabilities Act (ADA)** and reasonable accommodation

• FMLA policy (if the employer has 50 or more employees, is a public employer, or is covered by an applicable state law)

• Family Military Leave policy (as required under the amended FMLA)

• Military leave policy

• Policy regarding other leaves such as jury duty, school conferences, etc.

• Policy against harassment, discrimination, and retaliation that includes sexual harassment and a complaint procedure meeting the requirements of both federal and state law

• COBRA policy that provides employees with the notice of rights required upon commencement of employment

• Internet, e-mail, social media, and/or other technology policy limiting any employee expectation of privacy

• Policy on electronic monitoring, if applicable

• Smoking policy

• Solicitation policy

• Policy explaining part-time versus full-time employment and exempt versus nonexempt

• Rules for timekeeping for nonexempt employees

• Designation of regular paydays and when time must be submitted

• Hours of work

• Lunch and rest periods

• Policy on overtime, including any mandatory approval process

• Absences and tardiness, including procedure for calling in to report absences and any rules related to job abandonment

• A noninclusive list of conduct that is not acceptable and will result in discipline, including threatening conduct or violence; theft; possession or use of illegal drugs in the workplace; inappropriate use of the Internet, e-mail, voice mail or other forms of electronic communication; harassment; etc.

• A description of the disciplinary process and statement that the employer will decide what level of discipline, up to and including the immediate termination of employment, is appropriate in any given circumstance

• Policy on drug and alcohol testing, if applicable

• General description of employee benefits such as health, dental, life, and disability

insurance

• General description of any 401(k) or other retirement plan

• Notification of employees’ right to report any workplace injury or illness, as required by the OSH Act

• Additional information on safety and workers' compensation

• Policies on education or tuition reimbursement

• Credit union participation

• Code of ethics

• Policy on competition, confidentiality, intellectual property, etc.

For additional information and guidance on developing any of the above policies in compliance with your applicable state and federal laws, please also refer to the relevant state and federal topic analysis pages on HR.BLR.com®.

Other policies may be included to suit the company's needs. As noted earlier, many companies use the employee handbook to give employees information about the company's history, mission, products, and customers. This is often done through a letter from the company's president or chief executive officer.

The employee handbook may also include policies encouraging volunteer work or explaining an open-door policy. In addition, a public company might want to include a statement regarding confidential information and media relations.

Employers may consider a wide range of other policies depending on the needs of the individual organization.

Union and NLRA Concerns

As noted above, employers must be careful not to include language in their handbooks that in any way infringes on or discourages an employee's right to organize.

Section 7 of the NLRA, which applies to most private workplaces (even those that are not unionized), provides employees with the right to engage in “concerted activities” to advance their interests as employees. These activities might include discussing pay, workplace conditions, and discipline with others.

Up until the 2017 decision in *Boeing,* the NLRB had been increasingly vigilant in interpreting and protecting employees’ Section 7 rights; in particular, the Board cracked down on numerous handbook provisions that could reasonably “chill” or deter employees from exercising those concerted activity rights.

For example, a social media policy that prohibited employees from posting “negative remarks” about the company could have been reasonably interpreted to dissuade employees from discussing wage practices or workplace conditions with others.

Other policies that were subject to NLRB scrutiny include at-will disclaimers, conduct standards and morals clauses, media contact policies, antidisparagement standards, arbitration policies, and language that a company is “union-free.”

In the *Boeing* decision, the NLRB set forth new standards for evaluating facially neutral workplace policies, rules, and handbook provisions that, when reasonably interpreted, could potentially interfere with the exercise of NLRA rights.

Under the *Boeing* test, the Board will evaluate:

1. The nature and extent of the potential impact on NLRA rights, *and*

2. Legitimate justifications associated with the rule.

With this test in mind, it is still important for employers to consider that any policy that touches on an employee’s ability to discuss work with another person is fair game for the NLRB, so it’s still a good idea to review these policies with a couple of best practices in mind:

- **Be specific.** Be specific as to the type of activity you wish to restrict. Vague policies that prohibit "negative attitudes" or "discussing sensitive information on social media" are less likely to pass muster than policies that specifically state that employees should not harass colleagues or disclose customers’ data to noncompany personnel.

- **Use disclaimers.** When in doubt, remember the power of the disclaimer. An NLRA disclaimer can help clarify an otherwise vague policy by specifically alerting employees that "nothing contained in this policy is designed to interfere with, restrain, or prevent employee communications regarding wages, hours, or other terms or conditions of employment. Company employees have the right to engage in and refrain from such activities."

Practice tip: Employers, whether unionized or not, should make sure that their employee handbooks do not conflict with employees' rights under the NLRA.

Even if such policies are not enforced, the NLRB may still find the employer engaged in an unfair labor practice just by maintaining such policies.

As noted above, an attorney experienced in labor law should review employee handbooks for compliance with the NLRA.

− Legal Concerns

In most states, courts have held that statements in an employee handbook may create a contract between the employer and employee.

Therefore, it is important to carefully consider the information that will be included in the employee handbook.

Employers should also be prepared to follow the policies in the handbook.

Where Problems May Arise

Long-term employment guaranteed. Phrases such as "you are now part of the XYZ company family" and you can expect to be employed "as long as you do a good job" have been problematic in several court cases.

Some courts have interpreted these statements as creating a binding contract that prevented termination except in cases where the employer could demonstrate "just cause."

Creating legal obligations. A promise in an employee handbook may obligate an employer to provide statutory benefits that it otherwise would not be required to provide.

For example, in one case, an employer that was not covered by the FMLA had nonetheless included information in its handbook stating that eligible employees were entitled to 12 weeks of leave under the FMLA.

An employee who was replaced while on medical leave sued the employer claiming that the employer had violated the FMLA and that it should be bound by the handbook promises.

The employer argued that it was not liable because it was exempt from FMLA's provisions.

The court disagreed, ruling that even though the employer was not covered by the FMLA, it still could be bound by the promises in the handbook, particularly when the employee relied on those promises in taking medical leave (*Peters v. Gilead Sciences, Inc.,* 533 F.3d 594 (7th Cir. 2008)).

In another case, a federal district court came to the same conclusion, holding that an employer could be bound by a handbook provision clearly promising FMLA leave,

even though the employer was not covered by the FMLA (*Reaux v. Infohealth Management Corp.,* No. 08 C 5068 (N.D. IL 2009)).

Procedures not followed. Some employees have fought dismissal or other disciplinary action by claiming that procedures in the handbook were not followed.

For instance, if the handbook sets out a three-step disciplinary process, an employee who did not receive all three steps of this progressive discipline might challenge his or her termination on the grounds that the disciplinary process was promised, and if given the chance, he or she could have improved job performance or corrected inappropriate conduct.

Changes not recorded. Another potential problem arises when the handbook is not updated to conform to new rules or procedures.

Employees might claim that they relied on the written policies in the handbook and did not know about the new or different rules.

Each of these potential problem areas can be addressed by including a properly drafted at-will employment statement and a properly worded contract disclaimer in the employee handbook and by having employees sign an acknowledgment.

Practical Tips to Avoid Liability

The following practical tips are aimed at helping employers avoid the legal traps associated with employee handbooks while still taking full advantage of the positive aspects of communicating with employees:

- Have any new policy or handbook reviewed by local employment counsel before distributing to employees.
- Include an at-will disclaimer that is bold and conspicuous at the beginning of the handbook.
- Include a specific disclaimer with certain policies; e.g., policies related to progressive discipline, performance reviews, dispute resolution, and workplace rules.
- Consider disclaimer language with policies that may limit or restrict employees' NLRA-protected communication about work conditions, pay, or similar matters.
- Avoid using the word "probation" or referring to employees as "probationary" employees.

- Avoid the word "permanent."
- Be fair and consistent in the interpretation and enforcement of policies.
- Review and update the handbook regularly so that the written policies are consistent with actual practice and applicable law.
- Train managers and supervisors in the proper administration of company policy.
- Each time an employee is hired—or when a revised employee handbook is issued—have employees sign acknowledgment forms that the handbook has been received, read, and understood, and then place the signed forms in the employees' personnel files.

Creating the Handbook

Employee handbooks should be drafted according to the particular needs of each individual workplace and in accordance with the requirements of state and federal law. Employers should try to develop policies and procedures that reflect the company's size, employee needs, and company philosophy. Employers should have an attorney familiar with state labor and employment laws review their handbooks for legal accuracy and timeliness. Outdated or erroneous policies can be as dangerous as not having policies at all.

Employers should exercise caution when developing handbooks and related policy statements. To avoid implied contract claims, employers should issue only general statements of policy in employee handbooks and should always include an explicit statement reserving the right to alter, amend, or change any handbook policy at any time and for any reason.

— Handbooks as Contracts

Tennessee is an "employment-at-will" state. Therefore, an employer may generally terminate an employment relationship at any time and for any reason unless a collective bargaining agreement, employment contract, existing law, or recognized public policy provides otherwise.

In keeping with a strong presumption in favor of the at-will standard, the Tennessee courts have traditionally held that *general* statements contained in an employee handbook or policy manual *maynot* result in the formation of an employment contract (*Rose v. Tipton County Public Works Dept.,* 953 S.W.2d 690 (Tenn. App. Ct. 1997)).

However, contractual obligations may arise if the language in the employee handbook demonstrates the employer's intent to be bound by its provisions (*Reed v. Alamo Rent-A-Car, Inc.,* 4 S.W.3d 677 (Tenn. App. Ct. 1999)).

— Writing an Effective Disclaimer

Many courts allow employers to escape potential contractual liability for handbook policies as long as a proper and sufficient disclaimer has been included. The Tennessee courts generally agree with this position (*Sudberry v. Royal & Sun Alliance,* 344 S.W.3d 904 (Tenn. App. Ct. 2008)).

Therefore, in order to preserve the at-will nature of employment and avoid the creation of a contract, every employee handbook should include a prominent, plain-English disclaimer that:

- Uses bold, large, capitalized, and/or special type and includes a distinctive and descriptive heading such as "Notice—Employment at Will";
- Is inserted prominently near the very beginning of the employee handbook and repeated as appropriate (e.g., after the statement of disciplinary policies or a section on

performance appraisals);

• Includes language indicating that the employee handbook makes no promises and is not meant to create, nor should it be construed as creating, a contract of employment;

• Clearly states that all employment is at will, and, as such, may be terminated by the employee or the employer at any time, with or without cause;

• Includes language stating that the employer retains the right to modify, amend, or discontinue any policy or procedure in the handbook at its discretion with or without notice; *and*

• Clarifies that progressive discipline and other suggested performance procedures included in the handbook are not all-inclusive, not mandatory, and that the employer reserves the right to depart from the disciplinary policy at its discretion.

In addition, employers should require employees to sign an acknowledgment stating that they received a copy of the employee handbook, and the acknowledgment should repeat the at-will disclaimer included at the beginning of the handbook. The signed acknowledgment should be kept in the employee's personnel file.

Finally, it is also a good idea to include a statement that these terms and conditions may be altered only in writing and signed by specified officers of the organization, e.g., the president.

− Adding Disclaimers to Existing Handbooks

What if the handbook has already been distributed without a disclaimer? The safest path is to issue a new edition of the handbook that includes a disclaimer, along with a notice calling attention to it. Prior to issuing the handbook, employers should review the existing handbook carefully to be sure it is consistent with the disclaimer.

Since courts in some states have ruled against employers for not adequately “communicating” the new handbook to employees, many employers require their employees to discard the old handbook and sign an acknowledgment of receipt of the new one. The acknowledgment does not need to say that the employees agree with the handbook, but only that they received, read, and understood it. The new handbook should also contain a statement that says that the manual supersedes and replaces all earlier versions.

General Recommendations

In order to avoid those contractual pitfalls associated with developing and distributing an employee handbook, employers should take careful note of the following recommendations.

Avoid detailed statements. In order for any promise to be binding, it must first be communicated in definite terms. Therefore, perhaps the most important guideline for any employer interested in designing and producing an employee handbook is to avoid detailed and rigid policy statements. By using general terms, rules, and statements, and reserving the right to alter, amend, and change any policy at any time, an employer may adequately reassure employees that certain guidelines will be followed without unduly inviting contractual liability.

Never tire of repeating yourself. Another important lesson for employers is to repeat, repeat, and repeat. As mentioned earlier, *every* employee handbook should include a disclaimer statement that preserves the at-will status of the employment relationship. However, a singular communication of a disclaimer statement in one format is arguably not enough. Instead, an employer should constantly retool and refine the disclaimer statement and avail itself of every appropriate opportunity to publicize it, whether the publication is made throughout the handbook, on bulletin boards, or as part of an employment application, orientation meeting, etc. By doing so, the employer's commitment to the at-will standard will be clearly evident.

Train the front line. Although in many cases the promises contained in a handbook may not be sufficient to create an employment contract, the same handbook, when combined with oral assurances that the handbook is binding on an employer, may be. Therefore, every supervisor and manager should be trained in the *proper* communication of company policy. Separate, distinct, and related promises in support of handbook policies should *never* be made to *any* employee.

Recognize and tolerate the risk. Because of the risk of contractual liability, many employers become wary of and refrain from using employee handbooks. However, every profitable enterprise arguably contains a certain element of risk. As long as an employer is careful with respect to the nature and content of handbook policy statements, many positive employee relations benefits may be realized. As mentioned above, to most effectively limit the potential liability created by employee handbooks, employers should always seek out the assistance and counsel of an experienced employment law attorney.

— Handbooks and Unions

Policies and procedures established in an employee handbook may be subject to collective bargaining. A unilateral change in an employee handbook, especially in matters concerning discipline, may result in an unfair labor charge.

More information on handbooks, union concerns, and employee rights under the National Labor Relations Act (NLRA) is available.

REFERENCES

− Summary

Reference checks are a useful way for employers to gather information that is not readily available from other sources, such as from the application or resume, or the job interview. However, employers are leery about providing references because they could be sued for giving a negative reference about a former employee or for failing to tell a prospective employer about an employee's poor performance or misconduct. In response to this legal quagmire, some states have enacted laws providing employers with protection or immunity from claims based on references. In addition, there are steps employers can take to limit liability for giving accurate and factual references about former employees. Likewise, there are policies and practices employers can use to help them obtain the necessary information they need to make hiring decisions.

− References: A Dilemma For Employers

Employers invest time and money in hiring and training new employees. As a result, they want to find out as much information as possible before hiring an individual. Often, former employers and supervisors can provide the most helpful information about a candidate's past work experience, ability to work with others, customer service skills, attendance, etc. In addition, information provided by former employers can help determine if a candidate provided accurate information on the employment application.

Still, many employers are reluctant to provide detailed references for former employees for fear of legal repercussions. Conversely, employers are concerned that if they don't check references and, as a result, fail to uncover information that would have proved a new employee unsuitable for the job, they may expose themselves to claims of negligent hiring or, at the very least, make an expensive mistake.

Risks of Disclosure

Some employers consider the legal risks of responding fully and truthfully to a request for a job reference—especially with negative information—are too high to justify any disclosure beyond name, job title, and dates of employment. The principal hazard is lawsuits by former employees, claiming that such disclosures were defamatory or were made in retaliation for the former employee exercising his or her statutory rights, such as filing a discrimination complaint.

Although employers win the overwhelming majority of such lawsuits, the mere threat of litigation has remained a serious deterrent to candor in reference giving. The result has been deafening silence about the job performance and abilities of former employees, especially those that had been disciplined, even for serious misconduct, or identified as unproductive.

Risks of Silence

Even though the reluctance of employers to provide references grew out of concern over litigation, the refusal to give full and truthful references has also given rise to claims against former employers, both by former employees and by third parties. In one line of cases, employers have been sued because the mere fact they refused to provide a reference allegedly resulted in the hiring employer drawing a negative inference about the former employee. In these cases, the assumption is that if the former employer had positive things to say about the employee's work record, it would have provided the information.

In a second line of cases, former employers have been sued because they failed to disclose information about past instances of misconduct, particularly serious

misconduct, such as sexual harassment or a propensity toward violence. The theory in these cases is that if the hiring employer had known about the misconduct, it would not have hired the employee. As a result, if the employee engages in misconduct that results in injury to the company and/or its employees, the former employers may be sued because they knew or should have known that by failing to disclose the information, they placed others at risk.

━ Reducing the Risks

State Laws Providing for Employer Immunity

Some states have enacted laws "immunizing" employers from claims by former employees that they were denied employment because of a negative reference. Because the most common claim made by former employees is that the negative reference was defamatory, the protections afforded by these immunity laws are from claims for defamation of character-- both libel and slander. Defamation is a state common-law claim and, therefore, the immunity statutes are enacted by state legislatures, and there is no corresponding federal law. Even in the absence of a state immunity statute, some courts have held that employers are immune from defamation actions for providing truthful references.

Federal and State Laws Requiring the Release of Certain Information

Prompted by safety concerns, both the federal and state legislatures have enacted some laws that require former employers to disclose certain information about former employees. For instance, the Federal Motor Carrier Safety Administration (FMCSA) requires prospective employers to request certain information from an applicant's previous DOT-regulated employers. Former employers must provide the information to the prospective employer within 30 days of the request, including information about traffic accidents and violations of drug and alcohol policies. More detailed information on these laws is available in the state and federal sections on background checks.

Service Letters

A few states have enacted laws that require employers to provide each terminated employee (regardless of the reason for the termination) with a letter that describes the nature and duration of employment and the reason for termination. These laws

generally cover such things as when the employer must provide the terminating employee with the service letter; what must be in the service letter; and any penalties for failure to provide the letter.

Reference-Related Claim Waivers

Some employers use reference claim waivers to increase the likelihood of receiving detailed references. Such a waiver is signed by the applicant and authorizes the prospective employer to speak with listed references. Typically, such waivers state that the applicant is giving up any claims he or she might otherwise have against reference providers as a result of the information given. A waiver may alleviate an employer's concerns about liability for releasing job-performance-related information about a former employee to a prospective employer. However, the employer must still ensure that no information legally protected from disclosure (*i.e.*, medical status information) is released. Furthermore, it may be advisable to check with legal counsel about the validity of the particular waiver before releasing negative information.

− Best Practices for Providing References

Whether your state has a reference immunity law or not, the recommended practice is to establish a specific routine for handling requests for references on former employees. Some basic rules to consider include the following:

- Only provide employment references on *written* request.
- Clearly define in written policies and training materials exactly who in the organization has authority to give references, and who does not. Inform employees that if anyone who is not authorized to give references does so, he or she will be subject to discipline.
- If direct supervisors are authorized to give references, they should be given specific guidelines to follow including that the references be in writing and that a copy be sent to Human Resources. As a practical matter, it is difficult to keep supervisors from providing references for highly regarded former employees. Therefore, permitting and regulating such references will likely better serve the employer's interest than prohibiting supervisors from providing references altogether.
- Include in reference guidelines an explicit prohibition against mentioning anything about the physical or mental characteristics, or the personal life of the former employee.
- Reference information should be provided in response to a specific question from the prospective employer. Individuals providing references should not simply volunteer

information unless it is responsive to a question.

• Information provided in response to a request for reference should be factual, verifiable, and accurate.

Note. Individuals who have been denied employment and believe it may be the result of a negative reference from a former employer may hire a background checking service to find out what the former employer said about them. Therefore, when a reference checking service calls to check the references of a former employee on behalf of a “client,” keep in mind that the “client” might well be the former employee.

Caution. Employers should not release pay information over the phone or to an employee's creditors unless the employee consents to disclosure in writing. Moreover, under the **Fair Credit Reporting Act (FCRA),** commercial collection agencies are prohibited from contacting employers except to verify the location of the debtor, and they may not mention the debt (*15 USC 1692(b)*).

━ Best Practices When Checking References

Employers have a number of options with regard to checking the references of a prospective employee. These can range from having human resources or the hiring manager call the former supervisor directly to check the reference to hiring a third party to collect background information on a candidate, including checking references, and then reporting back to the employer.

Hiring Third Parties to Check References and Perform Background Checks

When employers hire a third party to conduct a background check, including a check of references, or to obtain reports from outside agencies, such background checks and reports are subject to the FCRA. The types of information that may be obtained through background checks include:

• Verification of Social Security number and past addresses

• Criminal and civil records searches

• Driving records

• Credit history

• Verification of education and past employment

• Verification of professional licenses

- Reference checks
- Bankruptcy and workers' compensation records

Under the FCRA, employers must provide employees with certain notices and obtain their written authorization before having a third party conduct a background or reference check. Employers should take care to hire reputable companies to perform any background or reference checks on their behalf and to make sure that these companies comply with all local, state, and federal laws.

Practical Tips for Checking References Internally

If an employer decides to check references in-house by contacting the applicant's former employer directly, the following guidelines should be considered:

- Include a statement on the employment application directly above the applicant's signature line stating that all information on the application is subject to verification and that any false or misleading information may result in refusal to hire or, if already hired, immediate discharge.
- Require every applicant for employment to sign a waiver and consent form authorizing the prospective employer to check references and authorizing all former employers, supervisors, and managers to release information in response to a request for a reference and/or verification of employment.
- Establish a written procedure for reference checking including the point in the hiring process at which reference checks will be conducted, who will conduct the reference checks, and what kinds of documentation will be kept of information obtained (or unsuccessfully sought) through a reference check.
- Limit questions to information that is job-related; do not ask for medical information, information about physical characteristics, and/or other personal information that is unrelated to the employee's conduct on the job.
- Consider preparing a list of job-related questions that will be asked of all finalists for a particular position. This may help avoid claims of discrimination or claims that the prospective employer inquired about information that it was not legally entitled to have.
- Be fair and consistent.

━ Providing References

Employers generally use reference checks to verify or gather information about job applicants. Despite the usefulness of reference checks, employers that are asked to provide references may be legitimately concerned about defamation lawsuits by former employees if negative information is provided in response to a reference request. A discussion of these legal issues is available.

Employer Immunity

To deal with employers' reluctance to provide information about former employees, a number of states have enacted laws "immunizing" employers against employee claims over such disclosures. The immunity laws generally provide protection from claims for defamation of character.

Tennessee is among the states that have reference immunity laws. Under Tennessee law, employers that provide truthful, fair, and unbiased information about job performance in response to a request from a current or former employee or a prospective new employer are presumed to be acting in good faith (*TN Stat. Sec. 50-1-105*). This presumption of good faith may only be rebutted by proving that the employer disclosed information:

- It knew to be false
- That was deliberately misleading
- With a malicious purpose
- With reckless disregard for whether it was false or defamatory in nature
- In violation of state or federal civil rights laws

Note: The Tennessee Supreme Court has held that an employer cannot be held liable when a former employee is compelled to "self-publish" allegedly defamatory statements by the employer to a new employer, so long as the statements are otherwise protected by the immunity statute (*Sullivan v. Baptist Memorial Hospital,* 995 S.W.2d 569 (TN 1999)).

Practical advice. Even with a reference immunity law, employers in Tennessee should consider taking precautionary measures when giving references, including:

- Insisting on a written authorization from the employee/former employee who will be the subject of the reference or from the prospective new employer. The written authorization should be kept on file along with a copy of the reference or a written summary of the

reference, if given orally.

• Confining remarks to an objective evaluation of job performance and job qualifications.

Separation Notice

Employers in Tennessee must provide each terminated employee with a form, Separation Notice LB-0489 (https://www.tn.gov/content/dam/tn/workforce/documents/Forms/LB-0489.pdf), within 24 hours of the employee's separation from employment (*TN Admin. Code Sec. 0800-09-01-.02*). Notices are not required for a person employed for less than a week or who will be recalled within 7 days.

In addition to the employee's name and Social Security number, required information on the form includes the date of separation; the reason; and, if the employee left for any reason other than a lack of work, the circumstances of the separation.

− Employee Access to Records

Public employees (those who work for the state, cities, etc.) have the right to inspect their own personnel files and request copies of items contained in them (*TN Code Sec. 8-50-108*). Letters of reference are given no special status and are open to inspection by public employees. Employees in the private sector have no legal right to see their personnel files, and references may be held in confidence.

− Checking Applicants' References

It is customary for most employers to conduct at least a cursory background check before a final employment offer is made. The level of detail involved can range from verification of prior employment to a full background check of prior employment references, arrests and convictions, education, military experience, and consumer reports.

EMPLOYEE PRIVACY RIGHTS

— Summary

Privacy in the workplace requires a delicate balancing act between the right of employers to control their workplaces and employees' expectation of privacy. Although many employees claim a right to privacy for their individual workstations, computer files, telephone conversations, and e-mail, employers often have the legitimate right to monitor such activity and to inspect and review all related records. In fact, for employers that are engaged in particularly sensitive or competitive industries, such as the manufacture of drugs or the development of national defense systems, monitoring and investigating the workplace and after-hours activities of employees may be a compelling and entirely lawful act. The increased role and use of computers in the workplace have also presented employers with an entire set of new problems to worry about in the form of identity theft and security breaches.

— General Considerations

Although employers generally possess a significant degree of latitude with regard to maintaining the integrity of company products, monitoring the productivity of employees, and ensuring a safe worksite, employers must balance such interests with the interests of their employees to maintain a degree of privacy.

Whether an employee's alleged privacy “rights” are grounded in a constitutional or statutory provision or simply in corporate culture expectations, employers should always weigh their “need to know” with the employee's *reasonable* expectation of privacy. In doing so, not only will a more respectful and productive working relationship naturally result, but costly and needless litigation of employee privacy claims will be avoided.

Practice tip: It is important to remember that employees have only a *reasonable* expectation of privacy. Employers can lower the threshold of what is considered reasonable by developing a clear policy addressing workplace privacy issues and communicating the policy to their employees.

– Legal Bases for Employee Privacy Rights

Several states have enacted statutory or constitutional provisions guaranteeing their citizens the right to privacy from certain intrusions. In the absence of a state constitutional provision or existing law, however, private employees enjoy relatively little freedom from workplace intrusion. Therefore, private employees must look to common, or judge-made, law to find privacy protections.

There are essentially four common-law privacy claims that are available to private employees. These are:

Intrusion into an individual's private solitude or seclusion. An employee may allege this form of privacy invasion when an employer unreasonably searches (e.g., a locker or desk drawer) or conducts surveillance (e.g., dressing rooms) in areas in which an employee has a legitimate expectation of privacy. An employer's improper questioning of an employee (e.g., sexual habits or orientation) may also give rise to this type of claim.

Under this claim, the employer's intrusion into the employee's private affairs *must* involve a genuinely private matter and *must* also be of such a nature that a reasonable person would deem the intrusion to be “offensive.” Therefore, an employer's receipt of employee test scores after the conclusion of a company-

sponsored training session will most likely *not* be judged offensive. However, an employer's unjustified investigation into an employee's *privately* funded and ongoing psychiatric treatment *may* be viewed as offensive.

Public disclosure of private facts. An employee may claim this form of privacy invasion when an employer publicly discloses private and arguably embarrassing facts about an employee to a wide audience without his or her permission. In order to sustain such a claim, however, an employee must be able to show that the information was genuinely private, the employer's publication of the information was offensive by reasonable standards, and the employee suffered a resulting injury. For example, an employer's communication to employees that a coworker had undergone a mastectomy might be an unreasonable publication of private facts.

Portraying an individual in a false light. Under this theory, if an employer attributes a false or offensive conduct or characteristic to an employee that is not true (e.g., criminal activity), the employee may claim invasion of privacy.

Use of an individual's name or likeness. When an employer uses an employee's photograph, likeness, or attributes specific statements to an employee without his or her permission, an individual may have a valid misappropriation claim (e.g., the employer publishes an employee's photograph or likeness on company brochures without first obtaining the employee's consent). The overriding principle governing such claims is that an individual has an exclusive right to his or her identity. To prevent such claims, employers should obtain a release from the employee before using his or her name or likeness.

Constitutional Guarantees

Public employees. Public employees are also protected by the federal Constitution (*O'Connor v. Ortega,* 480 U.S. 709 (1987)). The U.S. Supreme Court has held that there is a federal constitutional right to personal privacy. Thus, public employers must be very careful to avoid practices that infringe upon their employees' reasonable expectations of privacy as guaranteed by the Constitution.

Private employees. As mentioned above, several states have included privacy protections for private employees in their state constitutions. For example, some state constitutions limit the nature and scope of permissible searches.

− Common Workplace Privacy Issues

In the employment setting, there are unfortunately a number of areas in which an employer's practices might ultimately violate an employee's privacy rights. Although the following summary outlines the more important existing federal regulations and general rules that may restrict and affect employer activities, many state laws and constitutions also actively regulate in this area.

Physical Searches

An employer's search of an employee's person or private belongings is perhaps the most intrusive form of employer inquiry. However, a physical search may be warranted and lawful under certain circumstances. For example, if a jewelry store videotape shows that an employee is stuffing jewelry in his or her pockets without paying for it, the employer may be justified in conducting a limited physical search of the employee. (**Note:** It is *strongly* recommended that, in such situations, the employer have an established practice of informing all employees of the existence of the videotaping equipment before hire and that any subsequent search conform with established company policies and/or procedures.)

The general rule is that an employer *may* physically search an employee and any aspect of the workplace (lockers, files, desks, etc.) provided the search is either limited to a work-related reason (e.g., to retrieve a company file) or is in response to a valid suspicion of criminal or civil wrongdoing and/or a deviation from company policy. Employers must ask themselves, "Does the employee have a reasonable expectation of privacy in the item/area to be searched?" If the answer is yes, the employer should think twice about conducting the search.

One U.S. district court case illustrates some factors courts will look at to determine whether an employee has a reasonable expectation of privacy in a work area (*Ratti v. Service Management Systems, Inc.,* No. 06-6034 (D.N.J. Aug. 25, 2008)). In this case, an employer searched an absent employee's desk while looking for a work-related cell phone bill. The employer found a pellet gun and ammunition in the desk and immediately discharged the employee for violating the company's weapons policy. The employee then sued the employer for, among other things, invasion of privacy. The court noted that the desk was located in an unlocked office, was used by other employees, and contained the employer's documents. The court ruled that under these circumstances, no reasonable jury could find that the employee had a reasonable expectation of privacy in the desk.

Practice tip: Employers should draft and disseminate a clear policy stating that

employees have a reduced expectation of privacy in the workplace and notifying employees that they might be subject to searches. Have employees sign a statement acknowledging receipt of the policy. Employers should keep keys for all company lockers, desks, and company cars and notify employees that the employer has the right to enter all lockers, desks, and company cars at any time. If possible, however, employers should get employee consent before conducting a search.

Public employees. Remember that a public employer's right to conduct searches is limited by the Fourth Amendment's prohibition on unreasonable search and seizure. Like private employers, public employers can lower their employees' expectations of privacy by notifying them that they are subject to workplace searches.

Video Surveillance

An employer may have a legitimate business interest in videotaping its employees. For example, an employer might need to investigate allegations of employee theft or might need to more closely monitor plant productivity. To avoid running afoul of an employee's privacy rights, however, employers should *only* videotape in open or public areas in which there is a diminished or no expectation of privacy (e.g., shop floor), and the employer should give its employees notice that they are being videotaped.

An employer should *never* videotape employees in private areas, such as break rooms, restrooms, locker/dressing rooms, etc. Furthermore, and in accordance with the federal law, circuit courts have held that an employer *may not* produce or secure a videotape that includes an audio component.

Telephone Surveillance

Under the **Electronic Communications Privacy Act of 1986 (ECPA),** a conversation may be taped as long as one party to the conversation consents, even if that party is the one conducting the taping. The theory behind this law is that any person who engages in a telephone or in-person conversation with another should reasonably appreciate the risk that his or her statements may be recorded. However, note that a few states prohibit telephone monitoring unless *both* parties consent.

Global Positioning Systems

Some employers use location awareness technology, such as assisted global positioning or global positioning systems (GPSs), to monitor employees' whereabouts. The GPS may be installed in company-owned vehicles or cell phones.

Like other employee monitoring, GPSs are used by employers to increase

productivity and efficiency and to promote safe practices (e.g., driving within the speed limit). GPS monitoring can be useful for employers when their employees do not work at a central location or when their jobs entail travel in company-owned vehicles. However, GPSs also have the potential to alienate employees who may feel that they are being “spied” on.

Because employer use of GPSs to monitor employees is a relatively new phenomenon, few courts have addressed employee claims of employer misuse of the technology. However, when employees claim that their employers have violated their privacy rights by using GPSs, courts are likely to balance the nature of the intrusion on the employee's privacy with the legitimate business interests of the employer. Some states have adopted laws restricting GPS monitoring, although they usually exempt employer-owned vehicles.

Background and Credit Checks

The federal **Fair Credit Reporting Act (FCRA)** requires employers to obtain applicants' consent when a third party conducts a background investigation. Some states also have their own background check laws.

Additionally, many employers run credit checks on at least some applicants. However, as a result of high unemployment in recent years, many states have taken action to prohibit employers from considering credit histories when making hiring decisions.

Internet and E-Mail

Federal law. The ECPA prohibits the unlawful and intentional interception of any wire, oral, or electronic communication (*18 USC 2510 et seq.,18 USC 2701 et seq.*). Title II of ECPA, the **Stored Communications Act (SCA),** also prohibits access to such information while in electronic storage.

There are three broad statutory exceptions that might prove useful to employers:

The provider exception permits an employer to monitor electronic communications transmitted on its own proprietary e-mail system.

The second exception is known as the business-use exception. To determine whether the exception can be applied, courts look to the content of the communications (whether they are business or personal in nature) and the context (whether the employer has a legitimate business reason to justify the monitoring). Decisions interpreting this exception look to the type of equipment used to perform the monitoring, whether the monitoring occurs during working time, and whether the employees were first notified that they were

being monitored.

The third exception, known as the prior-consent exception, provides that employers will not be subject to liability for electronic monitoring when they first obtain the employee’s consent. A carefully crafted policy notifying employees that e-mail is not private and is subject to monitoring may be sufficient to constitute implied consent provided, however, that the policy discloses the nature of the monitoring that will occur and the exclusion of personal correspondence.

Several states also have laws in this area.

Public employers. The U.S. Supreme Court has upheld a public employer's search of an employee's text messages sent and received on an employer-owned pager (*City of Ontario v. Quon,* 560 U.S. 746 (June 17, 2010)).

In this case, the city police department provided police officers with pagers so that they could more effectively respond to emergencies. The department reserved the right to monitor text messages pursuant to its e-mail and Internet use policy. However, it had an informal policy that it would not audit text messages if officers paid charges for exceeding the number of characters allotted per month under the department's text messaging contract.

After some officers regularly exceeded the monthly limit, the department decided to review transcripts of text messages in order to determine if the overages were for work or personal messages. The department discovered that one officer had sent and received many non-work-related messages and that some were sexually explicit. The department disciplined the officer. He sued, alleging that the search of his text messages violated the Fourth Amendment's prohibition on unreasonable searches.

The Court did not determine whether the employee had a reasonable expectation of privacy in the text messages. Rather, it held that, regardless of an employee's expectation of privacy, an employer's search of the employee's property is reasonable if the search is "justified at its inception" and “reasonable in scope.” The Court ruled that the search in this case was reasonable at its inception because it was conducted for noninvestigatory work-related purposes. It was also reasonable in scope because it was an efficient and expedient way to determine whether the officer's overages were for work or personal purposes.

Note: Employers should keep in mind that this case involved a public employer who, unlike private employers, was subject to the constraints of the Fourth Amendment. Additionally, the Court's ruling was quite narrow. It determined only whether the employer's review of text messages in this particular case was reasonable under the Fourth Amendment. The Court declined to rule on the broader question of

the extent of employees' privacy expectations in employer-provided technological equipment, noting the rapid changes in technology and society's view of acceptable workplace behavior. The Court stated that employer policies, when clearly communicated, will help shape the reasonable privacy expectations of employees.

Common-law privacy claims. Courts have generally rejected privacy claims by employees when their employers intercepted e-mail sent over the company's e-mail system (*Smyth v. Pillsbury Co.,* 914 F. Supp. 97 (E.D. Pa. 1996)).

For example, in this case, the employer assured its employees that e-mail communications would be kept confidential and privileged. An employee who was terminated for sending e-mail containing threats to sales management personnel brought suit against the employer, claiming invasion of privacy. The terminated employee specifically relied on the employer's statements that e-mails were confidential.

The court first ruled that, despite these assurances from the employer, the employee had no reasonable expectation of privacy in e-mail he voluntarily sent over the system used by the entire company. Additionally, the court noted that, even if the employee had an expectation of privacy in the e-mail, a reasonable person would not consider the employer's interception of the communications to be a substantial and highly offensive invasion of privacy. The court also reasoned that the employer's interest in preventing unprofessional, inappropriate, and perhaps illegal conduct over its e-mail system outweighed any possible privacy interest of the employee. However, if an employee is e-mailing his or her attorney, the attorney/client privilege might come into play. When an employee used a company-owned laptop to communicate with her attorney about work issues, these communications were protected by the attorney/client privilege and could not be accessed by the employer, a state Supreme Court ruled in *Stengart v. Loving Care Agency, Inc., 990 A.2d 650 (N.J. 2010)*.

Possible liability for failing to investigate. While some employers may be reluctant to interfere with employees' private computer use at work, they may risk liability for failing to investigate and take prompt action if they are aware of possible criminal activity by an employee (*Doe v. XYC Corp.,* 887 A.2d 1156 (N.J. App. 2005)).

In this case, the employer's network administrator discovered that an employee had been accessing pornography sites on his workplace computer. The employer instructed the employee to stop the activity, but took no further action, even after it became aware that the employee continued to access the sites while at work. The employee was later arrested on child pornography charges involving his stepdaughter. The employee's wife sued the employer, claiming that it should have

taken action to stop the employee's conduct.

The court agreed, noting that the employer had a policy stating that employees could access only business websites and that violations of the policy could result in discipline, up to discharge. The court also concluded that the employer had a duty to report the employee's activities to the proper authorities and to take effective internal actions to stop his conduct.

Practice tip: Employers should have e-mail and Internet policies in place restricting nonbusiness use of company computers. Equally important, these policies should be consistently enforced.

Social Networking Sites

Employers have recognized that social networking sites such as Facebook, LinkedIn, and Twitter can be useful marketing and recruiting tools. Likewise, employees have increasingly been using social networking sites for a variety of purposes, both personal and professional. Although these sites can be beneficial, their use can also have risks.

Discrimination. Some employers review social networking sites as a method of screening applicants. Generally, once an applicant or employee posts something on a public domain, such as a social networking site, an employer is free to view it. However, by viewing candidate profiles, employers may learn more information than the employer could legally ask about directly (e.g., race, disability, age, religion, family/marital status, sexual orientation). Therefore, it is critical that employers base all interviewing and hiring decisions on job-related criteria. Employers must also be aware that everything they find on a social networking site may not be current, accurate, or even placed there by the prospective applicant, as users of these sites sometimes "pretext" or pretend to be someone else.

Background check laws. As discussed above, the federal FCRA requires employers to obtain applicants' consent when a third party conducts a background investigation, and some states also have their own background check laws. It is unclear whether these laws would require consent from an applicant before an employer or third party conducted an Internet search as part of a background check. However, even if not legally required to do so, employers should consider getting consent so that applicants are on notice that the information they post on social networking sites may be reviewed by the employer. Please see the national Background Checks section.

Monitoring employee use of social networking sites. There is little case law

addressing the monitoring by employers of employees' social networking posts. However, the few cases in this area suggest that courts will be reluctant to uphold an invasion of privacy claim (whether based on the federal Constitution or state common law) when an employee voluntarily posts information on a public site. But the outcome may be different if employees set up an invitation-only site and have an expectation that only invited users will be able to read their posts.

Employers should be aware that, while it may not be an invasion of privacy to access an employee's public social networking site, actions taken based on the information on the site may lead to liability under other legal theories. Moreover, coercing an employee to provide access to a private site may be an invasion of privacy, as well as a violation of federal and state law. Employers should also keep in mind that some states have laws prohibiting employers from taking adverse action against an employee for engaging in legal activities while off-duty. An employer in a state with such a law may face liability if it takes adverse action against an employee because of the employee's legal activities shown on a social networking site.

Practice tip: Because this area of the law is developing, employers should consult with legal counsel before taking adverse action against an employee because of his or her posts on a social networking site.

Right to organize. Another possible concern for employers that monitor employee use of social networking sites is the **National Labor Relations Act (NLRA),** which protects employees' right to engage in concerted activity regarding terms and conditions of employment. The NLRA applies to both unionized and nonunionized workplaces. If employees use social networking sites to discuss employment conditions, employers may be liable for an unfair labor practice if they appear to be interfering with those discussions.

The National Labor Relations Board (NLRB) has released guidance addressing social media use that discusses specific social media cases and also covers employer policies on social media. In several of the cases, the NLRB determined that employees' social media use constituted protected concerted activity. However, in other cases, it found that the employees' activities were not protected. Since this is an evolving area of law, employers must be careful when managing employees' use of social media. Please see the national NLRA section.

Employees' use of social networking sites. Employers may find that employees use social networking sites to post positive information about their organization's products or work culture. Unfortunately, employee posts can also be detrimental to employers. Therefore, employers should have policies in place setting

forth their expectations regarding employee's social networking as it relates to the employer. Such policies should prohibit:

- Harassment of coworkers or customers;
- Interference or disruption of work because of social networking; *and*
- Exposing trade secrets or other proprietary company information.

It is also a good idea to train employees on the proper and improper use of social networking at or relating to work.

FTC guidelines on testimonials and endorsements. The Federal Trade Commission (FTC) has issued guidelines requiring individuals who are paid to provide testimonials and endorsements on social networking sites to reveal that they are being compensated (*16 CFR 255.5*). These guidelines could affect employers if their employees tout a product or service on a social networking site or blog without mentioning the employer/employee relationship.

The FTC has stated that, when determining whether to initiate an enforcement action, it will consider whether the employer had policies and practices relating to employee participation in social media. In the past, the FTC has brought law enforcement actions against companies whose failure to establish or maintain appropriate internal procedures resulted in consumer injury. However, it is unlikely to bring an enforcement action against a company for the actions of a single “rogue” employee who violated an established company policy.

Practice tip: Employers should make sure that their blogging and/or social networking policies contain provisions requiring employees to reveal their employment status whenever they discuss company products or services using these media. Companies should also enforce these policies as a matter of good business practice and to ensure their credibility in case the FTC reviews a situation involving their employees' use of social media to promote the business.

Social Media/Personal Internet Account Privacy

More than half of the states have passed legislation barring employers from seeking certain personal electronic account information, including social media passwords. Employers need to remain vigilant and stay updated on proposed and pending federal and state social media privacy legislation.

Bring Your Own Device (BYOD)

BYOD describes the scenario when employees use their own devices to do their

jobs and use an organization's data or information systems in the process. As technology advances, more and more employees are buying smartphones, tablets, and other connected devices, and they want to use them for work purposes. Employees like BYOD because they get to pick their own devices, which may often be nicer and more up to date than what they would be issued by their employers.

Advantages. There are advantages to a BYOD program/policy for both employers and employees.

For employers, there is potential for cost savings, and it may improve employee productivity, availability, and morale. Generally, it is a policy that makes employees happy, and many employees actually *expect* their employers to allow them to use their own devices.

Employees favor BYOD because it gives them more mobility and helps them balance work and the rest of their lives. Additionally, they like to be able to choose the devices they will be using and use something they are familiar with and can personalize.

Challenges and disadvantages. Although there are advantages for both employers and employees to implementing a BYOD program, there are also challenges and problems. For example:

- Employers may not be able to keep up with the latest technology and upgrades;
- Important employer data may be stored on devices not owned by the organization; *and*
- Personal and corporate data may be intertwined on the devices.

There are also compliance and security risks, including risk of data security breach, risks to an organization's IT network and, of course, issues of employee privacy.

Developing a policy/program. Many employers may not consider all the issues that go along with BYOD before allowing their employees to bring and use their own devices. However, it is vitally important for employers to:

- Consider the advantages, disadvantages, and issues involved in a BYOD program;
- Implement a policy for BYOD; *and then*
- Let employees begin using their own devices.

Whether employees are using their own or company-issued mobile devices, their loss or theft can be very damaging if confidential or personal information is involved. Employers can cut down on these security risks by (1) controlling what data can be stored or accessed remotely by employees; (2) encrypting information stored on

mobile devices; and (3) training employees on the safe use of mobile technology. (See Breach of Security, below.)

Employment Interviewing and Testing

Antidiscrimination laws may prohibit an employer from inquiring into a variety of areas related to prospective employees (e.g., an applicant's marital or disability status or age). Therefore, all interview questions should be phrased and presented in a manner that accurately reflects upon an applicant's ability to perform the job in question. Please see the national Civil Rights, national Disabilities, national Hiring sections.

Please see the state Civil Rights, state Disabilities, state Hiring sections.

An employer's use of specific selection tests and/or procedures might unreasonably intrude upon recognized privacy and antidiscrimination rights. For example, the **Americans with Disabilities Act (ADA)** prohibits employers from requesting a medical exam until after an offer of employment has been made. In addition, many states have enacted laws that protect employees and applicants from acquired immunodeficiency syndrome (AIDS) testing and the use of any other test that may negatively reflect on an individual's impaired sensory or cognitive skills.

Genetic Information

The **Genetic Information Nondiscrimination Act (GINA)** prohibits employers and insurance companies from using genetic information to reject job applications, deny promotions, deny health coverage, or set premiums. GINA has two sets of general provisions: Title I and Title II. In general, Title I applies to group health plans and insurers, prohibiting them from:

- Adjusting group premiums or contribution amounts based on genetic information;
- Requesting or requiring an individual or family member to undergo a genetic test; *or*
- Requesting, requiring, or purchasing genetic information for underwriting or before enrollment in the plan.

Title II, on the other hand, applies directly to employers. It prohibits them from:

- Obtaining genetic information about employees—including former employees and job applicants—and their family members; *and*
- Discriminating based on such genetic information.

Title II generally applies to private employers that have at least 15 employees. Similar prohibitions apply to employment agencies, labor organizations, and joint

labor-management committees.

What genetic information is protected? GINA protects the genetic information of employees, members of the group health plan, and the family members of any employee or group member. "Genetic information" includes:

- Requests for or receipt of "genetic services," which are defined to include both genetic counseling and genetic education;
- "Genetic testing," which is defined as an analysis of human DNA, RNA, chromosomes, proteins, or metabolites that detect genotypes, mutations, or chromosomal changes; *and*
- Information regarding the manifestation of a genetic disease or disorder in the family member of an employee or group member (such as family medical history).

However, protected genetic information does not include information regarding the employee or group member's own manifestation of a disease or disorder. A disease or disorder is "manifested" if it has either been diagnosed or could reasonably be diagnosed by a healthcare professional with appropriate training and experience.

An individual or family member's sex or age is also not considered genetic information.

Discrimination. The main provision of GINA that should concern employers is its prohibition against genetic discrimination. The statute and regulations spell out a number of specific actions that employers are prohibited from taking in response to the acquisition of genetic information, even if such acquisition was intentional or inadvertent. They include:

- Failing or refusing to hire because of genetic information;
- Terminating an employee because of genetic information;
- Otherwise discriminating against an employee with respect to compensation, terms, conditions, or privileges of employment because of such genetic information;
- Limiting, segregating, or classifying employees in any way that would deprive or tend to deprive them of employment opportunities or otherwise adversely affect their status as an employee; *and*
- Denying admission to training or apprenticeship programs.

Obtaining genetic information. GINA also prohibits employers from requesting, requiring, or purchasing genetic information with respect to an employee or the employee's family member(s). There are, however, several limited exceptions, including:

- An employer that requests or requires family medical history from the employee to comply with the certification provisions of the **Family and Medical Leave Act (FMLA)** or state family and medical leave laws;
- An employer that acquires genetic information from commercially and publicly available sources such as newspapers, magazines, periodicals, books, or information communicated through electronic media;
- Employers that acquire such information as part of a monitoring program of the biological effects of toxic substances in the workplace; *and*
- An employer that is a forensic laboratory that conducts DNA analysis for law enforcement purposes (employee testing may be done for quality control purposes).

In addition, employers may be allowed to acquire genetic information in connection with health or genetic services offered, such as those offered as part of a wellness program.

Inadvertent violations. Employers that acquire genetic information that is protected by GINA do not necessarily violate the law's requirements. Various exceptions are allowed for inadvertent violations, such as if an employer learns about genetic information during a casual conversation with employees, overhears a conversation between coworkers, receives unsolicited correspondence that includes genetic information, or learns genetic information from an employee's social media site if the employee has given the employer permission to access information on that site.

Exceptions also apply to certain situations in which an employer gets more information than it was asking for in response to a legitimate request for medical information, such as in trying to determine whether an employee requires an accommodation under the ADA.

However, an employer's acquisition of genetic information in response to a lawful request for medical information will generally be considered inadvertent only if the employer asks the individual and/or healthcare provider giving the information not to provide genetic information. Fortunately, the U.S. Equal Employment Opportunity Commission's (EEOC) final GINA regulations provide safe harbor language for employers to use in medical inquiry forms.

Confidentiality requirements. GINA specifies that any genetic information an employer lawfully possesses (or inadvertently acquires) must be maintained as a confidential medical record in a separate, secure file. Employers are required to treat genetic information in the same manner as they generally treat other medical information. In fact, the regulations specify that employers may use the same

confidentiality procedures as are required under the ADA and may even keep genetic information in the same file as medical information obtained pursuant to the ADA.

Similarly, GINA prohibits employers from disclosing genetic information to anyone, except under the following circumstances:

- To the employee or a family member upon their written request;
- To an occupational or other health researcher if the research is conducted in compliance with federal regulations;
- To governmental officials who are investigating compliance with the law if the information is relevant to the investigation;
- In order to process a request for FMLA leave;
- To make a mandatory report to a public health agency, but only if (1) a contagious disease poses an imminent hazard and (2) prior disclosure is made to the employee/family members;
- As permitted by the **Health Insurance Portability and Accountability Act (HIPAA)**; *or*
- In response to an order of a court as long as (1) the employer discloses only genetic information that is expressly authorized by the order; and (2) the employee is informed of the order and what is being disclosed.

GINA's application to wellness plans. GINA allows employers to offer health or genetic services to their employees if they are part of a bona fide wellness program that meets the following criteria:

- Participation in the program must be purely voluntary;
- The employee must provide written authorization beforehand;
- Only the employee (or family member if the family member is receiving the service) and the licensed healthcare professional or board-certified genetic counselor may receive individually identifiable information concerning the results of the service; *and*
- Any individually identifiable genetic information provided as a result of the service is available only for purposes of the service and is not disclosed to the employer except in aggregate terms that don't disclose the identity of specific employees.

The GINA regulations further clarify how the law applies to voluntary wellness programs and the health risk assessments (HRAs) that are used in conjunction with such programs.

Alcohol and Drug Testing

Many employers maintain drug- and alcohol-free workplaces. It is not uncommon for employers to want to require drug testing of applicants and employees. Note that state and federal law may limit or regulate the employer's ability to test and, if tests are permitted, to maintain the privacy of results in a specified manner.

Legal and Recreational Activities Outside the Workplace

As noted earlier, many states have enacted laws protecting employees from adverse employment action based on their lawful conduct.

Many of these laws limit protection to prohibiting employment discrimination because of use of tobacco products outside the workplace. However, others are broader and limit an employer from taking adverse action against an employee for engaging in various legal behaviors, such as recreational or political activities, outside of work.

Nonfraternization Policies

It is not automatically unlawful for an employer to institute a nonfraternization policy (i.e., a ban on employees dating each other). But while a prohibition against supervisor-subordinate romantic relationships may be reasonable, a more expansive and general prohibition might be viewed as an unreasonable intrusion into employees' private affairs.

In the latter instance, sound employee relations principles should be the primary factor in an employer's decision to implement or not to implement such a policy. In addition, recent cases decided under the NLRA have found that overly broad policies may violate employee rights to engage in union or concerted activity under the Act.

Medical Information

HIPAA created national standards to protect individuals' medical records and other personal health information and to give patients more control over their health information. It sets limits on the use and release of health records and provides for safeguards that covered entities (healthcare providers, health plans, and healthcare clearinghouses) and their business associates must implement to protect the privacy of health information.

The Privacy Rule provides that, in general, a covered entity may not use or disclose an individual's protected health information (PHI) without specific authorization except for treatment, payment, or healthcare operations. Data security and breach notification requirements also apply.

HIPAA technically does not apply directly to employers, but it does apply to their group health plans. So whoever accesses PHI to administer the plan must comply with HIPAA, be they in-house HR/benefits staff or third-party service providers. In addition, the ADA and the FMLA both contain provisions mandating the confidentiality of employee medical record information.

− Social Security Numbers (SSNs)

In an effort to thwart the growing tide of identity and credit theft cases, a number of states have passed legislation governing the manner in which employers and other individuals handle SSNs. Those states strictly regulate the way that employees' SSNs must be protected, stored, and communicated.

Even if a state does not have a law specifically targeting SSN privacy, there are a number of ways in which an organization can protect the privacy of employees' SSNs.

Specifically, consider measures such as locking up employee files and limiting access to them, having a written privacy policy safeguarding employee data, conducting background checks on employees who have access to employee files, and educating employees on fraud prevention. Even simple steps such as positioning computer screens so that they face a wall so that people walking by won't be able to easily read confidential information on screens may be effective.

Employers that are more proactive may also choose to have a policy that addresses what to do in the event employee information is compromised and may even contract with an outside firm that helps employees who are victims of identity theft.

− Identity Theft

Fair and Accurate Credit Transactions Act (FACTA). FACTA requires

employers, regardless of size, that collect personal information or consumer reports about customers or employees for a business purpose to safeguard such information and to use reasonable measures to destroy the information before it is discarded (*15 USC Sec. 1681 et seq.*). FACTA is enforced by the FTC.

Examples of reasonable measures to destroy personal information include:

- Burning, shredding, or pulverizing documents so that they are impossible to reconstruct;
- Destroying or erasing media or electronic files that contain consumer reports so that they cannot be recovered; *and*
- Conducting due diligence before hiring a document destruction contractor to dispose of personal information. Due diligence could include reviewing an independent audit of a disposal company's operations and/or its compliance with the law, obtaining references for the disposal company, requiring that the disposal company be certified by a recognized trade association, or reviewing and evaluating the disposal company's security policies or procedures.

Employers may face penalties if they do not comply with FACTA. Any employer whose action or inaction results in the loss of personal information can be fined by federal and state government and sued in civil court. Employees are entitled to recover actual damages sustained if their identity is stolen due to the employer's inaction or damages up to $1,000. Employees may also bring class action suits against employers for actual and punitive damages.

Create a plan. To comply with FACTA, employers should develop a written security plan describing how personal information will be protected. Having a written plan will help demonstrate that the employer has taken affirmative steps to protect personal information in the event that the FTC conducts an investigation or a breach actually occurs. According to the FTC, a security plan should:

- Designate an employee who will be responsible for implementing the plan;
- Identify what and how personal information is collected and retained and the risks to the security of the information;
- Design and implement measures to safeguard both physical and electronic personal information;
- Retain only the personal information that is needed for the business;
- Train employees on the security policy; *and*
- Develop a plan for handling a security breach that does occur to mitigate any damage and repair the breach.

Employers should also reevaluate and modify the plan as needed.

Red flags rule. The FTC has issued a red flags rule required by FACTA with specific requirements for financial institutions and creditors to help eliminate identity theft (*16 CFR 681.1 et seq.*). The FACTA law was amended in 2010 to clarify that businesses are not "creditors" simply because they bill consumers for goods or services that have already been provided.

"Red flags" are patterns, practices, or specific activities that indicate possible identity theft. A red flag can be any of a number of things, including an application that appears to have been forged or altered, use of an account that has been inactive for a reasonably long time, or notification from a customer that he or she is not receiving account statements.

Covered entities must develop an identity theft program that incorporates relevant red flags. In addition to identifying red flags, the identity theft program should contain procedures for detecting red flags and appropriate responses. An appropriate response will depend on the degree of risk posed by the red flag and may involve contacting the customer, changing passwords, or notifying law enforcement. Identity theft programs must be updated periodically to reflect changes in risks from identity theft.

To assist covered entities in complying with the red flags rule, the FTC has published *Fighting Identity Theft with the Red Flags Rule: A How-To Guide for Business* that can be accessed at http://business.ftc.gov/privacy-and-security/red-flags-rule (http://business.ftc.gov/privacy-and-security/red-flags-rule).

Protecting Employees from Identity Theft

While identity theft is becoming an increasingly common problem, there are steps employers can take to help protect their businesses and employees from invasion. When choosing the best alternative for protecting your employees and your company from identity theft, consider the four types of protection available:

- Computer protection such as antivirus, antispyware, and wireless security;
- Guidance on protecting against a variety of exposures of personal data from shredding documents; to opting out of marketing databases; to tracking data in Social Security, motor vehicle, medical, and financial databases;
- Credit monitoring at varying levels of frequency, sometimes with alert services in the event of credit inquiries or changes; *and*
- Insurance coverage, sometimes including assistance with identity recovery activities.

Specifically for computer security, there are a number of things employers and employees can do to prevent identity theft:

- Be aware of "phishing scams" or fraudulent e-mail and websites that impersonate legitimate businesses and trick employees into providing personal information.
- Avoid clicking on links to websites provided in e-mail.
- Install computer security software.
- Use discretion when opening e-mail attachments.
- Share e-mail addresses selectively.
- Permanently erase hard drives before discarding computers.
- Use passwords.
- Provide personal information only if the website is secure.
- Use caution when instant messaging.

Protection as an employee benefit. One solution that provides an affirmative defense against potential fines, fees, and lawsuits is to offer identity theft protection as an employee benefit. An employer can choose whether to pay for this benefit. The key is to make the protection available and have a mandatory employee meeting on identity theft and the protection you are making available, similar to what most employers do for health insurance.

– Breach of Security

In order to stem the tide of identity theft in the workplace and elsewhere, all state legislatures now have passed so-called "breach of security" laws covering employers and other organizations that maintain individual personal information such as Social Security numbers, driver's license numbers, state identification card numbers, account numbers, credit card numbers, or debit card numbers.

Breach of security laws dictate that organizations that gather and store such information on computer systems must give notice of any unauthorized access of the computer security system protecting personal information. Generally, notice must be given in the most expedient time possible in writing or by electronic notice or conspicuous posting.

A growing number of states are moving beyond mere notification by requiring businesses to institute a certain level of security measures to safeguard sensitive

personal data in storage, transmission, or disposal.

Preventing Security Breaches

Employers of all sizes should take steps to protect their computer networks from unauthorized access, and there are a number of measures they can take in order to prevent security breaches. For example, employers can:

• Create an incident response team, often called a Computer Emergency Response Team (CERT), that is available around the clock and includes information technology (IT) personnel, legal counsel, public relations specialists, and employees that can address customer relations issues.

• Determine what and where personal information is collected and maintained and the security risks to the information.

• Require service providers and business partners that handle personal information to follow your organization's security policies.

• Collect the least amount of personal information possible.

• Use technology that can detect unauthorized access to personal information.

• Develop a record retention policy to maintain necessary documents and destroy those that are no longer needed in a secure manner.

• Encrypt personal information that is stored electronically.

• Develop a policy to protect the security of unencrypted electronic information and physical records.

• Have a preemptive emergency response plan that identifies who to contact in the event of a breach, what steps will be taken to investigate and contain a breach, steps to ensure that any vulnerabilities in the system have been eliminated, and procedures for communicating with third parties.

• Conduct training for employees on security issues.

Responding to a Security Breach

Security breaches can be extremely harmful to employers, not only because of the legal implications, but because of the potential for loss of reputation, customer trust and loyalty, and a drop in stock prices.

While no policy can completely insulate an employer from security breaches, measures can be taken after a breach to limit the damage. A swift and effective response to a security breach is a vital component of restoring an employer's

reputation and complying with the legal obligations imposed by state law.

Employers should take into account the following tips, whether or not their states of operation have enacted breach of security laws:

- Instead of trying to cover up a breach, report it in a timely manner and offer help to affected individuals.
- Investigate the breach and determine its scope.
- Contact law enforcement officials.
- Determine the organization's notice obligations under applicable state law and prepare the required notice.
- Contact your CERT immediately.
- Have the employee(s) who detected the possible breach take notes on what they observed.
- Notify upper management via telephone or in person rather than by e-mail.
- Notify employees of a possible breach on a need-to-know basis.
- Contact legal counsel or the legal department.
- Contact public relations specialists, if necessary.
- Follow up after the breach by conducting meetings and briefings, taking appropriate remedial action, and improving your security policy, if necessary, to prevent future breaches.

As mentioned, many states have laws that mandate what employers must do when a security breach occurs.

− Employers' Private Information

Employers also have an interest in maintaining the privacy of certain information, such as trade secrets, customer lists, and other proprietary information. Carefully drafted noncompete and nonsolicitation agreements can help protect the privacy of such information and provide employers with a legal cause of action in case an employee or former employee violates such an agreement.

Additionally, the federal **Computer Fraud and Abuse Act (CFAA),** a criminal statute that was originally enacted to prevent unauthorized access to government

computers and to deter hackers, has been used by employers in suits against employees for, among other things, breach of noncompete agreements and misappropriation of trade secrets (*18 USC Sec. 1030*).

The CFAA allows a private right of action when anyone furthers a fraud or obtains anything of value by accessing a computer without authorization or by exceeding authorized access. "Without authorization" includes a situation where a former employee whose access has been terminated uses a password provided by a current employee, a federal appeals court ruled in *U.S. v. Nosal*, 844 F.3d 1024 (9th Cir. Dec. 8, 2016).

To sue a former employee under the CFAA and SCA, an employer need not show actual damage or interruption, a different appellate court ruled. The cost of responding and assessing the extent of the unauthorized access was sufficient (*Brown Jordan Int'l v. Carmicle*, 846 F.3d 1167 (11th Cir. Jan. 25, 2017)).

To prevent former employees from gaining access to sensitive information in your computer system, consider the following steps:

- Keep a list of the employees who have access to your information systems;
- Revoke employees' passwords immediately on their departure;
- Disable former employees' access rights to limit the adverse consequences of missing any access codes; *and*
- Designate a manager, and provide a checklist, to make sure that former employees' access rights have been disabled.

− Policy Guidance

Because the touchstone of any employee privacy claim is whether or not there is a "reasonable expectation" of workplace privacy, the value of a comprehensive policy setting forth an employer's right to search work areas, monitor workplace activities and employee computer and telephone use, and thoroughly investigate any allegation of theft or wrongdoing cannot be underestimated.

Of course, a policy statement will never shield an employer from liability for an obviously or overly intrusive act. However, a carefully drafted, inherently reasonable, and well-communicated policy statement may effectively negate any employee expectation of privacy.

Thus, when formulating or implementing a privacy policy, employers should adhere to the following guiding principles:

- Ensure that the policy reflects a proper balance between the company's "need to know" and an employee's right to privacy.
- Insert language indicating that a second neutral and management-level employee will be included as part of any search, interview session, or investigation procedure to ensure full documentation of every inquiry.
- Stress consistency and ensure conformance with the policy to avoid allegations of discriminatory motivation.
- Reissue the company privacy policy periodically. Note an employee's receipt and understanding of the policy via a signed authorization form. Post the policy on all employee bulletin boards. Provide new employees with a copy of the privacy policy as part of the orientation process.

━ Invasion of Privacy

Tennessee courts have recognized the common-law tort of invasion of privacy (*Roberts v. Essex Microtel Assocs., 46 S.W.3d 205* (Tenn. Ct. App. 2000)). This common-law tort includes four different types of privacy claims:

- Intrusion upon solitude or seclusion;
- Public disclosure of private facts (e.g., unreasonable publicity given to one's private life);
- False light privacy (e.g., publicity that normally places the other in a false light before the public); *and*
- Appropriation of one's name or likeness.

Surveillance. It is unlawful for a person to spy on, observe, or otherwise view an individual without prior consent when the individual is in a place where there is a reasonable expectation of privacy, if the viewing:

- Would offend or embarrass an ordinary person if the person knew he or she was being viewed; *and*
- Was for the purpose of sexual arousal or gratification of the viewer (*TN Code. Sec. 39-13-607*).

Global Positioning System (GPS) monitoring. Placing an electronic tracking device on a vehicle to monitor the occupants' movements is illegal without the vehicle owner's consent (*TN Code Sec. 39-13-606*).

– Wiretapping

With certain exceptions, state law prohibits intentionally intercepting or procuring any wire, oral, or electronic communication individually or through another person. The law further prohibits disclosing or using the communication that was obtained illegally.

Exceptions. Although there are several exceptions to this law, the exceptions most relevant to employers are the consent exception and the "ordinary course of business" exception. Under the consent exception, it is lawful to intercept a communication when the person is a party to the communication or one of the parties to the communication has given prior consent to the interception. To fall within the ordinary course of business exception, the employer must be a provider of a wire or electronic communications service. This means, for example, that the employer provides its own e-mail system for employees to use for work purposes. The employer may monitor employee use of such a system provided that the monitoring occurs in the normal course of employment and the employer has a legitimate business reason for monitoring (*TN Code Sec. 39-13-601 et seq.*).

– Social Media/Personal Internet Accounts Privacy

Tennessee law provides protections for employees' and applicants' personal Internet accounts (*TN Code Sec. 50–1–1001 et seq.*). More specifically, under the **Employee Online Privacy Act of 2014,** employers are prohibited from:

- Requesting or requiring employees or applicants to disclose passwords that allow access to their personal Internet accounts;
- Compelling employees or applicants to add the employer or employment agency to their list of contacts associated with personal Internet accounts;
- Compelling employees or applicants to access personal Internet accounts in the presence of the employer in a manner that enables the employer to observe the contents of the employees' or applicants' personal Internet accounts; *or*

- Taking adverse action, failing to hire, or otherwise penalizing employees or applicants because of a failure to disclose information or take an action specified above.

Definitions. The law defines a "personal Internet account" as an online account that is used by an employee or applicant exclusively for personal communications unrelated to any business purpose of the employer. Such an account includes any electronic medium or service where users may create, share, or view content, including, e-mails, messages, instant messages, text messages, blogs, podcasts, photographs, videos, or user-created profiles. However, it does not include an account created, maintained, used, or accessed by an employee or applicant for business-related communications or for a business purpose of the employer.

Exceptions. The law does provide some clarification for employers. More specifically, it makes clear that nothing prevents employers from:

- Requesting or requiring an employee to disclose a username or password required only to gain access to (1) an electronic communications device supplied by or paid for wholly or in part by the employer; or (2) an account or service provided by the employer that is obtained by virtue of the employee's employment relationship with the employer, or used for the employer's business purposes;

- Disciplining or discharging an employee for transferring the employer's proprietary or confidential information or financial data to an employee's personal Internet account without the employer's authorization;

- Conducting an investigation or requiring an employee to cooperate in an investigation if (1) there is specific information on the employee's personal Internet account regarding compliance with applicable laws, regulatory requirements, or prohibitions against work-related employee misconduct; or (2) the employer has specific information about an unauthorized transfer of the employer's proprietary information, confidential information, or financial data to an employee's personal Internet account;

- Restricting or prohibiting an employee's access to certain websites while using an electronic communications device supplied by or paid for wholly or in part by the employer or while using an employer's network or resources, in accordance with state and federal law;

- Monitoring, reviewing, accessing, or blocking electronic data stored on an electronic communications device supplied by or paid for wholly or in part by the employer, or stored on an employer's network, in accordance with state and federal law;

- Complying with a duty to screen employees or applicants before hiring or to monitor or retain employee communications that are established under federal law or by a "self-regulatory organization," for purposes of law enforcement employment, or for purposes of an investigation into law enforcement officer conduct performed by a law enforcement

agency; *or*

• Viewing, accessing, or using information about an employee or applicant that can be obtained without violating a prohibition listed above or information that is available in the public domain.

No duty to monitor. The law also clarifies that it does not create a duty for employers to search or monitor the activity of personal Internet accounts. It also states that employers are not liable under the law for a failure to request or require that an employee or applicant grant access to, allow observation of, or disclose information that allows access to or observation of the employee's or applicant's personal Internet account.

– Identity Theft

Under the **Tennessee Identity Theft Deterrence Act of 1999,** it is illegal to engage in identity theft or any unfair, deceptive, misleading act or practice for the purpose of engaging in identity theft. Under the law, identity theft is defined as:

• Obtaining, possessing, transferring, using, or attempting to obtain, possess, transfer, or use, for unlawful economic benefit, one or more identification documents or personal identification numbers of another person; *or*

• Otherwise obtaining, possessing, transferring, using, or attempting to obtain, possess, transfer, or use, for unlawful economic benefit, one or more financial documents of another person (*TN Code Sec. 47-18-2103*).

Identification documents include any card, certificate, or document that identifies an individual and includes driver's licenses, nondriver identification cards, birth certificates, marriage certificates, divorce certificates, passports, immigration documents, Social Security cards, employee identification cards, cards issued by the government to provide benefits of any sort, healthcare benefit cards, or health benefit organization, insurance company, or managed care organization cards. Personal identification numbers are numbers that are assigned by the government to identify a particular person, including Social Security numbers, federal taxpayer identification numbers, Medicaid, Medicare, or TennCare numbers, and any number assigned to a person as part of a licensure or registration process (such as a board of professional responsibility number, driver's license number, passport number, and any number assigned by an insurance company, health maintenance organization, managed care organization, or other health benefit organization).

Security Breaches

State law requires that any "information holder" must disclose any breach of system security, following discovery or notification of the breach, to any resident of Tennessee whose personal information was, or is reasonably believed to have been, acquired by an unauthorized person (*TN Code Sec. 47-18-2107*).

Definitions. For the purposes of the state law governing breaches of security, the following definitions apply:

- "Breach of system security" means acquisition of computerized data by an unauthorized person that materially compromises the security, confidentiality, or integrity of personal information maintained by the information holder. Good-faith acquisition of personal information by an employee or agent of the information holder for the purposes of the information holder is not a breach of system security, unless the personal information is used or subject to further unauthorized disclosure.
- "Information holder" means any person or business that conducts business in this state, or any agency of the state of Tennessee or any of its political subdivisions, that owns or licenses computerized data that include personal information.
- "Personal information" means an individual's first name or first initial and last name, in combination with any one or more of the following data elements, when either the name or the data elements are not encrypted: (1) Social Security number; (2) driver's license number; or (3) account, credit, or debit card number, in combination with any required security code, access code, or password that would permit access to an individual's financial account. Personal information does not include publicly available information that is lawfully made available to the general public from federal, state, or local government records, or information that has been encrypted in accordance with the current version of the Federal Information Processing Standard (FIPS) 140-2 unless the encryption key has been acquired by an unauthorized person.
- “Unauthorized person” includes an employee of the information holder who is discovered to have obtained personal information with the intent to use it for an unlawful purpose.

Notice. Disclosure of breach must be made immediately, but no later than 45 days from the discovery or notification of the breach, unless a longer period of time is required consistent with the legitimate needs of law enforcement. Any information holder that maintains computerized data that includes personal information that the information holder does not own must notify the owner or licensee of the information of any breach of the security of the data immediately following discovery of a breach

of security, but no later than 45 days from the discovery or notification of the breach.

Notice may be provided by one of the following methods: (1) written notice; (2) electronic notice, if the notice provided is consistent with the provisions regarding electronic records and signatures; or (3) substitute notice, if the information holder demonstrates that the cost of providing notice would exceed $250,000, the affected class of subject persons to be notified exceeds 500,000, or the information holder does not have sufficient contact information.

Substitute notice must consist of *all* of the following: (1) e-mail notice, when the information holder has an e-mail address for the subject persons; (2) conspicuous posting of the notice on the information holder's Internet website page, if the information holder maintains such a website page; *and* (3) notification to major statewide media.

If a breach necessitates notifying more than 1,000 individuals, the entity also must notify, without unreasonable delay, all consumer reporting agencies and credit bureaus of the timing, distribution, and content of the notices.

Private right of action. A "customer" of a private sector information holder, if injured by a violation of this law, may sue for damages and an injunction against further violations.

Exceptions. An information holder that maintains its own notification procedures as part of an information security policy for the treatment of personal information, and is otherwise consistent with the timing requirements for providing notice, will be deemed to be in compliance if it notifies affected persons in accordance with its policies in the event of a breach of security of the system. Entities already subject to the Health Insurance Portability and Accountability Act (HIPAA) or the Gramm-Leach-Bliley Act are exempt.

━ Security Freezes

A consumer may place a security freeze on his or her credit report by making a request in writing via certified mail or by an electronic method established by the consumer credit reporting agency. The agency must honor the request for a security freeze within 3 business days of receiving it and within 10 business days, notify the consumer that a freeze has been placed. Subject to certain exceptions, a security freeze prohibits the consumer credit reporting agency from releasing the consumer's credit report or any information from it without the express authorization of the

consumer (*TN Code Sec. 47-18-2108*).

− Private Information in Public Records

The following information regarding state and local government employees and their family members must be treated as confidential and cannot be open to the public:

- Home telephone and cell phone numbers;
- Bank account information;
- Social Security number;
- Home addresses;
- Driver's license information;
- Certain information regarding immediate family members;
- Certain emergency contact information; *and*
- Personal, nongovernment issued, e-mail addresses (*TN Code Sec. 10-7-504(f)*).

− Additional Information

"Privacy" is a general, catchall phrase encompassing many complex areas of the law.

WAGES & PAY PERIODS

− Summary

The payment of wages is regulated by federal and state law. Employers must pay wages in cash or its equivalent, and direct deposit is continually gaining popularity as a convenient method for paying wages. In addition to the method of payment, state laws also regulate how frequently employees must be paid. Many states have laws regarding the payment of wages upon the termination of employment, including accrued vacation, and these rules often differ depending on whether the termination is voluntary or involuntary. State and federal laws also require that employers maintain certain records related to payroll.

− Payment of Wages

Employers must pay wages in cash or its equivalent, and direct deposit is continually gaining popularity as a convenient method for paying wages. The payment

of wages is regulated by federal and state law. There is no federal law that sets out how often or in what form employers must pay wages to employees. State laws regulate how frequently employees must be paid. Many states have laws regarding the payment of wages upon the termination of employment, including accrued vacation, and these rules often differ depending on whether the termination is voluntary or involuntary. If there is a dispute about wages, the employer must pay the employee what it concedes is due. The employee may file a wage claim with the commissioner of Labor to collect any remaining wages he or she believes are owed.

Frequency of Payment

According to federal **Fair Labor Standards Act (FLSA),** a workweek is a period of 168 hours during 7 consecutive 24-hour periods. A workweek may begin on any day of the week and at any hour of the day established by the employer. Generally, for purposes of computing minimum wage and overtime, each workweek stands alone, regardless of whether employees are paid on a weekly, biweekly, monthly, or semimonthly basis. Two or more workweeks cannot be averaged.

Virtually all states regulate how frequently employers must pay employees their wages. State laws also specify the length of time that may elapse between the end of the pay period and payday. Employers in some states are required to notify their employees in advance of regularly scheduled paydays. In addition, some state laws specify when to pay employees who are absent on payday and when the regular payday falls on a holiday.

Method of Payment

The U.S. Department of Labor (DOL) regulations interpreting the FLSA state that employers must pay their employees in cash or its equivalent (negotiable instrument). Without further guidance, employers should use reasonable judgment when deciding how to pay employees and use the general definition of negotiable instrument.

Direct deposit and payroll cards have become increasingly popular with some employers, financial institutions, and payroll service providers. Employers may not require that their employees receive their wages by electronic transfer to a payroll card account. An employer may, however, offer employees the choice of receiving their wages on a payroll card or receiving them by some other means. Permissible alternative wage payment methods are governed by state law but may include direct deposit to an account of the employee's choosing, a paper check, or cash. The protections in Regulation E for consumers who receive wages on a payroll card are

similar to, with a few exceptions, protections available to consumers who receive their wages by direct deposit.

Giving paycheck to another individual. Employees who are absent on payday will sometimes ask a friend or relative to pick up their paychecks for them. Although there is no specific legal prohibition against this practice, the law requires the employer to pay the employee. If the relative or friend steals the check, the employer must still pay the employee. Employers that engage in this practice should be sure to get identification and a signed receipt.

Timekeeping Methods

Keeping track of employee working hours is not an optional chore. The FLSA and numerous other federal and state laws require employers to keep records of hours worked, wages paid, and other conditions of employment. Beyond the law, it is impossible to run a successful business without keeping track of employee working hours. The FLSA requires that time records show the date and time a worker's workweek starts, the number of hours worked each day, and the total hours worked during the week. For many business reasons, employers need to keep thorough, accurate records of all hours worked, including starting and quitting times for each employee. According to the DOL, employers may use any timekeeping method they choose. For example, they may use a time clock, badge reader, hand scanner, have a timekeeper keep track of employee's work hours, or tell their workers to write their own times on the records. Any timekeeping plan is acceptable as long as it is complete and accurate.

Commissions

Employees paid either partially or solely on a commission basis must receive at least the minimum wage for weeks in which their earnings would otherwise fall short of the minimum wage because of low commissions. As with piece rate payments, when employers are forced to make up the difference between an employee’s earnings and the minimum wage, they cannot later recover any part of that payment from the employee’s earnings in weeks when his or her commissions exceed the minimum wage.

Employers sometimes assume that sales employees who are paid partially or solely on a commissioned basis are exempt from the recordkeeping, minimum wage, and overtime requirements of the FLSA. This is a fallacy. Certain commissioned employees may be exempt under the retail sales or outside sales exemptions from the FLSA. However, certain criteria must be met for these exemptions to apply, and for the retail

sales exemption, time records must be kept, regardless. Many types of commissioned sales positions fall under neither of these exemptions and are subject to the recordkeeping, minimum wage, and overtime provisions of the FLSA.

Commissions and overtime. The FLSA does not require that overtime be paid weekly. The general rule is that overtime pay earned in a particular workweek must be paid on the regular payday for the period in which the workweek ends. If the amount of overtime owed cannot be determined until sometime after the regular pay period, the employer must pay the overtime compensation as soon as is practicable. An example of that would be if an employee later receives commissions that must be included in calculating his or her regular rate of pay.

Commissions must be included in total remuneration, regardless of the basis on which they are calculated and whether they are the sole source of income or paid in addition to a guaranteed salary or hourly rate. The fact that commissions are paid on some other basis than weekly, or that payment is delayed for a time past the employer's normal payday, does not excuse the employer from including them in the employee's regular rate. Note that, as a practical matter, most commissions are calculated based on periods of time (for instance, months and quarters) that are not neatly divided into equal 7-day FLSA workweeks.

Employers may have to retroactively calculate the regular rate and overtime owed for commissions, bonuses, or other forms of compensation that are paid irregularly or cannot be identified with a particular workweek. If an employer does not know the amount of a commission or bonus until the end of the month, quarter, or even year, it may temporarily disregard them in making weekly overtime pay calculations. However, once the payment is made, the employer must retroactively calculate and pay any overtime owed for those weeks. It can be issued as a separate check or included in the employee's next paycheck or a bonus check.

Commissions must be included in total remuneration, regardless of the basis on which they are calculated or whether they are the employee's sole source of income or paid in addition to a guaranteed salary or hourly rate.

When an employee's pay is increased by bonuses, commissions, or other forms of additional compensation, his or her regular and overtime rates of pay are also increased. The following calculations are used:

- Divide the employee's total earnings for the week—including bonuses, commissions, and so on—by the number of hours worked to determine the regular rate of pay for the week.
- Multiply the regular rate by 1.5 to determine the employee's overtime rate for the week.
- Multiply the regular rate by 40 nonovertime hours; multiply the overtime rate by the

number of overtime hours worked, and then add the two totals to determine total compensation owed for the week, including overtime; *or*

• Multiply the regular rate by the total number of hours worked, including overtime; then multiply one-half the regular rate by the number of overtime hours worked, and add the two totals to determine compensation owed for the week, including overtime. This should be the same result as reached under the method described in the third bullet point, above.

If a monthly bonus is paid at the end of the month but the employee was paid weekly, the employer must apportion the bonus among the workweeks. For each week in which the employee earned some portion of the bonus, the employer must then:

• Recalculate the employee's regular rate of pay with the commission added in;

• Subtract the original rate of pay from the adjusted rate of pay (to find out how much it was increased by the bonus or commission); *and*

• Pay the employee one-half the amount of the increase for each overtime hour worked in that week.

If it is impossible to attribute bonuses and commissions to the actual week in which they were earned, some other reasonable and equitable method of allocation must be adopted. For example, it may be reasonable and equitable to assume that the employee earned an equal amount of bonuses or commissions during each week of the pay period. It is generally not acceptable to simply attribute a commission or bonus earned over time to the single workweek in which it is calculated and/or paid.

Example 1. At the end of December, Robert received a $600 longevity payment based on his years of continuous service with the company. The payment was made pursuant to a long-standing policy set forth in the company's employee handbook. During the year, Robert worked 2,000 regular hours and 500 overtime hours, for a total of 2,500 hours. He was paid his regular hourly rate and an appropriately calculated overtime rate for all those hours. However, when he receives the longevity bonus, he is entitled to receive additional overtime compensation as follows:

• The employer must adjust his regular rate, retroactively, by $.24 per hour ($600÷2,500 hours).

• This means he is entitled to an additional $.12 ($.24 x .5) for each overtime hour worked during the year.

• He is entitled to an additional $60 in overtime pay ($.12 x 500 overtime hours).

• The total payment owed to Robert is $660 (the amount of his longevity pay plus

additional overtime owed).

If an employee receives a weekly commission, it is treated the same as a bonus for the purpose of calculating overtime owed for the week. The commission is added to the employee's hourly earnings for the workweek, and the total is divided by the total number of hours worked to obtain the employee's regular hourly rate. The employee must then be paid the overtime rate of one and one-half times the regular rate for each overtime hour worked that week.

Example 2. Zack is a nonexempt inside sales employee. He is paid $15 per hour, plus commissions totaling 10 percent of any sale made during a workweek. During a workweek, he works 50 hours and earns $200 in commissions. His compensation is calculated as follows: First, take his total earnings for the week ($750 in hourly pay ($15 x 50) plus the $200 bonus, totaling $950) and divide that figure by the number of hours worked (50) to determine the adjusted regular rate, which is $19. Zack is thus owed $19 per hour for all 50 hours worked, plus an additional $9.50 (one-half of $19) for the 10 overtime hours, or $1,045 in total compensation for the week. This amount incorporates the hourly pay, the commission, and overtime at the correct rate.

− Payment on Termination

Many states also specify when employers must pay employees who leave the company. Often, the statutes distinguish between voluntary and involuntary termination. Under the most common provision, employees who are fired or laid off must be paid just after termination; employees who resign must wait until the next regular payday. However, some state laws provide that employees who give their employers sufficient advance notice of their intention to resign are entitled to receive their pay on their final day of work. Some states require that, in addition to wages, employers pay terminating employees for accrued vacation time.

− Wage Disputes

In case of wage disputes, employers must pay the wages it concedes are due. Employees may file a wage claim with the commissioner of Labor to collect the rest. States may have their own laws on wage disputes.

— Recordkeeping

Both federal and state laws regulate payroll recordkeeping. Many states require employers to notify employees of all earnings and deductions for each pay period. The FLSA requires that employers keep certain information on file for each person on the payroll.

Exempt and nonexempt. The following information must be kept for both exempt and nonexempt personnel:

- Employee's full name, number, or identifying symbol (company identification (ID) number or Social Security number)
- Home address, including ZIP code
- Date of birth, if the employee is under the age of 19
- Sex, and occupation in which employed
- Time and day of week on which workweek begins
- Total wages paid each pay period
- Date of payment and the pay period covered by the payment
- Retroactive wage payment under government supervision

Nonexempt only. The following additional information must also be kept for nonexempt personnel only:

- For any week in which overtime pay is due, regular hourly rate of pay, the basis on which wages are paid, and regular rate exclusions
- Hours worked each workday and each workweek
- Total daily or weekly straight time earnings or wages
- Total premium pay for overtime hours
- Total additions to or deductions from wages paid in each pay period
- Factors other than gender that are the basis for payment of any wage differential to employees of differing sexes

Place of records. Employers must keep records safe and accessible at the place or places of employment, or at one or more established central recordkeeping offices where the records are customarily maintained. Where the records are maintained at a

central recordkeeping office, other than in the place or places of employment, the records must be made available within 72 hours following notice from an administrator of the DOL or a duly authorized and designated representative.

Inspection of records. All records must be available for inspection and transcription by an administrator of the DOL or a duly authorized and designated representative.

– Notices

Employers must display an official poster outlining the provisions of the Act, available at no cost from local offices of the Wage and Hour Division and toll-free, by calling (866) 4-US-WAGE (866-487-9243). This poster is also available electronically for downloading and printing at DOL's website at https://www.dol.gov/whd (https://www.dol.gov/WHD/resources/posters.htm).

– Loans

There are arguments both for and against the policy of advancing money to an employee. A loan may alleviate an employee's financial stress and the distraction it might cause in the workplace. On the other hand, some companies have decided that good employer/employee relationships are hard enough to maintain without the added complications of a lender/borrower relationship. Employers that do occasionally make advances against wages rarely consider making a loan to nonexecutive employees, except in an emergency, and then only when all conventional loan sources have been exhausted or are unavailable. Such an emergency situation might involve an employee learning of a family illness or death requiring immediate travel arrangements after banking hours. In some cases, employers may provide loans to employees if they do something the employer wishes; e.g., buy homes in neighborhoods or cities in order to revitalize them. Sometimes the employer will forgive these loans. Many companies that want to provide assistance in meeting employees' financial needs consider providing loans through a 401(k) plan or through participation in a credit union.

In order to set clear guidelines, no matter what they are, it is a good idea to adopt a policy that addresses loans to employees. The negative impact of a strict policy (e.g., that there will not be any pay advances under any circumstances) can be softened

with an explanation of the reasoning for the rule. Exceptions to the general rule may be adopted. The policy should provide explicitly who has authority to make exceptions. Most employers usually authorize only one or two officers to grant loans. Other factors to address in a loan or advance policy include maximum loan amounts, interest rates, documentation, and payback provisions.

Truth in Lending Act (TILA). An employee loan may be subject to the federal TILA. This is primarily a disclosure statute, the purpose of which is to give the borrower information *before* receiving the loan. If the employer makes employee loans regularly, the act mandates credit charges be completely and conspicuously disclosed in dollars and cents and as an annual percentage rate. The penalties for violating truth-in-lending laws may be severe.

Tax and legal considerations. Employee loan programs, especially those that might be interest-free (or very low rate) are a popular incentive or fringe benefit for executive-level employees. Some companies allow these types of loans to be used to exercise stock options. Tax and securities laws are complex, so employers should consult a tax expert before making such loans to ensure that their program complies with applicable laws and is structured to benefit both the employer and the employee. For example, because the Internal Revenue Service (IRS) considers interest-free loans a form of compensation, both the employer and the employee may be required to pay additional taxes. Advances are not considered taxable wages if the employees are legally obligated to repay them, whether on demand, upon a specific date, or in installments.

Loan payback provisions. Whatever sort of loan the employer is making, there is the question of how to structure payback. The employer's preferred method of repayment is generally through payroll deduction. However, since there are laws in many states regulating payroll deductions, the employer must structure the payback according to the state's law on the question. The employer and employee may agree to a wage assignment, generally requiring a written assignment, agreed to in writing and signed by the employer. The employee may revoke the terms at any time on written notice to the employer.

Employee assistance program (EAP) assistance. Granting a loan to an employee who is in serious financial trouble may be a mistake for both the employer and the employee. Another loan usually won't solve this kind of problem and may lead to loss of a good employee if the repayment schedule cannot be met. However, providing help through an EAP, consumer credit counseling company, or bank or credit union (possibly providing a good reference for the employee to the bank) may lead to some resolution for the employee.

Advance Earned Income Credit (EIC). EIC is a federal tax credit for working families who meet certain income guidelines. Eligible families either pay less federal income tax or get a larger tax refund. Salary, wages, some disability benefits, and 401(k) contributions by the employer count as earned income under the EIC guidelines. Employers must give employees an advance portion of their earned income credit if the employee requests the advance, the employee qualifies for the credit, and the employee provides the employer with a completed Form W-5 for the tax year. The advance is to be included in the worker's paycheck. The employee, not the employer, is responsible for determining whether he or she is eligible for the credits.

Below-market loans. According to the IRS, a below-market loan is a loan made in connection with performance of work by employee for employer. A loan of more than $10,000 with an interest rate less than the applicable federal interest rate means that the employee has received additional compensation. If the loan is a demand loan (one in which the loan may be called at any time by the employer or where the interest rate rises to at least the market rate if the borrower terminates work), the imputed income is counted only when the outstanding balance exceeds $10,000. For a term loan (a loan for a specified period with a specified rate), if the outstanding balance is over $10,000 at any time, the employee difference between the federal interest rate and the employer-charged rate is considered income until the loan is paid off. There is an exception for an employee relocation loan at below-market rates. The loan will not be considered additional income to the employee if it is secured by a mortgage on the new principal residence or is a bridge loan payable within 14 days after settlement on the former home. Employers that make these loans must follow the letter of state (if applicable) and federal law; otherwise, employees may invoke the law to avoid loan repayment. Before making a below-market loan to employees, employers should consult a tax attorney.

Employer-Assisted Housing Loans (EAH). This is an employer-provided benefit, most commonly offered to an employee as a second mortgage on a new house, as a grant, forgivable loan, deferred or repayable loan, or as matched savings. The EAH program involves a partnership between the employer, Fannie Mae (a government program that provides financial services for home buyers), a lender, and the employee. The employer may provide help with a down payment or closing costs, or both, and information about completing the home-buying process. Fannie Mae helps the employer create the plan and identify lenders.

Loans from 401(k) plans. An increasingly popular way for employees to obtain a loan is by borrowing from their own 401(k)-plan account. Plans may be designed or

amended to provide loans to participants. Allowing loans encourages lower-paid employees to participate in a 401(k) plan by giving employees tax-free access to the 401(k) accounts. An added incentive for employees is that 401(k)-plan loan repayments of both principle and interest go back to the employee's own account. The Internal Revenue Code (IRC) and the IRS regulations require that those 401(k) loans be available to all participants and beneficiaries on a reasonable equivalent basis; not be available to highly compensated employees in amounts greater than are available to other employees; have a reasonable rate of interest; be adequately secured; be consistent with plan provisions; be repaid over 5 years (up to 30 if the loan is used to purchase a borrower's principal residence); and be limited (assuming no prior loan was outstanding 1 year previously) to the lesser of 50 percent of the vested 401(k) account balance or $50,000. When an employee retires or terminates from the job, any unpaid amount of a 401(k) plan will be subject to federal (and perhaps state) income tax.

– Address

For additional information, employers may contact:

U.S. Department of Labor

Frances Perkins Building

200 Constitution Avenue, NW

Washington, DC 20210

866-487-9243

https://www.dol.gov/whd (https://www.dol.gov/whd)

– Wages Defined

Wages include all amounts due for labor or service performed by an employee for which the employee has a reasonable expectation of payment. Wages include vacation time earned by the employee. Wages may be fixed or determined by time, job, piecework, commission, or any other method.

− Regular Paydays

Private employers of five or more employees must pay employees at least monthly as follows (*TN Code Sec. 50-2-103*):

• When employees are paid monthly, all wages earned and unpaid before the first day of any month must be paid by the 5th day of the next month.

• When employees are paid twice monthly or more frequently, all wages earned and unpaid before the first day of any month must be paid by the 20th day of the next month, and all wages earned and unpaid before the 16th day of a month must be paid by the 5th day of the next month.

Employees absent on paydays. Employees who are not at their regular workplace on paydays must be paid when they return and ask for payment.

Deceased employees. Employees may pay a designated beneficiary wages due at the time of death. If no beneficiary is designated, employers may pay the surviving spouse or dependent children of a deceased employee wages due at the time of death up to $10,000 without a court order (*TN Code Sec. 30-2-103*).

Tips and gratuities. If a restaurant, lounge, bar, or private club includes a specific dollar amount as a gratuity or service charge on a customer's bill, payment must be made to the employee on the day the service charge is collected if the bill is paid in cash or at the time the employee is usually paid if the bill is paid by credit card. This rule does not apply to bills for food or beverages at a banquet, convention, or meeting facility separate from the general public. These payments may not be reduced to penalize an employee for conduct on the job. Violation of this rule is a misdemeanor (*TN Code Sec. 50-2-107*).

− Method of Payment

Wages may be paid in cash, by check or draft, by electronic automated fund transfer, or by credit to a prepaid debit card (*TN Code Sec. 50-2-103*).

Direct deposit. Employers may require direct deposit as long as employees are allowed to choose the bank or financial institution where the funds will be deposited.

Debit card. An employer that chooses to compensate employees using prepaid debit cards must also give employees the choice of being paid by electronic transfer. If

the employer has explained the system to an employee, including full written disclosure of any fees associated with the debit card, and the employee does not designate an account at a financial institution in advance and as required by the employer for the payroll transfer to occur, then the employer may arrange to pay the employee by prepaid debit card. Employees paid via debit card must have the ability to make at least one withdrawal or transfer from the card per pay period without incurring a fee.

− Deductions

An employer may deduct amounts from employees' wages only as required or permitted by law or as authorized by the employee in writing.

− Assignments

Assignments of income, such as child/spousal support and judgments, are allowed if accompanied by court order. Employers that fail to comply with the court order may be liable for damages. Employers are allowed to deduct $5 per month as a processing fee in child support cases.

− Terminated Employees

Resigning or discharged employees must be paid on their payday or 21 days following the date of leaving employment, whichever occurs last.

− Notices

Employers are required to notify prospective employees, at the time of hiring, of the amount of wages they will be paid (*TN Code Sec. 50-2-101*). Employees must also be informed in advance of any reduction in pay rates. Employers must post and maintain notices indicating the designated payday in at least two conspicuous places where such notices can be seen by the employees as they go to and from work.

— Failure to Pay Wages

Employers that violate Tennessee's wage payment law are guilty of a Class B misdemeanor and can be fined for each violation. Tennessee's **Wage Regulations Act** now requires that employees bring their complaints to the state Department of Labor, rather than initiating a civil court proceeding. Initiating a complaint in a civil court proceeding was previously allowed.

Tennessee prohibits local governments from enacting wage theft laws under the **Tennessee Wage Theft Protection Act,** stating that enforcement of existing wage statutes (such as the federal **Fair Labor Standards Act (FLSA)**) is the province of the state and federal governments. The amendment responds directly to the national trend of cities and towns enacting wage theft laws that provide local enforcement mechanisms for minimum wage and overtime violations.

— Unclaimed Wages

Wages remaining unclaimed by an employee for more than 1 year are presumed to be abandoned property; payroll cards are presumed abandoned 3 years after the earlier of (1) date of maturity or (2) date of the last indication of interest in the property by the apparent owner (*TN Code Sec. 66-29-105*). Employers in possession of abandoned property are required to file a report with the Tennessee Treasurer's Office on or before May 1 of each year. For more information, contact:

Tennessee Treasurer Unclaimed Property Division

PO Box 198649

Nashville, TN 37243

615-741-6499

http://www.state.tn.us/treasury/unclaim (http://www.state.tn.us/treasury/unclaim)

— Wage Garnishment and Child Support

A garnishment is an order of a court to an employer to withhold a sum of money from the earnings of an employee (the debtor) for payment of a court- or agency-

ordered debt. There are numerous state and federal laws pertaining to the procedure. Where state law is more restrictive than federal law (i.e., protects more of the employee's salary from garnishment), state law will govern. An employer that is served with a wage garnishment or child support order must respond promptly to the notice and any other court papers regarding garnishment. Employers failing to respond to a notice or in any way ignoring a garnishment run the very real risk of being held personally liable for the entire judgment. The **Consumer Credit Protection Act's Title III (CCPA)** sets limits on the amount that may be withheld from a person's earnings and provides protection from termination because of garnishment for any single debt.

The federal **Family Support Enforcement Act** authorizes states to pass their own implementing legislation to ensure collection of family support; states that do not do so lose federal subsidies.

Maximum garnishment. The maximum amount that may be garnished depends on two factors: the amount the employee earns and the reason for the garnishment (more is allowed when the money is going to support the employee's family). Maximum garnishment amounts are set by state and federal law.

− Address

For additional information, employers may contact:

Tennessee Department of Labor and Workforce Development

220 French Landing Drive

Nashville, TN 37243

844-224-5818

https://www.tn.gov/workforce (https://www.tn.gov/workforce)

VACATION TIME

(Paid & Unpaid)

Summary

There is ***no federal law*** that entitles private sector employees to paid or unpaid vacation; nonetheless, most employers do give employees time off for vacation, and employees generally consider this to be one of their most important benefits.

Though there is no federal vacation law, there *is* a steadily growing body of state law—an amalgam of statutes and court decisions—that controls how employers administer vacation time, including whether and how much employees must be paid at termination for accrued but unused vacation.

Employers must know the laws in their state(s) of operation in order to develop a comprehensive, compliant policy covering eligibility, accrual, carryover, forfeiture, administration, pay upon termination, and integration of vacation policy with other state laws—and to ensure strict compliance and consistency of administration.

— No Federal Vacation Law

There is ***no federal law*** that entitles private sector employees to paid or unpaid vacation; nonetheless, most employers do give employees time off for vacation, and employees generally consider this to be one of their most important benefits.

Though there is no federal vacation law, there *is* a steadily growing body of state law—an amalgam of statutes and court decisions—that controls how employers administer vacation time, including whether and how much employees must be paid at termination for accrued but unused vacation.

Employers must know the laws in their state(s) of operation in order to develop a comprehensive, compliant policy covering eligibility, accrual, carryover, forfeiture, administration, pay upon termination, and integration of vacation policy with other state laws—and to ensure strict compliance and consistency of administration.

— Vacation Accrual

Accrual is simply the particular method by which vacation time is accumulated; employers may generally set vacation accrual methods however they wish.

For example, some organizations provide all vacation time in a lump sum at the beginning of the calendar year or upon an employee’s anniversary date. Others prefer to have vacation accrue steadily throughout the year—with hours of paid leave earned with each pay period. Some organizations require new employees to work a certain number of days before earning vacation time, while others may offer generous leave benefits immediately upon hire for an attractive sign-on incentive.

(**Note:** This guidance is specific to *vacation time;* time off that is to be used for *illness* may be subject to additional requirements under state and local law.) Additional information on sick leave requirements is available.

Policy example: The following is an example of one method (there are many) of determining vacation accrual during an employee's first year and beyond:

During the first 60 days of employment, no vacation time is earned. Upon completion of the initial 60-day period, vacation is accrued on a pro rata basis, per pay period, according to the following schedule.

Length of Service/Annual Vacation Days Accrued

0 through 4 years	10 days
5 through 10 years	15 days
11 years	16 days
12 years	17 days
13 years	18 days
14 years	19 days
15+ years	20 days

In this example, a new employee earns no vacation during the first 60 days of employment and then begins accruing vacation on a pro rata basis (approximately 6.6 hours per month) thereafter, up to a maximum of 10 days per year. Upon 5 years of employment, the accrual rate increases—and the rate may then increase further for subsequent years of service, up to a maximum of 20 days per year for the longest-tenured workers. Employers should decide and communicate in advance whether they will allow vacation days to be carried over, how many, and for how long.

It is perfectly acceptable to have a different or more generous vacation policy for different job classes and categories—for example, professionals, executives, managers, or supervisors.

— Some Vacation Options

Just as employers are generally free to set an accrual method that best suits their organizations' needs, employers also have wide latitude in other vacation policy areas.

In recent years, a growing number of employers have begun thinking outside the traditional idea of "2 weeks' vacation" and, instead, have experimented with different vacation arrangements as a strategic tool—a tool to improve competitive recruitment, to reduce turnover in newer hires, and to find the perfect balance of regular work with regular rest and rejuvenation to keep employees engaged, passionate, and focused.

Open Leave or 'Unlimited' Vacation

One trend in vacation and paid leave policy is the idea of open leave, sometimes also referred to as flexible leave or unlimited vacation. An unlimited vacation policy is just that—unlimited. Rather than have employees earn a maximum number of days off per year based on tenure with the organization, employees with open leave are permitted to take all the leave they need, for any reason, as long as their work gets done. Leave requests are typically subject to each employee's immediate supervisor's approval.

Though it may sound like a recipe for employee abuse and an understaffing disaster, employers often derive considerable benefit from unlimited vacation policies as there is no responsibility to track accrued leave—and generally no liability to pay out such accrued leave as wages upon an employee's departure from the organization. The concept can also be quite attractive to new hires, who no longer have to put in several years of tenure with the company in order to comfortably take time off without fear of running out. (On the other hand, longer-tenured employees may resent a shift to an unlimited vacation policy.)

However, one downside to unlimited vacation can arise in an unexpected way—when employees are no longer earning or accruing vacation hours as part of their regular pay, workers may lack an idea of how much "unlimited" time is reasonable to take, so they actually take *fewer* days off. Similarly, when vacation time is "unlimited," employees and managers alike can lose the sense of respect for and entitlement to time off, defeating the purpose of a restful reset away from the office. In many cases, the hardest-working employees—the ones most in danger of leaving and most in need of time off—will be the least likely to unplug.

For these reasons, some employers that have tested unlimited vacation policies have later reverted to the accrual method, finding that the unlimited vacation option didn't achieve the intended goal. Of course, other employers have successfully adopted unlimited vacation and have enjoyed the ease of administration it provides.

If considering this type of policy in your workplace, it is important to train management on the benefits of vacation and to ensure that vacation requests are approved fairly and consistently. Some employees will request, and receive, more time off than others—this is unavoidable—but it's critical that all employees be assured a reasonable, uninterrupted break away from the workplace in order to remain engaged and focused.

Vacation as a Flexible Benefit

Employers that incorporate vacation policies into a flexible benefits plan may allow workers to "sell" vacation days in exchange for other benefits or "buy" vacation days by giving up other benefits.

For instance, an employee with a working spouse who has good medical coverage might give up some of his or her medical insurance in exchange for an extra week's vacation. Or an employee with small children might "sell" back some time in exchange for a childcare subsidy. There are endless possible combinations, and employees like the freedom of choice.

While a benefits program of this kind can be difficult to administer at first, if

structured correctly, it may come at little additional cost to the employer. On the other hand, as noted above, it is very important for employees to take vacation time and use it to rest and recover and not think about work; employers should encourage them to do so.

Unpaid Vacation or Furlough

Some employers, particularly in manufacturing industries, may impose a period of mandatory vacation—often without pay—to serve business operations needs.

For example, some manufacturers will shut down all line operations for 1 week or 2 in the summer and/or winter months to allow equipment maintenance, retooling, updates, and other operational needs. Similarly, some small businesses may find it more cost-effective to close entirely during holidays or times of low revenue. Mandatory vacation without pay may also be a means for employers to reduce corporate costs without resorting to layoffs.

The details of these mandatory vacations, shutdowns, or furloughs will vary based on the reason and organization. Some employers require only a few days, some make the unpaid leave program voluntary, and some ask employees if they are interested in taking the summer off—without pay, but with benefits and guaranteed return to their jobs.

These types of leave are permissible as long as they are administered in a consistent, nondiscriminatory way. Still, employers that wish to force leave must be sure that no conflicting policy or agreement prohibits the company from designating leave time.

Paid Time Off (PTO)

Many employers have adopted combined Paid Time Off (PTO) programs in the interest of cutting down on unscheduled absences.

A PTO program combines paid days off, which would otherwise be set in fixed allotments (i.e., vacation, sick time, personal days, and holidays), into a single bank or pool. Employees may then take as many days as they need, within the employer's cap or limit, for any reason. The concept of a specific number of sick days or vacation days is omitted; the employee does not have to make a choice between leave types, and the employer does not have to determine whether an employee's choice is legitimate.

PTO leave banks may be fashioned in any number of ways. Some questions the employer should consider include:

- What types of absences will be included? For example, will the absences include simply sick, vacation, and personal time, or will jury duty, educational time, and funeral leave also

be included?

• If PTO will include sick leave, does the combined leave provided satisfy any applicable state or local paid sick leave minimums?

• How many days will be available?

• What happens to unused leave at the end of the year?

• What happens when an employee terminates with time remaining in the bank?

━ The Family and Medical Leave Act (FMLA) and Vacation

The federal FMLA requires employers to provide up to 12 weeks of unpaid leave to eligible employees for a variety of reasons related to family and medical care. Generally, leave taken under the federal FMLA is unpaid. However, employees may be eligible to receive money or pay while they are on FMLA leave by substituting paid vacation, sick, personal, or other paid leave time for unpaid FMLA leave time.

The FMLA regulations provide that if an employee chooses to substitute accrued paid leave for FMLA leave, he or she may do so. If an employee does not choose to substitute accrued paid leave, the employer may require the employee to substitute accrued paid leave for unpaid FMLA leave pursuant to the employer's established policies for use of paid leave.

The employer may require that an employee comply with its established leave policies for use of paid leave, even if they are more (or less) stringent than FMLA's rules. However, when an employee chooses, or an employer requires, substitution of accrued paid leave, the employer must inform the employee that he or she must satisfy any procedural requirements of the paid leave policy in connection with the receipt of such payment.

This notice is provided in the federal Form WH-381 (*Eligibility and Notice of Rights and Responsibilities*).

If an employee does not comply with the additional requirements in an employer's paid leave policy, the employee is not entitled to substitute accrued paid leave, but the employee remains entitled to take unpaid FMLA leave.

━ Vacation and Termination

Payment upon termination. Once earned, *wages* generally cannot be forfeited or revoked.

This is important in the vacation context because, in many states, earned vacation time is interpreted as being a form of deferred compensation and may also be treated as “wages.”

Sometimes vacation is treated as wages by default, in which case the employer may (unless prohibited by other law) adopt an explicit policy that supersedes that presumption.

In other states, vacation is not considered wages until the employer’s actions(for example, in the form of a contract or policy) create that presumption.

Whether by statute or agreement, if vacation time is considered “wages,” it must typically be paid out at termination.

As noted, in some states, vacation time will only be interpreted as wages if the employer makes a promise—whether in an employment contract, handbook policy, or implied from common practice—that treats vacation as part of compensation in such a way that it becomes an expected part of wages. Employers can avoid this liability by avoiding, or clearly refuting the existence of, such promises and obligations.

In other states, earned vacation is automatically treated as wages; however, employers can also overcome that presumption by clearly setting forth a written policy that, for example, vacation time will not be paid out upon termination, that vacation time does not carry over from year to year, or that vacation time does not accrue above a certain cap.

Note, however, that a handful of states, such as California, prohibit accrued vacation time from being lost or forfeited for almost any reason. In these states, “use it or lose it” policies are prohibited and payout of earned vacation at termination is inevitable.

With these requirements in mind, note that some employers—particularly those in multiple states of operation—simply opt to compensate unused vacation at termination or under certain specified circumstances, regardless of the law. Even in these circumstances, employers may institute accrual caps that reduce vacation payout liability by preventing employees from earning additional vacation time until a portion of their accrued balance is used.

− Private Sector

In most states, private sector employers are not required to provide vacation, whether paid or unpaid, to employees. Therefore, employers have significant discretion in developing vacation and personal leave policies that best fit the needs of their workplace and employees.

If promised, vacation must be granted. Nonetheless, it is important for employers to understand that, if their practices, policies, or statements rise to the level of creating a “promise” of vacation, then the employer may create a binding legal obligation to provide vacation—even when state law would not otherwise require it to do so.

Payout of vacation at termination. This caution also applies to obligations to pay out accrued, but unused, vacation time at termination of employment.

Even where state law does not specifically require employers to pay out accrued vacation upon termination, a consistent practice, written policy, or contract promising such payment may create an enforceable legal obligation to do so.

In such circumstances, earned vacation will generally be treated as wages pursuant to state wage payment and collection laws.

Tennessee law provides that, unless the employer’s policy or labor agreement specifically requires compensation of unused vacation pay or other compensable time to an employee upon his or her termination of employment, it is not required that an employee’s final wages include such compensation (*TN Code Sec. 50-2-103(a)(3)*).

According to an opinion written by the state attorney general, the law does not require that an employee's final wages include unused vacation pay or other compensatory time upon the employee's termination (OAG 06-169 (11/13/06)).

For additional information on final wage payments, please see the Paychecks (https://hr.blr.com/analysis/Compensation/Paychecks) topical analysis.

Clear policy language will control. Therefore, when state law does not expressly require employers to provide vacation or to pay out accrued vacation upon termination, employers should assume that their established policy will control.

For this reason, employers must ensure that vacation accrual, caps, and payout terms are set forth clearly and unambiguously in a written policy available to all covered employees. If there is any ambiguity in the policy, it will likely be interpreted in favor of the employee.

— Public Sector

Tennessee mandates vacation time for state employees who receive paid vacation after the first 90 days of work based on the accumulated number of years of service.

Temporary (less than 6 months' service) and emergency and limited full-time employees are not eligible to accrue annual leave (*TN Stat. Sec. 8-50-801*).

— Additional Information

For additional information about vacation policies and pay in Tennessee, contact the state Department of Labor and Workforce Development at https://www.tn.gov/workforce

SEVERANCE BENEFITS

— Summary

Severance benefits are payments made to employees upon termination of employment caused by events that are beyond their control, such as workforce reductions, plant closings, company takeovers, and mergers. Severance benefits are sometimes offered to encourage early retirement or voluntary resignation, or to discourage terminated employees from suing an employer. Severance benefits are not required by federal law and are required only by a handful of states. However, most companies offer severance pay. The payments themselves may be a onetime occurrence or spread over a period of time. These benefits are usually calculated by the employee's length of service with the company (e.g., 1 week of severance pay given for every year employed with the company).

— General Practice

Severance benefits are payments made to employees upon termination of employment caused by events that are beyond their control, such as workforce reductions, plant closings, company takeovers, and mergers. Severance benefits are sometimes offered to encourage early retirement or voluntary resignation, or to discourage terminated employees from suing an employer. Severance benefits are not required by federal law and are required only by a handful of states. However, most companies offer severance pay. The payments themselves may be a onetime occurrence or spread over a period of time. These benefits are usually calculated by the employee's length of service with the company (e.g., 1 week of severance pay given for every year employed with the company).

Outplacement Counseling

Another severance benefit often offered by companies is outplacement counseling. This can be provided in the form of résumé assistance, job placements, and career counseling. Outplacement counseling is designed to help terminated employees prepare themselves for a new job or a new career, to lend assistance in providing outside resources to provide training, and to generally help employees cope with leaving the company. Larger organizations may hire outplacement services to assist employees, whereas smaller organizations may hire a single counselor or use existing resources to assist employees.

Voluntary Severance Program

Employers may offer a voluntary severance program in lieu of laying off employees. This allows an employer to encourage employees it does not want to retain to accept a severance package. However, a risk associated with a voluntary severance program is that more valuable employees that the employer would like to retain may choose to accept the severance. A typical voluntary severance program pays an employee 1 to 2 weeks' salary per year of service.

− ERISA Coverage

It is important for an employer to determine whether the severance program it chooses to offer will be covered by the **Employee Retirement Income Security Act (ERISA)** and, if it is, whether the plan is a pension benefit plan or a welfare benefit plan. Severance programs not covered by ERISA are subject to very little regulation. Welfare benefit plans primarily must comply with ERISA's fiduciary, reporting and

disclosure, and claims procedure requirements. Pension benefit plans must comply with additional ERISA requirements, including minimum participation and vesting rules. If a severance plan is subject to ERISA, it must satisfy many requirements under ERISA. For example, such a plan must make available a compliant summary plan description (SPD) to participants and establish certain procedures for participants to appeal adverse claim determinations. In addition, if a severance plan is governed under ERISA, the plan fiduciary or administrator must file a Form 5500 *(Annual Return/Report of Employee Benefit Plan)* with the federal government. Failure to do so could result in very harsh fines, and willful failure to do so may subject an employer to criminal liability. Please see the national ERISA section.

Welfare Plan or Pension Plan?

ERISA generally treats deferred compensation as a pension plan. Department of Labor (DOL) regulations (*29 CFR 2510.3-2*), however, provide that a severance arrangement will not be treated as an employee pension benefit plan because the payment of severance benefits is on account of the termination of an employee's service if the following requirements are also satisfied:

- The payments are not contingent, directly or indirectly, upon the employee's retiring;
- The total amount of such payments does not exceed the equivalent of twice the employee's annual compensation during the year immediately preceding the termination of his service; *and*
- All the payments to any employee are completed within specified time limits.

The time limits for completion of severance payments for an arrangement to be treated as a welfare plan are:

- In the case of an employee whose service is terminated in connection with a limited program of terminations, within the later of 24 months after the termination of the employee's service, or 24 months after the employee reaches normal retirement age; *and*
- In the case of all other employees, within 24 months after the termination of the employee's service.

A "limited program of terminations" is a program that, when begun, was scheduled to be completed on a date certain or on the occurrence of one or more specified events under which the number, percentage, or class or classes of employees whose services were to be terminated was specified in advance. There must be a written document that contains information sufficient to demonstrate that the required conditions have been met.

Disclosing the Intention to Implement or Upgrade a Severance Plan

To keep the cost of an early retirement incentive program down, employers will not want the fact that such a plan is under consideration to be disclosed. ERISA, however, requires that plan fiduciaries perform their duties solely in the interest of the participants and beneficiaries, and this has been interpreted as requiring that participants and beneficiaries be provided with accurate information about the "likely future of plan benefits."

− Provision of Other Benefits

For most companies, only salary payouts are included in the severance arrangement, but some participants may provide health and welfare benefits, accelerated vesting of company stock, reallocation services, and supplemental executive retirement plans as part of their severance package. These benefits generally last for the same length of time as the salary payments. Employers may also be required to offer continued healthcare benefits under the **Consolidated Omnibus Budget Reconciliation Act (COBRA).**

− Tax Issues--FICA Taxes

Under the **Federal Insurance Contributions Act (FICA),** employers and employees contribute a certain percentage of an employee's earnings (up to a "maximum taxable earnings" amount that is determined annually) during the year for Social Security and a certain percentage of all taxable earnings for Medicare. Different rates apply for each of these taxes (i.e., one rate for the Social Security tax and one rate for the Medicare tax).

Whether severance pay is subject to FICA taxes has often been a source of confusion for employers. However, the U.S. Supreme Court clarified the issue in *U.S. v. Quality Stores, Inc.*(No. 12-1408, U.S. S.Ct., 2014), holding that generally, severance pay is subject to FICA tax withholding. Thus, employers must ensure they are aware of this development and are withholding FICA taxes from applicable severance payments.

━ Tax Issues--Sec. 409A Deferred Compensation Requirements

Internal Revenue Code (IRC) Sec. 409A sets out rules for nonqualified deferred compensation (NQDC). Severance pay is included in the definition of NQDC unless a specific exemption applies.

409A coverage. Sec. 409A defines "NQDC" as compensation that workers earn in one year but that is not paid until a future year to the extent that the compensation is not subject to a substantial risk of forfeiture and not previously included in gross income. Sec. 409A does not apply to qualified plans (such as a 401(k) plan) or to a 403(b) plan or a 457 plan.

Tax penalties. If deferred compensation covered by Sec. 409A meets the specified requirements, there is no effect on the employee's taxes. The compensation is taxed in the same manner as it would be taxed if it were not covered by Sec. 409A. If the arrangement does not meet the requirements, the compensation is subject to certain additional taxes, including a 20 percent additional income tax.

409A Exclusions

Exception for certain types of separation pay. The Internal Revenue Service (IRS) regulations (*IRS Reg. Sec. 1.409A-1*) provide exceptions from coverage under Sec. 409A for:

• Certain bona fide collectively bargained arrangements;

• Certain arrangements providing separation pay due solely to an involuntary separation from service or participation in a window program in limited amounts and for a limited period of time;

• Certain foreign separation pay arrangements;

• Certain reimbursement arrangements providing for expense reimbursements or in-kind benefits for a limited period of time following a separation from service; *and*

• Certain rights to limited amounts of separation pay.

These exceptions from coverage for specified separation pay plans may be used in combination.

Window program. A "window program" is a program established by an employer in connection with an impending separation from service to provide separation pay that is made available for a limited period of time (no longer than 12 months) to employees who separate from service during that period or to employees who separate from service during that period under specified circumstances. A program is

not a window program if an employer establishes a pattern of repeatedly providing for similar separation pay in similar situations for substantially consecutive, limited periods of time. Whether the recurrence of these programs constitutes a pattern is determined based on the facts and circumstances. Relevant factors include whether the benefits are on account of a specific business event or condition, the degree to which the separation pay relates to the event or condition, and whether the event or condition is temporary or discrete or is a permanent aspect of the employer's business.

Involuntary separation from service exception. The exception from coverage under Sec. 409A for rights to payments available only upon an involuntary separation from service or participation in a window program applies to amounts payable no later than the end of the second taxable year of the employee following the year of the separation from service. The payment must be limited to an amount that is generally the lesser of two times the service provider's annual compensation or two times the limit on compensation set in *IRC Sec. 401(a)(17)*.

Definition of an "involuntary separation from service." Whether a separation from service is involuntary is determined based on all the facts and circumstances. Any characterization of the separation from service as voluntary or involuntary by the employee and the employer in the documentation relating to the separation from service is rebuttably presumed to properly characterize the termination. For example, if a separation from service is characterized as voluntary, the presumption may be rebutted by demonstrating that if the employee had not voluntarily resigned, the employer would have terminated him or her. If the right to a payment is contingent on a voluntary separation from service following an occurrence that constitutes good reason for termination of the employee's services, the right may be treated as payable only on an involuntary separation from service. An involuntary separation may not be devised in order to avoid the requirements of Sec. 409A.

Safe harbor for good-reason voluntary separations. IRS regulations also provide a safe harbor under which a provision for a payment on a voluntary separation from service for good reason will be treated as providing for a payment on an actual involuntary separation from service. Those conditions include that:

• The amount is payable only if the employee separates from service within a limited period of time not to exceed 2 years following the initial existence of the good-reason condition;

• The amount, time, and form of payment on a voluntary separation from service for good reason is identical to that for a payment on an involuntary separation from service;

- The employer provide notice of the existence of the good-reason condition within 90 days of its initial existence; *and*
- The employee is provided a period of at least 30 days during which it may remedy the good-reason condition.

A good-reason condition may consist of one or more of the following conditions arising without the consent of the employee:

- A material reduction in the employee's base compensation;
- A material reduction in the employee's authority, duties, or responsibilities;
- A material reduction in the authority, duties, or responsibilities of the employee's supervisor, including a requirement that a supervisor report to a corporate officer or employee instead of reporting directly to the board of directors of a corporation or similar entity for organizations that are not corporations;
- A material reduction in the budget over which the employee retains authority;
- A material change in geographic location at which the employee must work; *or*
- Any other action or inaction that constitutes a material breach of the terms of an applicable employment agreement.

Tax exempt benefits. IRS regulations provide that a right to a benefit that is excludable from income will not be treated as a deferral of compensation for purposes of Sec. 409A. Accordingly, for example, an arrangement to provide health coverage excludable from income under *IRC Sec. 105* generally would not be subject to Sec. 409A.

Outplacement services and moving expenses. The reimbursement of certain expenses such as reasonable outplacement expenses and reasonable moving expenses for a limited period of time due to a separation from service is not covered by Sec. 409A, whether the separation from service is voluntary or involuntary. Reasonable moving expenses include a reimbursement for a loss incurred selling a primary residence.

Limited payments of separation pay. If not otherwise excluded, a taxpayer may treat (as excepted from 409A coverage) a right or rights under a separation pay plan to a payment or payments of less than the maximum amount of an elective deferral permitted to a 401(k) plan under *IRC 402(g)* for the year of the separation from service. The limited payment exception is intended to avoid the application of Sec. 409A to incidental benefits often provided on a separation from service where the parties may not realize that the benefits are nonqualified deferred compensation.

The exclusion may be applied to any type of separation pay plan but may apply only once with respect to amounts paid by a service recipient to a service provider.

409A Requirements

An NQDC plan or arrangement that does not qualify for an exception must be in writing and satisfy requirements for:

- The initial deferral election;
- The timing of payments to the employee;
- Acceleration of payments;*and*
- Subsequent deferral elections.

The material terms of the plan must be specified in the plan document, and the plan must be operated in accordance with the document. The material terms of the plan include the amount (or the method or formula for determining the amount) of deferred compensation, the time and form of payment, the 6-month payment delay for “key employee” of public companies (if applicable), and the conditions that apply to any employee elections.

– Tax Issues--Payment of Performance-Based Compensation at Termination

The $1million-per-year limit on the deductibility of compensation paid to the chief executive officer or one of the four highest paid officers of a publicly held corporation does not include “remuneration payable solely on account of attainment of one or more performance goals” (*IRC Sec. 162(m)(4)(C)*). However, a payment won't qualify for this exemption as a performance bonus even though the plan or agreement under which the covered employee is paid provides that the compensation will be paid upon attainment of a performance goal if it also provides that the compensation will be paid without regard to whether the performance goal is attained if the covered employee’s employment is involuntarily terminated without cause or the covered employee terminates his or her employment for good reason or retires (*Rev. Rul. 2008-13*).

– Waiver of Severance Pay

An employer and employee may agree to waive severance pay as long as the

employee is *knowingly and voluntarily* waiving any future claims.

— Age Discrimination

The **Age Discrimination in Employment Act of 1967 (ADEA)** prohibits employers from discriminating against employees based on age. Employers cannot offer severance pay to only one age group without violating the ADEA.

Waiver of age discrimination claims. Employers often ask employees to waive age discrimination claims in exchange for severance pay. The **Older Workers' Benefit Protection Act (OWBPA)** dictates that employees over 40 can waive age discrimination claims under the ADEA if those waivers are *knowing and voluntary* and comply with the requirements of the OWBPA. The specific requirements for a valid waiver or release are set forth in *29 CFR 1625.22*. According to the law and the regulations, the release or waiver must:

- Be in writing.
- Not contain long, complex sentences or technical or legal jargon.
- Be written in "plain language" geared to the level of understanding of the individual or typical participant signing the waiver.
- Not mislead, misinform, or fail to inform participants of the benefits and limitations of the waiver.
- Specifically refer to the employee's waiver of rights and claims covered by the ADEA and the OWBPA.
- Not waive rights or claims that arise after the waiver is signed.
- Provide something of value--"consideration"--beyond that to which the employee would have already been entitled without having signed the waiver.
- Advise the employee in writing to consult with an attorney before signing the waiver.
- Give an employee 21 days to consider whether to sign the waiver. (The 21-day period runs from the date of the employer's final offer.)
- Give an employee 45 days in the case of an exit incentive program or other employment termination program. (The 45-day period begins from the date of the employer's final offer.)
- Allow for a 7-day period after the waiver is signed during which the employee can revoke his or her decision. The 7-day period cannot be shortened by either party. The agreement

does not become effective until after the 7-day revocation period has expired.

If these conditions are not met, the agreement may not be enforceable. This means that the employee may still be able to bring a claim for age discrimination. Employers should ensure that their waiver agreements and employment practices comply with the requirements of the OWBPA.

Must severance pay be returned if the agreement is invalid? The U.S. Supreme Court has ruled that a discharged employee does *not* have to return severance pay already received if the waiver signed did not comply with the OWBPA (*Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998)).

Strict informational requirements. The Equal Employment Opportunity Commission (EEOC) requires that if the release is in connection with an exit incentive program or other termination program that applies to a group or class of employees, employers must provide all eligible participants with:

- The class, unit, or group of persons covered by the program; eligibility factors; and applicable time limits of the program;
- Job titles and ages of those individuals eligible for the program; *and*
- The ages of those individuals in the same "job classification or organizational unit" who are not eligible or were not selected for the program.

− Unemployment Compensation

Employees may or may not be entitled to receive unemployment compensation at the same time they are receiving severance benefits. This is a state-specific area.

− How to Amend a Severance Policy

As long as benefits are not required by state law, an employer may amend its severance policy or eliminate it altogether. Rights to severance benefits do *not* vest. The key is to make certain that the amendments to the severance policy or elimination of the policy are published and that all employees receive notice of the changes made.

— Policy Planner

Every business should have established guidelines concerning severance pay. Such a policy not only provides employees with guidelines, but also protects the employer from lawsuits based on claims of unfair business practices. Severance policies will vary according to an employer's needs. To institute a severance policy that is right for you, consider including sections that address:

Rationale. Briefly state the reason for granting severance pay.

Eligibility. Who is eligible to receive severance pay? Are only actively, regularly employed individuals eligible? Are employees covered by collective bargaining agreement or employees who have an individual written employment contract covered? Are employees who are terminated for gross misconduct eligible? What events qualify an individual for severance pay? Does discharge for poor job performance qualify an individual? Does layoff due to a reorganization qualify? Does termination due to elimination of a position? What if the person obtains another position within the company, a related company, or the company acquiring the business? As stated earlier, eligibility is usually limited to employees whose termination has been initiated by the company. Be sure to mention any other limitations regarding eligibility.

Payment schedule. If the amount of severance pay is linked to length of service, explain how it is determined. Is the amount of severance pay based on a base salary, a bonus, overtime, or other compensation? Will there be any amounts deducted from the severance pay?

Coordination with other benefits. Will the amount of severance pay be increased or decreased as a result of other benefits? For example, will someone who is on disability be eligible for severance pay? If disability pay ends because a job is eliminated, does the person then receive severance pay? Is severance pay reduced by any amount payable because of a competing state law?

Exceptions. If there are some groups of employees who receive different treatment or who will be handled on an individual basis (e.g., high-level executives), say so.

Terminology. Keep in mind that a former employee's eligibility for unemployment benefits may be affected by the terminology used for “severance pay” or “pay in lieu of notice.” When using the term “severance pay,” unemployment offices may view the individual as being immediately eligible for unemployment benefits. In contrast, using

the term “pay in lieu of notice” may qualify the individual for unemployment benefits until the end of the period for which the pay is intended.

When payment will be received. Will the employee receive his or her severance pay on the last day of work, or will it be mailed to his or her home at a later date? Will the pay be provided on a regularly scheduled payday? Will the payment be made over time (i.e., 3 months' severance pay paid over 6 months)? Keep in mind when deciding to pay severance that the cooperation of the employee may be needed for sometime after he or she leaves.

Maximums and minimums. Regardless of the formula for severance pay, it is a good idea to establish a maximum and a minimum for it. There may be exceptions to this where employers will want to pay more or less than those amounts. For example, an employer may want to increase severance pay beyond the normal rate if an employee asserts a discrimination claim against the company. In contrast, employers may not want to pay severance pay to an employee caught stealing.

Releases. As a condition for the payment of severance benefits, employers may require the individual to release them from any claims, such as violations of any discrimination law. Care should be taken to ensure that such a release is binding and enforceable.

Noncompete. Employers may wish to provide that an employee accepting severance pay cannot compete with them for a specific amount of time. This period may be linked to the amount of the severance pay or its duration.

− Other Things to Consider

Before committing the policy to writing, employers should also give careful consideration to:

The company's ability to pay. Is a large-scale payoff possible in the future? Would the company be able to pay each of the individuals who loses his or her job the promised severance pay? Many companies make the mistake of considering only individual separations when they draw up their policy on severance pay and neglect to consider what it might cost the company in the unforeseen event that a large number of employees have to be terminated at the same time.

Relevant union contract provisions. If the company is unionized, severance pay may be a matter requiring negotiation. Review relevant portions of the contract before you write the policy.

AGE DISCRIMINATION

— Summary

The **Age Discrimination in Employment Act (ADEA)** prohibits all public employers and private employers with 20 or more employees from discriminating against employees or applicants based on age. Individuals must be at least 40 years of age to be covered by the ADEA. Harassment of employees based on age is also unlawful discrimination. The ADEA also protects an older worker's disability payments, retirement incentives, life insurance, pension, and retirement plans. Amendments to the ADEA set out standards for waivers of legal rights by older employees in return for retirement incentives. Many states also have fair employment laws that prohibit age discrimination. Different age groups may be protected under state law, and smaller employers may be subject to state requirements.

— Prohibited Practices

The **Age Discrimination in Employment Act (ADEA)** prohibits private employers with 20 or more employees from discriminating against employees and applicants based on age (*29 USC 621 et seq.*). In 2018, the U.S. Supreme Court held that the ADEA applies to all public employers, regardless of size (*Mount Lemmon Fire Dist. v. Guido*, 139 S. Ct. 22 (2018)).

The ADEA protects individuals who are 40 years of age or older. The laws of individual states or municipalities may set a lower age limit and cover smaller employers.

Under the ADEA, it is unlawful for an employer to:

- Refuse to hire, discharge, or otherwise discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment because of age.
- Limit, segregate, or classify employees in any way that deprives them of employment opportunities or otherwise adversely affects employee status because of age.
- Reduce the pay of any employee in order to comply with the ADEA.

Disparate treatment. The ADEA prohibits employers from intentionally discriminating against applicants or employees who are at least 40 years of age. This is referred to as disparate treatment. In a disparate treatment case, the person alleging discrimination must prove that the employer was motivated by discriminatory intent.

No mixed motive under the ADEA. In a mixed-motive case of disparate treatment, an employee alleges that both legitimate factors and unlawful discrimination influenced the employment action in question (i.e., that discrimination was a motivating factor). The U.S. Supreme Court has ruled that the ADEA does not permit the use of a mixed-motive analysis (*Gross v. FBL Financial Services,* 129 S. Ct. 2343 (2009)). Instead, for employees to prevail in a disparate treatment age discrimination case, they must prove that age bias was the "but-for" reason the employer took the adverse employment action (i.e., that the adverse employment action would not have occurred "but for" the employee's age). As a result, it is now more difficult for employees to prevail in age discrimination lawsuits.

The but-for rule is different from the rules applied in mixed-motive cases under **Title VII of the Civil Rights Act of 1964 (Title VII).** In Title VII cases, once the employee proves that unlawful discrimination was a motivating factor, the burden of persuasion shifts to the employer to prove that it would have taken the same employment action for a legitimate reason in the absence of discrimination. In its decision, the Court noted that Congress expressly amended Title VII to authorize

claims in which unlawful discrimination was "a motivating factor," but it did not add a similar provision to the ADEA.

Disparate impact. The U.S. Supreme Court has confirmed that workers who are 40 or older can sue their employers under the ADEA for practices that favor younger workers, even if no intentional bias is shown (*Smith v. City of Jackson,* 544 U.S. 228 (2005)). This is referred to as disparate impact. In a disparate impact case, an employer may be found liable for discrimination if it uses a neutral employment practice or policy that adversely and disproportionately impacts a protected group of applicants or employees, even if the employer never intended to use the policy to discriminate. Typically, statistics that demonstrate a disparate impact on the protected group are used in these cases to establish that there has been unlawful age discrimination.

Subgroup disparate impact. The 3rd Circuit Court of Appeals has ruled that a group of employees may assert a disparate impact claim based on an employment practice that had a disproportionate impact on employees over the age of 50, despite the fact that the employment practice had a favorable impact on employees who were at least 40 but not yet 50 (*Karlo v. Pittsburgh Glass Works, LLC,* 849 F.3d 61 (3rd Cir. 2017)). The 3rd Circuit's position is at odds with decisions in the 2nd, 6th, and 8th Circuits.

Disparate impact claims by applicants. A federal district court ruled that job applicants can bring disparate impact claims (*Rabin v. PricewaterhouseCoopers, LLP,* 236 F. Supp. 3d 1126 (N.D. CA 2017)). The employer argued that the disparate impact section of the ADEA does not apply to applicants, but the court disagreed, noting that the text of the ADEA prohibits employers from depriving "any individual" of employment opportunities. The 11th Circuit Court of Appeals has taken the opposite view, so disparate impact claims by job applicants are not permitted within that court's jurisdiction.

Defense to disparate impact claim. An employer can defend against a claim of disparate impact age discrimination by showing that its decision was based on a reasonable factor other than age (RFOA), but the employer must prove the factor was reasonable to use (*Meacham v. Knolls Atomic Power Lab.,* 128 S. Ct. 2395 (2008)). According to the Court, an employer that seeks the benefit of the RFOA defense must prove that it applied to the challenged employment practice.

"RFOA" defined. The Equal Employment Opportunity Commission (EEOC) has issued final regulations that define an RFOA (*29 CFR 1625.7*). According to the regulations, determining whether an employment practice is based on an RFOA depends on the particular facts and circumstances of the situation and must be

objectively reasonable when viewed from the position of a prudent employer mindful of its ADEA responsibilities under like circumstances. To establish that a nonage factor is an RFOA, an employer must show that an employment practice was both:

- Reasonably designed to further or achieve a legitimate business purpose, *and*
- Administered in a way that reasonably achieves that purpose in light of the particular facts and circumstances that were known, or should have been known, to the employer.

The regulations advise employers to evaluate employment practices on a case-by-case basis. A nonexhaustive list of "considerations" is included in the regulations to help employers determine whether an employment practice is an RFOA, including:

- The extent to which the factor is related to the employer's stated business purpose;
- The extent to which the employer defined the factor accurately and applied it fairly and accurately, including the extent to which managers and supervisors were given guidance or training about how to apply the factor and avoid discrimination;
- The extent to which the employer limited supervisors' discretion to assess employees subjectively, particularly where the criteria that the supervisors were asked to evaluate are known to be subject to negative age-based stereotypes;
- The extent to which the employer assessed the adverse impact of its employment practice on older workers;
- The severity of the harm to individuals within the protected age group, in terms of both the extent of injury and the number of persons adversely affected, and the extent to which the employer took steps to reduce the harm, in light of the burden of undertaking such steps.

Employers should use the factors to evaluate whether an employment practice, such as a reduction in force, is based on an RFOA. Employers should also train their decision-makers to apply objective, nondiscriminatory factors when implementing an employment practice.

− Pay Discrimination Charges

Under the **Lilly Ledbetter Fair Pay Act of 2009 (Ledbetter Act),** an employer violates the ADEA, with respect to compensation discrimination, when:

- A discriminatory compensation decision or other practice is adopted;
- An individual becomes subject to a discriminatory compensation decision or practice; *or*

- An individual is affected by the application of a discriminatory compensation decision or practice, including each payment of wages, benefits, or compensation that resulted, in whole or in part, from the decision or practice.

Under the Ledbetter Act, the time period for filing a charge of discrimination begins *each time* an employee receives *any* compensation or benefits (e.g., a paycheck) resulting from an employer's past discriminatory pay practice or decision, regardless of how long ago the discriminatory practice occurred. Once an alleged discriminatory paycheck is received, an employee has 180 days (300 days if the charge is also covered by state or local fair employment laws) to file a pay discrimination charge with the EEOC.

− Retaliation Prohibited

It is unlawful for an employer to retaliate or discriminate against any individual for making a complaint of age discrimination or for assisting in the investigation of an age discrimination complaint (*29 USC 623*).

Protection expanded. Under a U.S. Supreme Court decision, an employee is also protected from retaliation for speaking out about discrimination when questioned as a witness during an employer's internal investigation of another employee's discrimination complaint (*Crawford v. Metro. Gov't of Nashville and Davidson County,* 129 S.Ct. 846 (2009)). In this case, the employee did not disclose that she had been sexually harassed until her employer questioned her about a coworker's sexual harassment complaint. The employee revealed that the alleged harasser had also sexually harassed her in the past. Subsequently, the employee was fired and brought a lawsuit against the employer claiming she was fired in retaliation for her disclosure. The employer argued that the employee was not protected from retaliation because she had not initiated the harassment complaint, and Title VII's opposition clause required "active, consistent" activities. The trial court agreed, and the appeals court affirmed the ruling. However, the Supreme Court reversed the decision, concluding that the opposition clause of Title VII protects employees who report discrimination during the course of an investigation.

Practical tip: Employers should update their policies, procedures, and training to emphasize that retaliation is prohibited against anyone who discloses discriminatory conduct while participating in any investigation.

Federal employees protected. Under a decision by the U.S. Supreme Court,

federal employers are also prohibited from such retaliation despite the lack of an express prohibition in the law (*Gomez-Perez v. Potter,* 128 S.Ct. 1931 (2008)). The employee in this case claimed the Postal Service retaliated against her after she filed an age discrimination claim. The circuit court ruled that the ADEA does not authorize retaliation claims by federal employees. In its analysis, the Supreme Court pointed out that the ADEA's provisions were extended to cover federal employees several years after the law was originally enacted. The Court reasoned that Congress "had reason to expect" the law to include retaliation because of court rulings in effect at the time. Ultimately, the Court concluded that the federal sector provisions of the ADEA cover retaliation claims.

− Exceptions

There are several exceptions to the ADEA's prohibitions. Under these exceptions, an employer may:

- Make an employment decision based on a reasonable factor other than age (e.g., required educational degree for hiring or termination for poor performance).
- Make an employment decision based on age if age is a bona fide occupational qualification (BFOQ). See **BONA FIDE OCCUPATIONAL QUALIFICATION** in this section for details.
- Comply with a *bona fide* seniority system or a *bona fide* employee benefit plan. Refer to **BENEFITS PLANS** in this section for specifics.

BFOQ

The BFOQ defense is applicable in highly limited circumstances in which age is an expressed criterion for employment. The ADEA provides that age may be a BFOQ if it is reasonably necessary to the normal operation of the particular business (*29 USC 623(f)(1)*). Under the BFOQ defense, the employer must prove that the age limit imposed is reasonably necessary to the essence of the employer's business and *either:*

- The employer has a factual basis for believing that all or substantially all persons 40 years old and older would be unable to perform the job duties safely and efficiently; *or*
- It would be impossible or highly impractical to individually test persons over the age limit to determine if they are qualified.

The majority of the cases in which age has been held to be a BFOQ involve public

safety personnel, such as police officers who must demonstrate a high level of physical fitness and stamina.

— Employees Not Covered by the ADEA

The ADEA does not apply to American citizens employed in a workplace in a foreign country where compliance with the ADEA would cause the corporation to violate the laws of the country in which the corporation is located (*29 USC 623, 630*).

The ADEA does not apply to an American employee working for a foreign corporation in the United States who was allegedly denied a promotional opportunity outside the United States based on his or her age (*Denty v. SmithKline Beecham Corp.,* 907 F.Supp. 879 (EDPA 1985)).

The ADEA does not apply to foreign nationals working abroad for American companies or their subsidiaries (*Hu v. Skadden Arps, et al.,* 76 F.Supp. 2d 476 (SDNY 1999)).

— Favoring Older Workers Permitted

The ADEA does not bar an employer from favoring an older worker over a younger one, even if the younger worker is at least 40 years old (*General Dynamics Land Systems, Inc. v. Cline, et al.,* 124 S. Ct. 1236 (2004)). Although the ADEA protects individuals who have reached the age of 40 from age discrimination, its intended purpose, according to the Court's decision, is to prohibit discriminatory preference of the young over the old. The Supreme Court concluded that the ADEA's text, purpose, history, and structure “does not mean to stop an employer from favoring an older employee over a younger one.”

In July 2007, the EEOC amended its regulations to conform to the Supreme Court's decision. The amended regulation deleted language prohibiting discrimination against relatively younger employees and states that "favoring an older individual over a younger individual because of age is not unlawful discrimination under the ADEA even if the younger individual is at least 40 years old" (*29 CFR 1625.2*). The revised regulations expressly permit employers to post help wanted notices or advertisements expressing a preference for older individuals with terms such as "over age 60," "retirees," or "supplement your pension" (*29 CFR 1625.4*).

Note: Many state and local laws impose restrictions on advertising terms that reference age. Employers should check applicable state or local law carefully before authorizing any such advertisements.

− Employer Liability for Harassment

Under landmark U.S. Supreme Court decisions, employers are responsible for unlawful sexual harassment by supervisors (*Burlington Industries, Inc. v. Ellerth,* 118 S.Ct. 2257 (1998) and *Faragher v. City of Boca Raton,* 118 S.Ct. 2275 (1998)). It is generally accepted that this rule also applies where a supervisor harasses an employee based on age. Under the rulings, an employer is liable for harassment by a supervisor that culminates in a tangible employment action (e.g., firing, failure to promote, demotion, and/or reassignment).

If no tangible employment action results, the employer may be able to avoid liability or limit damages by establishing an *affirmative defense*, composed of two necessary elements:

- The employer exercised reasonable care to prevent and promptly correct any harassing behavior; *and*
- The employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm.

Harassment by nonsupervisory employees. An employer is liable for harassment by an employee's coworkers or by nonemployees (e.g., customers, vendors, or clients) if the employer knew, or should have known, about the harassment and failed to take prompt and appropriate remedial action.

When age is an issue, the Supreme Court is likely to apply the same guidelines established in the *Burlington* and the *Faragher* cases. Thus, employers should establish antiharassment policies and complaint procedures covering *all* forms of unlawful harassment. Information on employers' liability for harassment is available on the EEOC's website (https://www.eeoc.gov/laws/types/harassment.cfm). Employers should provide training to ensure that their supervisors are prepared to address inappropriate conduct and prevent harassment.

Guidelines for Employers to Avoid Age Harassment Claims

Know who your supervisors are. Employers are often exposed to unnecessary liability by failing to be aware of who is representing the company in a supervisory

capacity. The U.S. Supreme Court has ruled that for purposes of harassment liability, an employee is a supervisor only if he or she has the authority to take tangible employment actions against the victim (*Vance v. Ball State Univ.,* 133 S. Ct. 2434 (2013)).

Use reasonable care. An employer should take steps to prevent harassment in the workplace by establishing, communicating, and enforcing an antiharassment policy containing:

- A clear explanation of prohibited conduct
- Assurance that employees who make complaints of harassment or provide information related to such complaints will be protected against retaliation
- A clearly described complaint process that provides alternative avenues for complaints
- Assurance that the employer will protect the confidentiality of harassment complaints to the extent possible
- A complaint process that provides a prompt, thorough, and impartial investigation
- Assurance that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred
- Other measures to ensure effective dissemination of the policy and complaint procedure, including posting them in central locations and incorporating them into employee handbooks

Enact an effective complaint procedure. An effective complaint procedure requires an appropriate response by management, such as a thorough investigation of all complaints and action to correct any and all offensive conduct in a timely manner, along with other reasonable steps to prevent and correct harassment.

Train employees. Employers should encourage employees to use internal complaint procedures to report harassment allegations in a prompt and reasonable manner. An employer's antiharassment policy should prohibit retaliation against employees who report harassment or otherwise exercise their rights under fair employment laws.

− Good Sense Helps Prevent Claims

Federal law does not prohibit simple teasing, offhand comments, or isolated minor incidents, but in order to prevent claims of age discrimination, employers and

supervisors should train all employees to:

- Avoid using age-related humor or references that can later be used as evidence of age bias (e.g., jokingly referring to an employee as an "old fogey").
- Reject stereotypes about older employees (e.g., that they are less flexible or less willing to learn new skills or to adopt new technologies).
- Apply discipline consistently, regardless of age.
- Document employees' performance honestly and consistently. A record of poor performance, preferably documented in prior performance appraisals, should be used to form the basis for termination.
- Place older employees in jobs according to ability without regard to age.
- Use a fair, unbiased process for hiring, retaining, demoting, or terminating employees, and document the legitimate business factors for the decisions.

— Benefit Plans

The **Older Workers Benefits Protection Act (OWBPA),** a 1990 amendment to the ADEA, prohibits age-based distinctions in the structure and administration of employee benefit plans unless justified on a payment-made or cost-incurred basis. This means that an employer may provide reduced benefits for older workers as long as:

- The employer can show that the cost of providing benefits for the older worker is equal to or greater than that for the younger worker.
- The plan is insured or based on insurance methods (e.g., reduced benefits for life insurance if risks are assessed to determine the premium).
- The plan is one in which the increasing age of the insured person results in increasing costs.

In other words, an employer may provide reduced benefits for older workers, as long as the actual amount of payments made by an employer or costs incurred by the employer on behalf of older workers are the same as or greater than the costs for younger workers.

Health Plans

If employees or their spouses are covered by both an employer plan and Medicare, most employer-sponsored health benefit plans are primary for the covered employee

and his or her spouse regardless of age. Benefits must be paid by the “primary” plan before the secondary plan pays any benefits. Medicare, however, is primary for retirees. Detailed information is available.

Reduction of Disability Benefits

Employers may reduce from the disability benefits they pay any government-provided disability benefit that an employee is eligible to receive that is triggered by the employee's disabling condition and is not age-based. These government-provided benefits include Social Security disability payments and workers' compensation.

Employers may also reduce long-term disability benefits to an older worker by the amount of the worker's pension benefits that are attributable to employer contributions. The employer may do so if the worker voluntarily (at any age) elected to receive the pension, or if the worker has attained the latter of age 62 or the pension plan's normal retirement age, and if the employee is eligible for an unreduced pension.

Early Retirement Incentives

An early retirement incentive cannot be denied to older employees based on their age. For example, a program limited to employees between the ages of 55 and 60 would unlawfully discriminate against employees aged 61 and older. To be lawful, an early retirement incentive program must be voluntary and must be based on something other than age for incentive eligibility. For more information, see **Waivers and Release Agreements** in this section.

Life Insurance

Employers may reduce life insurance benefits for older workers to keep premium costs equal among employees of different ages. For example, a premium of $100 a year may buy $100,000 in life insurance coverage for employees between the ages of 55 and 60. Life insurance coverage for employees between the ages of 60 and 65 may also cost $100 a year but buy only $80,000 in coverage. The $20,000 difference in bene fits may be legal under the ADEA because the cost of the benefit is the same for both age groups. Certain conditions must be met for an employer to satisfy the equal cost defense.

Pension and Retirement Plans

The ADEA explicitly requires equal treatment in pension plans regardless of age. However, employers may set a limit on the maximum number of years of service they

will credit to employees. Employers may not deny pension credit and contributions to employees who work past normal retirement age. The Act also exempts employee benefit plans that work to the benefit of older workers with minimum-age eligibility requirements, subsidized early retirement benefits, and Social Security supplements.

Severance Pay

The OWBPA permits employers to deduct the value of any retiree health benefits and additional pension benefits from the amount an employee would otherwise receive as severance pay.

Long-Term Disability Payments

An employer may deduct from long-term disability payments paid to the employee any pension benefits not attributable to employee contributions.

− Waivers and Release Agreements

Many employers offer bonuses, continued insurance, and other benefits as part of an exit incentive or employment termination program or in settlement of a charge or court action. In exchange for receiving the bonus, settlement, or enhanced benefit, the employer often requires the employee to sign a release agreement, or waiver of any claims against the employer, including claims under the ADEA. The OWBPA amended the ADEA to include specific requirements for a waiver and release of claims under the ADEA in order to ensure that the waiver or release is “knowing and voluntary” (*29 USC 626(f)*). The EEOC has issued a document titled "Understanding Waivers of Discrimination Claims in Employee Severance Agreements," (https://www.eeoc.gov/policy/docs/qanda_severance-agreements.html) which summarizes the waiver requirements.

Waiver Requirements

The OWBPA is clear—an employee may not waive or release his or her rights under the ADEA unless the waiver or release satisfies the OWBPA's specific requirements for a “knowing and voluntary” waiver. The specific requirements for a valid waiver or release are set forth in *29 CFR 1625.22*.

According to the law and the regulations, the release or waiver must:

- Be in writing.

- Not contain long, complex sentences or technical or legal jargon.
- Be written in “plain language” geared to the level of understanding of the individual or typical participant signing the waiver.
- Not mislead, misinform, or fail to inform participants of the benefits and limitations of the waiver.
- Specifically refer to the employee's waiver of rights and claims covered by the ADEA and the OWBPA.
- Not waive rights or claims that arise after the waiver is signed.
- Provide something of value—“consideration”—beyond that to which the employee would have already been entitled without having signed the waiver.
- Advise the employee *in writing* to consult with an attorney before signing the waiver.
- Give an employee 21 days to consider whether to sign the waiver. The 21-day period runs from the date of the employer's final offer.
- Give an employee 45 days in the case of an exit incentive program or other employment termination program. The 45-day period begins from the date of the employer's final offer.
- Allow for a 7-day period after the waiver is signed during which the employee can revoke his or her decision. The 7-day period cannot be shortened by either party. The agreement does not become effective until after the 7-day revocation period has expired.

Federal courts have ruled that strict compliance with each provision of the OWBPA is necessary for a release to be considered knowing and voluntary. In addition, an employer cannot attempt to cure a defective waiver by issuing a supplemental document that meets the requirements and asking employees to reaffirm their acceptance of the release (*Butcher v. Gerber Prods. Co.,* 8 F. Supp. 2d 307 (S.D.N.Y. 1998)). In this case, the court noted that because the OWBPA establishes minimum or threshold requirements, "absolute technical compliance with its provisions" is required.

If the release or waiver is in connection with an exit incentive program or other employment termination program that applies to a group or class of employees, the EEOC also requires that the release or waiver:

- State the class, unit, or group of persons covered by the program; eligibility factors; and applicable time limits of the program;
- State the job titles and ages of all individuals eligible or selected for the program; *and*

- State the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

Information detailing the employer's offer must be given to each person in the “decisional unit” who is asked to sign an agreement.

“Decisional unit” defined. A "decisional unit" is the portion of the employer's organizational structure from which the employer chose the employees who would be asked to sign an agreement. For example, if the employer's goal was to reduce its workforce at a particular facility, the facility as a whole would be the decisional unit. If only one department at the facility is being considered for a workforce reduction, that department is the decisional unit.

Waivers in Settlement of Charge or Lawsuit

A waiver in settlement of a charge filed with the EEOC or a court action is only “knowing and voluntary” if it meets the same requirements described above. However, instead of a specified time period for consideration, the employee must be given a reasonable time period within which to consider the settlement agreement.

Strict Compliance with Requirements

Compliance with the OWBPA and the EEOC's regulations regarding releases and waivers is imperative. Releases and waivers that do not comply with the law are not enforceable—meaning that an employee who signs an invalid release or waiver may still sue the employer under the ADEA. In addition, the Supreme Court has ruled that if a release is invalid, not only may the former employee sue under the ADEA, but he or she may also keep any money already received as part of the agreement or program (*Oubre v. Entergy Operations, Inc.,* 200 U.S. 321 (1998)).

Under EEOC regulations, an individual claiming that a waiver or release was invalid under the ADEA may keep any benefits received from the employer in exchange for signing that waiver or release before filing a lawsuit or discrimination charge (*29 CFR 1625.23*). Other provisions of the regulation are:

- An employer may not limit an older worker's right to challenge a waiver agreement nor penalize an older worker for challenging a waiver or agreement by, for example, requiring an older worker to agree to pay damages or attorneys' fees for filing a suit.

- An employer may be entitled to restitution or setoff against an employee's recovery for a violation of the ADEA.

- Even if the older worker challenges the waiver, the employer is still required to fulfill the duties to which it agreed until the court provides otherwise.

Arbitration Agreements

Individual agreements. The U.S. Supreme Court has held that a private arbitration agreement between an individual and that individual's employer does not prevent the EEOC from filing a court action in its own name and recovering monetary damages for the individual (*EEOC v. Waffle House, Inc.,* 122 S.Ct. 754 (2002)).

Collective bargaining agreements. The Supreme Court has also ruled that a provision in a collective bargaining agreement that "clearly and unmistakably" requires union members to arbitrate claims arising under the ADEA is enforceable (*14 Penn Plaza, LLC v. Pyett,* 129 S.Ct. 1456 (2009)). The Court reasoned that nothing in the ADEA draws a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative.

━ Mandatory Retirement and Maximum Hiring Ages

The ADEA generally prohibits an employer from forcing an employee to retire because of age or refusing to hire an applicant who is over a particular age, with the following exception:

- An employer may involuntarily retire a bona fide executive who is over the age of 65, has been in his or her current position for the past 2 years, and is entitled to a retirement benefit from the employer that is worth at least $44,000 annually (excluding Social Security benefits, benefits from previous employers, or benefits from employee contributions).

━ Apprenticeship Programs

Age limitations in apprenticeship programs are subject to the prohibitions of the ADEA but are valid where:

- A BFOQ applies;
- The differentiation is based on reasonable factors other than age; *or*
- An employee in a foreign country is involved and compliance with the ADEA would cause the employer or a corporation controlled by the employer to violate the laws of that country (*29 CFR 1625.21*).

− Preemployment Inquiries

Requesting age-related information on a job application is not in itself a violation of the ADEA. However, some states do prohibit this type of question, where a BFOQ exception does not apply. Employers should note that the EEOC's guidelines on preemployment inquiries state that the EEOC will closely scrutinize an employer's request for age-related information and that there must be a legitimate, nondiscriminatory reason for asking an applicant's age. Therefore, as a practical matter, employers should limit preemployment inquiries regarding age to situations in which child labor laws are involved or age is a BFOQ.

− Recordkeeping Requirements

Employers covered by the ADEA are required to maintain:

• Payroll records that contain the employee's name, address, date of birth, occupation, rate of pay, and compensation earned for 3 years (*29 CFR 1627.3(a)*).

• Personnel or employment records, including job applications, résumés, promotion information, and training and related information for 1 year from the date of the personnel action to which any records relate (*29 CFR 1627.3(b)(1)*).

• A file regarding employee benefit plans for the full period of the plan or system in effect and for at least 1 year after its termination (*29 CFR 1627.3(b)(2)*).

• Copies of any seniority systems and merit systems that are in writing for the full period the plan or system is in effect and for at least 1 year after its termination. If the plan is not in writing, a memorandum that outlines the terms of the plan and the manner in which it was communicated to the affected employees, with all notations of revisions, must also be kept on file for that year (*29 CFR 1627.3(b)(2)*).

− Enforcement

The ADEA is enforced by the EEOC or by private civil action. The EEOC has, in many states, entered into agreements with various state human rights commissions and state agencies whereby the state agency or commission is authorized to receive complaints filed under the ADEA, investigate complaints, and refer valid claims to the EEOC for litigation or enforcement.

An individual alleging a violation of the ADEA may bring a civil suit if 60 days have passed since the individual filed an age discrimination charge with the EEOC. An individual is not required to wait until the EEOC has completed action on the charge. The 60-day period is intended to provide the EEOC with an opportunity to conciliate the claim.

The ADEA provides remedies in the form of back pay, front pay, attorneys' fees, court costs, liquidated damages, reinstatement, and injunctive relief. In contrast to remedies available in Title VII discrimination cases, compensatory and punitive damages are not available under the ADEA except in retaliation cases. However, compensatory and punitive damages may be available under state laws that prohibit age discrimination.

− Retaining Older Workers

According to the Employee Benefit Research Institute, workers who are 55 years of age and older make up over 40 percent of the U.S. workforce. Many would like to continue working beyond the traditional retirement age of 65. In 2011, the Baby Boomer generation began turning 65 years of age, and by 2030, nearly 20 percent of the population, or 72 million people, are expected to be age 65 or older (*Federal Interagency Forum on Aging-Related Statistics*). Questions for your organization to consider include:

- What knowledge will be lost when an employee retires?
- What will the consequences be for the organization?
- Most important, what can be done to prevent this loss?

Suggestions for Employers

Some tips for encouraging senior members of the workforce to remain on the job are:

- Inform employees that working longer can make a huge difference in retirement living standards. Earning even a slim income often allows retirement portfolios to compound

over a longer period of time. In addition, individuals who have reached full retirement age can earn as much as they want and keep all of their Social Security benefits.

• Allow senior employees to be part-time consultants for the company. Older workers will have a more relaxing lifestyle while your organization still reaps the benefit of their knowledge.

• Offer financial counseling and retirement planning services to employees.

• Remind employees that work can be physically and mentally energizing. They may not realize how many empty hours they will need to fill in order to remain active.

• Redo pension plans that penalize working after a certain age.

• Provide cafeteria-style benefit packages that would be attractive to older workers. Consider phased retirement as opposed to standard retirement plans.

• Explore career growth for older workers to avoid career stagnation.

• Develop recruitment strategies that will successfully target older workers.

PROPER EMPLOYEE TERMINATION

An Overview of Tennessee & Federal Law

Federal

– Summary

Termination, while often unpleasant, is simply a necessary part of the employment relationship. Fortunately for employers and employees alike, employment is generally considered at-will, which means that either the employee or the employer may terminate an employment relationship at any time and for any reason—any *legal* reason, that is.

Of course, as with nearly all legal principles, there are limits to the at-will principle. For example, if an employment relationship is established and protected by contract, such as a collective bargaining agreement in a unionized workplace, this agreement limits the parties' rights to terminate employment. Additionally, note that termination can be for any *legal* reason. Numerous state and federal laws supersede and limit an employer's otherwise absolute right to terminate employment—for example, when the reason for termination is based on a protected class, status, or activity.

Finally, note that public employers and employers in the state of Montana generally do not have the at-will principle at hand, so these employers may have to follow specified discharge procedures.

In addition to the laws governing *why* termination may occur, employers may also be required to abide by specific practices regarding *how* termination can occur. Employees may be entitled to receive notice, continuation of health benefits, and timely payout of earned compensation.

– Overview—Understanding Employment at Will

Termination, while often unpleasant, is simply a necessary part of the employment relationship. Once an employment relationship no longer effectively serves the needs and interests of both the employer and employee, then it may simply be time for that relationship to end.

Fortunately for employers and employees alike, employment is generally considered at will, which means that either the employee or the employer may terminate an employment

relationship at any time and for any reason—any legal reason, that is. Employment at will can end because "it's just not working out" or even for no reason at all.

Of course, as with nearly all legal principles, there *are* limits to the employment-at-will principle. For example, if an employment relationship is established and protected by contract, such as a collective bargaining agreement in a unionized workplace, this agreement limits the parties' rights to unilaterally terminate employment. Contracts change the nature of the employment relationship such that it is no longer considered to be at will.

Additionally, note that termination can be for any *legal* reason. Numerous state and federal laws, several discussed below, supersede and limit an employer's otherwise absolute right to terminate employment—for example, when the reason for termination is based on a protected class, status, or activity.

Finally, note that public employers and employers in the state of Montana generally do not have the at-will principle at hand, so these employers may have to follow specified discharge procedures.

In addition to the laws governing *why* termination may occur, employers may also be required to abide by specific practices regarding *how* termination can occur. Employees may be entitled to receive notice, continuation of health benefits, and timely payout of earned compensation.

— Common Exceptions to Employment at Will

While employment at will is the law in most states, there are a number of exceptions to this general rule that have been created both by statute and by the courts. Several key exceptions are discussed in detail in the segments below.

Through these exceptions, and contrary to an almost common belief, employers cannot necessarily terminate employees for *any* reason.

Discrimination (Protected Class or Status)

Federal antidiscrimination laws protect employees from losing their jobs based on their race, color, national origin, sex, religion, disability, pregnancy, age, or genetic information. Employees can sue their former employers under a variety of antidiscrimination laws, including **Title VII of the Civil Rights Act of 1964** (42 USC Sec. 2000e *et seq.*), the **Americans with Disabilities Act (ADA)** (42 USC Sec. 12101 *et seq.*), the **Pregnancy Discrimination Act (PDA),** the **Equal Pay Act**(29 USC Sec. 206d), the **Age Discrimination in Employment Act (ADEA)** (29 USC Sec. 621 *et seq.*), and the **Genetic Information Nondiscrimination Act (GINA)** (42 USC Sec. 2000ff).

In addition, most states have enacted their own laws prohibiting discrimination in employment, some of which include additional protected classes such as sexual orientation, marital status, and military membership.

Retaliation (Protected Activity)

An employer may not terminate or otherwise discriminate against an employee in retaliation for engaging in an otherwise protected activity—for instance, making a discrimination complaint or participating in the investigation of a discrimination complaint.

An employer may be found liable for retaliatory discharge if the employee can prove that:

- He or she engaged in a protected activity;
- The employer was aware of the protected activity; *and*
- The employer subjected the employee to an adverse employment action because of the protected activity (e.g., termination).

Statutes addressing retaliation. The principal federal civil rights law, Title VII, prohibits employers from retaliating against employees who oppose any unlawful employment practice or who make a charge, testify, assist, or participate in any investigation, proceeding, or hearing under the law.

Illegal retaliation includes termination, as well as other employment actions such as suspension, demotion, altered work schedules or assignments, and negative performance evaluations.

Similar antiretaliation protections are also extended to employees under the ADEA, the ADA, the Equal Pay Act, and the **Family and Medical Leave Act.**

Section 1981 (Civil Rights Act of 1866). Even though the statute is silent on the issue of retaliation, the U.S. Supreme Court has held that 42 USC Sec. 1981, a federal civil rights statute, also encompasses retaliation claims (*CBOCS West, Inc. v. Humphries*, 553 U.S. 442 (2008)).

Section 1981 is a post-Civil-War-era statute that gives "all persons ... the same right ... to make and enforce contracts ... as is enjoyed by white citizens."

In this case, the employee claimed that his employer violated Section 1981 when it discharged him because of his race and because he had complained to managers that a coworker had also been discharged for race-based reasons.

What is retaliation? The U.S. Supreme Court has ruled that retaliation includes any action taken by an employer—whether job-related or not—that is "materially adverse" and could dissuade a reasonable employee or job applicant from exercising protected rights (*Burlington Northern and Santa Fe Ry. Co. v. White,* 548 U.S. 53 (2006)).

Under the Court's decision, retaliatory actions are not limited to actions that are employment-related (i.e., that affect the terms and conditions of employment or that occur in the workplace) but include any action by an employer that has a materially adverse effect and could reasonably deter a person from engaging in activity protected by Title VII.

Who is protected from retaliation? Title VII prohibits two types of retaliation: (1) the "opposition" clause protects employees from retaliation when they oppose any practice that is unlawful under Title VII; and (2) the "participation" clause protects employees from retaliation when they make a charge, testify, assist, or participate in an investigation, proceeding, or hearing brought under Title VII.

The U.S. Supreme Court has held that the opposition clause protects an employee from retaliation when he or she answers questions during an employer's internal investigation of another employee's improper conduct. The employee participating in the internal investigation is deemed to have opposed unlawful conduct even if he or she did not initiate the discrimination complaint (*Crawford v. Metro. Gov't of Nashville and Davidson County,* 129 S.Ct. 846 (2009)).

The U.S. Supreme Court has also ruled that an "aggrieved person" under Title VII is anyone with an interest intended to be protected under the statute, including employees who have a relationship with another employee who has brought a Title VII discrimination charge against the employer (*Thompson v. N. Am. Stainless,* LP, 131 S.Ct. 863 (U.S. 2011)).

In this case, the plaintiff and his fiancée worked for the same employer. Shortly after the employer learned that his fiancée had filed a discrimination charge with the Equal Employment Opportunity Commission (EEOC), the employer fired the plaintiff. The plaintiff brought a lawsuit under Title VII claiming unlawful retaliation, but the 6th Circuit Court of Appeals ruled that the plaintiff could not pursue his claim because he had not engaged in protected activity himself.

The Supreme Court reversed and ruled that the firing could constitute unlawful retaliation against the fiancée and that the plaintiff, by virtue of his relationship with her, was an aggrieved person under Title VII who fell within the zone of interests protected under the law. The Court concluded that the plaintiff was entitled to bring his lawsuit claiming unlawful retaliation against him by the employer. The Court declined to specify a "fixed class of relationships" that would qualify an individual for third-party protection, other than to state that firing a close family member would almost always meet the standard and inflicting a milder reprisal on a mere acquaintance probably would not.

Retaliation against former employees. The U.S. Supreme Court has ruled that an employer may be held liable for retaliation under Title VII if an unfounded and negative employment reference is given for a former employee. In *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997)), the Court allowed a worker to sue a former employer for providing an unfavorable job recommendation to another employer in retaliation for the worker's filing a discrimination complaint.

Accordingly, the term “employer,” within the context of Title VII, may encompass former employers.

Document, document, document—retaliation risk management. In the years since the Supreme Court’s decisions in *Crawford* and *Thompson*, claims alleging retaliatory behavior have steadily increased. Nearly half of the charges filed with the EEOC, the federal agency responsible for enforcing laws prohibiting employment discrimination, are claims alleging unlawful retaliation.

Enforcement trends like this reinforce the importance that employers carefully document legitimate, nondiscriminatory reasons for disciplining employees and, when necessary, terminating the employment relationship. The best protection against a claim of retaliation is a written disciplinary record demonstrating that there was a legitimate and nondiscriminatory reason supporting the action. An employer should be able to show that clear, understandable work rules and disciplinary policies were communicated to the employee and that the company personnel policies were applied consistently in the case at hand.

While the previously discussed principle of at-will employment doesn’t require employers to have, or state, a reason for discipline or termination, understand that often “the best defense is a good offense.” Being able to proactively demonstrate a fair and legitimate reason for an employment action can save time, resources, and frustration otherwise spent defending legal claims that a termination for “no reason” was unlawful.

Employers should also be especially aware that retaliation claims may—and often do—survive even when the underlying discrimination claim is dismissed. In other words, employers that may have initially done nothing wrong can still find themselves paying out hefty fines and

settlements if the employee is later retaliated against for exercising, or attempting to exercise, an employment right such as filing a complaint.

Discharging an employee who has engaged in a protected activity (taking protected leave, filing a claim or complaint) is a matter that should be approached with extreme caution. Nonetheless, the mere fact that a worker has filed a complaint should not alone prevent an employer from terminating an otherwise undesirable employment relationship. As long as the termination is warranted, is not based on a pretext, and is consistent with past practice, the employer is theoretically secure from liability.

Whistleblowing (Protected Activity)

Several federal laws also specifically protect employees from retaliation for engaging in whistleblowing activity. The following list details a few key examples; however, as a general best practice, employers should not retaliate against employees for any activity that could be seen as whistleblowing.

Affordable Care Act (ACA). The ACA prohibits employers from terminating or otherwise discriminating against an employee who:

- Received a credit or subsidy under the ACA;
- Provided or is about to provide to the employer or the federal or state government information the employee reasonably believes relates to a violation of Title I of the ACA;
- Testified or is about to testify in a proceeding regarding a violation of Title I of the ACA;
- Assisted or participated in such a proceeding; *or*
- Objected to or refused to participate in any activity, policy, practice, or assignment that the employee reasonably believed was a violation of Title I of the ACA (29 USC Sec. 218C).

Additional information is available. Please see the national Health Care Insurance section.

Consumer Product Safety Improvement Act of 2008 (CPSIA). The CPSIA provides employees of manufacturers, private labelers, distributors, and retailers of defective consumer products with whistleblower protection (15 USC Sec. 2087).

Under the CPSIA, employers may not discriminate against or discharge employees who:

- Report violations of the Act or any other law enforced by the Consumer Product Safety Commission (CPSC);
- Testify, assist, or participate in proceedings regarding such violations; *or*
- Object to or refuse to participate in any activity, policy, practice, or task that they reasonably believe to be a violation of the Act or any other law enforced by the CPSC.

The Department of Labor (DOL) is authorized to investigate employee complaints under the CPSIA. If a violation is found, the DOL may, among other things, order the employer to reinstate the employee and award compensatory damages.

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank). Dodd-Frank created several whistleblower protections, while also expanding those in existing law and providing significant financial incentives for employees to disclose to government officials what they believe may be illegal conduct by their employers.

Fair Labor Standards Act (FLSA). Federal wage and hour law (FLSA) prohibits employers from, among other things, discharging an employee "because such employee has filed any complaint" alleging a violation of the FLSA (29 USC Sec. 215(a)(3).

This includes claims for minimum wage, overtime, misidentifying employees as exempt or nonexempt, and unpaid wages of any kind (29 USC Sec. 201).

The U.S. Supreme Court has held that this provision protects oral as well as written complaints of an FLSA violation (*Kasten v. Saint-Gobain Performance Plastics Corp.,* 131 S.Ct. 1325 (U.S. 2011)). This means that an employer may be liable for retaliation if it discharges an employee because he or she complained about an FLSA violation, even if the employee does not make a formal, written complaint.

The Supreme Court did not resolve the issue of whether an oral internal complaint is sufficient under the FLSA's antiretaliation provision or if the complaint must be made to a government agency. However, most lower courts have ruled that internal complaints are also protected; therefore, employers should proceed cautiously before terminating an employee who has made *any* complaint of wage and hour violations.

Please see the Fair Labor Standards Act (FLSA) section.

Occupational Safety and Health Act (OSH Act). Under the OSH Act, employers may not retaliate against employees based on the filing of a complaint concerning work safety (29 USC Sec. 651 *et seq.*).

Public employees, protected speech, and testimony in court. In the context of *public* employment, issues can arise when an employee's individual First Amendment right to engage in protected speech (including whistleblower activity) is balanced with a government employer's interest in managing, controlling, and issuing discipline related to statements made by a public employee that could be seen as representing, disparaging, or otherwise compromising the employer.

Citizens do not automatically surrender First Amendment rights by accepting public employment. However, the Supreme Court has held that when public employees make statements pursuant to their official duties, these individuals are no longer speaking as citizens for First Amendment purposes but are operating in the employment context. Therefore, when disciplining a public employee for speech, it is critical to determine whether the speech was "employee speech" or "citizen speech," the latter of which is protected by the First Amendment (*Garcetti v. Ceballos,* 547 U.S. 410 (2006)).

This distinction can be fact-specific depending on the speech and the employee's duties. For example, in one decision the Supreme Court unanimously held that a public employee who provided subpoenaed testimony in court *was* afforded First Amendment protection—even though the testimony was related to the employee's official duties—because providing testimony was not part of the employee's ordinary job responsibility. The Court held that the employee's act of testifying in Court was outside the scope of his employment and was entitled to First Amendment protection as a matter of public concern (*Lane v. Franks,* 573 U.S. ___ (2014)).

Sarbanes-Oxley Act of 2002 (SOX). SOX prohibits retaliation against employees of publicly traded companies who report acts of mail, wire, bank, or securities fraud; fraud against shareholders; or violations of any rule or regulation of the U.S. Securities and Exchange Commission (SEC) to their supervisors or other appropriate officials within their companies or federal officials with the authority to remedy the wrongdoing.

The law also prohibits retaliation against employees who assist in any investigation of such violations or participate in any proceeding related to an alleged violation of these laws (18 USC Sec. 1514A).

Implied Contracts (Alteration of the At-Will Relationship)

Though an employment contract is generally understood to be a written agreement entered into by the employer and the employee, an unwitting employer may ultimately find itself bound to a promise made by a personnel manager during an interview, in the course of the worker's employment, or in a memo posted on a bulletin board. A promise, or "contract," may also be implied in an employee handbook. Most often, the promise boils down to this: no discharge except for good cause.

Although the enforcement of such promises varies considerably from state to state, employers should be extremely careful about the promises and representations that are made to employees before and during employment. Employers should train their managers not to make any statements or promises regarding terms or conditions of employment to job applicants or employees. Some careless promises can place an employer in an unexpected and undesirable contractual relationship and effectively remove any right it may have had to terminate an employee without cause.

Disciplinary policies. Many companies have specific disciplinary procedures set forth in a policy manual or employee handbook. If the employer has failed to follow such established procedures or the policies limit the employer's discretion to terminate its employees, the employee may have a state law cause of action for breach of implied employment contract or wrongful discharge.

Concerted Activity Under the National Labor Relations Act (Protected Activity)

Although the federal National Labor Relations Act (NLRA) is most often associated with unions and union organizing efforts, its protections—particularly those granted in Section 7 of the act—extend to nonunion workforces, as well. Section 7 gives employees numerous rights, including the right to engage in "concerted activities" for the purpose of collective bargaining or other mutual aid or protection.

Section 8 of the NLRA then makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of these rights. Thus, employers are forbidden from discharging employees who engage in "concerted activity" to bargain with the employer; challenge employer policies or practices; or advocate for better pay, benefits, or working conditions—regardless of whether the employees are unionized.

"Concerted activity" can be defined quite broadly and may include just about any lawful act undertaken by two or more employees—again, regardless of whether the employer has a unionized workforce or not. Please see the national Unions section.

Military Service (Protected Status and Activity)

The **Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)** (38 USC Sec. 4301 *et seq.*) provides protection for employees who are returning home from active military service and protects them from discharge without just cause.

Cat's paw liability. The U.S. Supreme Court has ruled that an employer may be held liable under USERRA for an adverse employment action taken by an unbiased Human Resources (HR) manager when the action is based on the recommendation of a supervisor who had discriminatory intent (*Staub v. Proctor Hosp.*,131 S.Ct. 1186 (U.S. 2011)).

In this case, the vice president of HR fired an employee following a report by the employee's supervisor that the employee had violated the terms of a disciplinary warning and a review of the disciplinary documents in the employee's personnel file. However, the disciplinary documents were put in the file by the employee's supervisors, both of whom were hostile to the employee's military obligations that were protected under USERRA.

The vice president of HR did not investigate the supervisor's report nor investigate whether the disciplinary documents were based on legitimate, nondiscriminatory factors. The fired employee subsequently brought suit under USERRA. Even though the vice president of HR had no discriminatory motive, the Court ruled that the employer could be liable.

Under the standards established by the Court, an employer may be liable if all the following are established:

- A supervisor performs an act motivated by unlawful bias;
- The act is intended to cause an adverse employment action; *and*
- The act is the proximate cause of the ultimate employment action.

Caution: This case illustrates the importance of having a process in place to effectively review disciplinary actions. Additionally, although this case was brought under USERRA, the Court noted that USERRA's language regarding a "motivating factor" is very similar to Title VII. Thus, "cat's paw liability" maybe applied by courts in cases brought under Title VII.

Jury Duty (Protected Activity)

Federal law makes it illegal to discharge an employee for performing jury service in any U.S. court (28 USC Sec. 1875).

Additional State Law Exceptions (Protected Class, Status, and Activity)

In addition to federal law, most states have enacted a number of laws that affect an employer's ability to terminate its employees.

− Additional Considerations

Termination due to Layoff or Plant Closing

If an employee is being terminated as part of a layoff, reduction in force, or plant closing, under the federal **Worker Adjustment and Retraining Notification Act (WARN Act)** (29 USC Sec. 2101 *et seq.*), an employer must give 60 days' notice of any plant closing and/or mass layoff. The

law applies to employers that employ 100 or more full-time workers and employers that employ 100 or more workers that work at least a combined total of 4,000 hours per week (excluding overtime hours).

At least 60 days before a closing or layoff, an employer must provide written notice to (1) the union representing the affected employees or to the employees themselves if there is no union, (2) the state dislocated-worker unit, and (3) the chief elected official of the local government unit in which the closing or layoff is to occur.

Some states have additional “mini-WARN” laws that cover smaller employers.

Voluntary Discharge (Resignation)

Recall that the employment-at-will doctrine applies to both employers and employees. This means that employees may also voluntarily terminate their employment at any time, for any reason, with or without notice.

Employee notice requirements. Of course, some advance notice of a resignation gives the company time to find a replacement, provides the company with time to discuss a counteroffer with the employee, gives the employer time to process the necessary paperwork for separation, and allows coworkers to make an easier transition.

For this reason, some employers encourage employees to provide notice via their internal policies—for example, by making receipt of certain benefits or payments, such as vacation or severance pay, contingent on providing and working the duration of a minimum notice period.

If benefit payout, such as that of accrued vacation or other paid time off, will be made contingent on provision of reasonable notice, consult applicable state law to determine whether this practice is permissible, then set forth the terms clearly in a formal written policy. Even in states where the practice is permitted, employers’ attempts to withhold or require forfeit of expected or promised benefits such as accrued vacation will rarely pass muster in court if the employer’s notice expectations have not been clearly communicated in writing.

Exit Interviews

An exit interview should be conducted with every employee who leaves the company voluntarily. Because many employees feel more comfortable providing honest feedback once the employment relationship has ended, exit interviews may yield important new information and insight on an employee’s overall employment experience and overview of the company.

The best practice for exit interviews is to have the interview in person immediately before the employee’s final departure date. Of course, this may not always be logistically possible, so consider alternatives such as e-mail, phone, or direct mail interviews, online surveys, and/or using third-party off-boarding services.

Sample questions. The content of an exit interview will certainly vary from employer to employer; however, the following questions provide a standard template:

- Why are you leaving the company?
- How did you feel about working here?
- Were your job duties clearly explained to you?

- Do you think the company benefits and compensation programs are adequate? Do you have any suggestions for improving the programs?
- Would you recommend future employment with the company to a friend or relative?

Keep questions open-ended. Try to incorporate as many open-ended questions as possible during an exit interview. "Yes or no" questions undermine the value of the exit interview, as they fail to elicit personal experiences, anecdotes, and valuable insight.

Handling troubling information. If an employee shares particularly troubling information during an exit interview, such as an allegation of sexual harassment, the shared information, as well as the employee, should be handled with extreme care.

Gather as much detailed information as possible from the employee and document the facts thoroughly. Convey a sincere appreciation for the information given and assure the employee that the allegation(s) will be investigated and resolved immediately.

━ Managing the Discharge Process—Best Practices

Terminating an employee is one of the most difficult and important steps an employer or supervisor can take. It should not be taken lightly, because its repercussions go beyond the employee and the employer. Coworkers can be unnerved by the firing of another employee, even if they felt the person was a poor worker, exhibited a poor attitude, or simply wasn't a good fit. A firing may engender feelings of uncertainty and vulnerability in others. Also, a firing may result in a wrongful discharge claim, which, even if not legitimate, is costly, unsettling, and a distraction to the workplace.

Despite the freedom, discussed above, afforded by the at-will employment doctrine, for many employers it will be preferable to err on the side of caution, terminating employees only for substantial business reasons such as demonstrating a continued inability to meet performance standards, consistently violating company policy, exhibiting violent behavior against another in the workplace, or engaging in criminal activity, such as embezzlement.

The Termination Meeting

The actual termination is never a pleasant experience. Therefore, every termination meeting should be planned carefully and executed quickly and competently. To achieve this, an employer may want to incorporate the following practices as part of its overall termination policy:

- Conduct the meeting as privately as possible, at either the start or end of the workday. By doing so, an employee's potential embarrassment when later retrieving personal belongings from the work area may be reduced (e.g., fewer employees may be in the work area).
- At least one other member of management should attend the meeting as a witness.
- Keep the meeting brief. Discourage any further or potentially volatile discussion regarding the reason for the termination. The purpose of the meeting is to

communicate the message, not to discuss the reasons, or rights and wrongs, behind the decision. Stay focused.

• Remain compassionate, but do not compromise the company's position by "siding with" the employee.

• Arrange for security if an employee has a history of violence or could react violently.

• Prepare a final paycheck, including all outstanding vacation, sick time, etc., when applicable. Full payment for the day of the termination meeting should be made, regardless of the time of day that it occurs.

• Provide information and forms regarding the continuation of group health insurance, unemployment insurance, etc., in order to reduce the need for a former employee to return to the workplace and possibly cause disruption.

• At the conclusion of the meeting, have the employee retrieve his or her personal belongings and immediately leave the premises. In some cases, it may be necessary to physically escort the employee to and from the work area.

Making a clean break. When terminating an employee, the employment relationship should end at the conclusion of the termination meeting.

Absent an intervening contract, there is no legal requirement for an employer to provide an employee with a notice period following the termination; in fact, it is not recommended. If the employer has promised a notice period, the employer may be bound to it, but most employers offer pay covering the period and dismiss the employee from further work.

There is little to gain by allowing an otherwise deficient employee to continue working for an extended period after the termination meeting. In almost every case, the employee's emotional connection to the employer is effectively severed, and the more important issues of employee morale, productivity, and risk to company property should take precedence.

If you believe the former employee might damage company property or cause some other disruption in the workplace, have someone escort the former employee to his or her desk to pack up and then escort him or her out. But do this only under extraordinary circumstances.

Releases/Waivers

Employers may ask an employee who is resigning, being terminated, or laid off to release potential legal claims the employee may have against the employer (e.g., for alleged employment discrimination) in exchange for additional compensation. Some state and federal laws prohibit the release of claims under those acts—for example, the FLSA, NLRA, and USERRA prohibit employees from waiving certain rights under those laws. For this reason, any general waiver of claims must be written carefully.

If the employee is aged 40 or over, the **Older Workers Benefit Protection Act (OWBPA)** (29 USC Sec. 621 *et seq.*) contains specific requirements for such a waiver and release of claims that must be followed to ensure that the release is enforceable.

If the format is not followed, the employee may ignore the release and sue the employer.

Regardless of the age of the employee signing the release, the employer should consult with an attorney when drafting the legally binding document in order to guarantee that all legal

requirements are fulfilled.

Severance Pay

No federal law requires that an employer pay severance pay upon terminating an employee. However, severance benefits are often offered in conjunction with waivers and releases of claims. Additionally, some employers opt to provide severance benefits to ease the transition for discharged employees, particularly those with lengthy tenure with the organization.

Additional information and guidance on severance plans and packages are available.

Final Paychecks

There are no federal laws regulating the payment of final wages, although many states have such laws.

For administrative simplicity, when termination is involuntary (firing or immediate layoff), many employers provide the final paycheck immediately upon discharge. For voluntary separations (resignations) or nonimmediate layoff, the final paycheck might be provided within the standard pay cycle.

In choosing the appropriate final pay practice for your organization, ensure that it complies with applicable state laws on final paycheck timing—otherwise, penalty wages could be assessed.

Questions regarding vacation pay, severance pay, or debts or obligations owed to the company should be addressed well in advance of the termination date. Postponing any of these actions until after the employee departs can lead to serious misunderstandings and possible legal problems.

COBRA

The Consolidated Omnibus Budget Reconciliation Act (COBRA) and many state laws require that employees be offered the option to continue group health insurance coverage after the employment relationship has ended.

Return of Company Property

Employers should assign responsibility for seeing that discharged employees return any company property, such as uniforms, keys, or credit cards, before departure.

In the case of employees with access to trade secret information, software, or product development plans (e.g., computer programmers), and particularly in the case of telecommuting arrangements, it may be necessary to take additional measures to protect company property (e.g., terminating the employment relationship immediately upon receipt of a resignation letter and escorting the employee from the premises, making arrangements to retrieve company computers, software, etc., from the employee's home office).

Deductions from Pay

A common concern raised by employers during the termination process is whether, and to what extent, employees can be charged for outstanding debts owed to the employer—for example, negative balances in a paid time off bank, damaged or unreturned company property, losses due to fraud or theft, previously authorized loans or paycheck advances, and clawbacks of bonuses or incentives the employee failed to earn.

Whether these amounts can be recovered via a deduction from pay or whether they will require separate reimbursement (and, perhaps, legal action) depends on several factors, including the amount owed, the reason owed, whether the employee authorized the deduction in writing, and the jurisdiction.

The best practice is for employers to refrain from advancing funds that would be sizable enough to warrant seeking a deduction from final pay; however, to the extent that hindsight is often 20/20, limited deductions approved in writing by the employee may be permissible.

Form W-2

Form W-2 may generally be issued at any time after termination, no later than January 31 of the following year.

However, if an employee requests issuance of Form W-2 (either verbally or in writing) and there is no prospect that the employee will be rehired by the company, the W-2 must be issued within 30 days of the request or within 30 days of the last payment of wages, whichever is later.

Employment References

While an employer may be subject to liability for giving a deliberately inaccurate or misleading job reference, an increasing number of states have enacted job reference immunity laws that exempt employers from liability when accurate job reference information is given.

Recordkeeping and Retention

All documentation associated with a termination should be filed in the employee's personnel file. If departmental personnel files are also maintained, they should be kept in a confidential and secure place.

Some states have laws that specifically govern the maintenance and retention of all employee personnel files.

<u>The WARN Act</u>

(*Layoffs* under the Worker Adjustment & Retraining Act)

− Summary

The **Worker Adjustment and Retraining Notification Act (WARN Act)** provides protection to workers, their families, and communities by requiring employers to provide advance notification of plant closings and mass layoffs.

Advance notice is designed to provide workers and their families some transition time to adjust to the prospective loss of employment, to seek and obtain alternative jobs and, if necessary, to enter skill training or retraining that will allow these workers to successfully compete in the job market.

The Act also provides for notice to state dislocated worker units so that dislocated worker assistance can be promptly provided.

Not all plant closings and layoffs are subject to the Act, and certain thresholds must be met before the Act applies.

— The WARN Act

A layoff is a termination of employment at the will of the employer. It may be temporary or permanent and can occur for several reasons including downsizing, changes in market conditions, or new technology.

The federal **Worker Adjustment and Retraining Notification Act (WARN Act)** imposes restrictions on the way layoffs are handled (*29 U.S.C. Sec. 2101 et seq.*; *29 U.S.C. Sec. 639.1 et seq.*).

WARN is designed to give employees advance notice of layoff to allow them to find other employment and/or seek retraining in a new occupation. This notice also gives state dislocated-worker units adequate preparation time to better assist affected workers.

Who Is Covered?

Employers must comply with the WARN Act if they have 100 or more full-time employees *or* 100 or more employees, including part-time employees, who regularly work a total of 4,000 hours per week, exclusive of overtime.

Part-time employees. The Act defines “part-time employees” as those who work an average of fewer than 20 hours per week or who have been employed for fewer than 6 of the 12 months preceding the date on which notice is required (*29 U.S.C. Sec. 2101*).

Temporary employees. Temporary employees are individuals hired with the understanding that their jobs will end when a specific project ends.

Workers on temporary layoff who have a reasonable expectation of recall are counted as employees.

An employee has a reasonable expectation of recall when he or she understands, through notification or industry practice, that his or her employment has been temporarily interrupted and that he or she will be recalled to the same or a similar job (*20 CFR Sec. 639.3*).

Public employers. Regular federal, state, and local government entities that provide public services are not covered by the Act (*20 CFR Sec. 639.3*).

Employees covered. Employees entitled to notice under the WARN Act include hourly and salaried workers, as well as managerial and supervisory employees.

Multiple employment sites. An employer may have several sites of employment under common ownership or control, yet there is only one "employer" for purposes of

the Act.

Independent contractors and subsidiaries. Independent contractors and subsidiaries that are wholly or partially owned by a parent company may be considered separate employers or part of the parent or contracting company depending upon their degree of independence.

Some of the factors to be considered in making this determination are (1) common ownership, (2) common directors and/or officers, (3) *de facto* exercise of control, (4) unity of personnel policies emanating from a common source, and (5) the dependency of operations (*20 CFR Sec. 639.3*).

WARN responsibility upon sale of the business. In the event of a sale of part or all of an employer's business, the *seller* is responsible for providing notice of any plant closing or mass layoff that takes place up to and including the effective date of the sale, and the *buyer* is responsible for providing notice of any plant closing or mass layoff that takes place after the effective date of the sale (*29 U.S.C. Sec. 2101*).

Employers should note that the requirements of the WARN Act may be interpreted strictly by the courts. Therefore, employers should work closely with an employment law attorney when planning and negotiating a business transaction that may involve layoffs.

Effect of state laws and collective bargaining agreements. The WARN Act does not replace state laws or collective bargaining agreements that may require additional notice.

Several states have enacted "mini-WARN" laws providing employees with greater protections than the federal WARN Act. Employers should check to see if their states of operation have any additional advance notice requirements.

What Is Required?

The law requires covered employers to give affected employees 60 days' notice of a “mass layoff” or a “plant closing” that is expected to last 6 months or longer.

Employers must also notify local government officials and the appropriate state dislocated worker unit(s).

Additional notice is needed if the planned layoff date is extended.

An employer may not order a plant closing or mass layoff until the end of the 60-day notice period and after the employer has served written notice of such an order.

When all employees are not terminated on the same date, the date of the first individual termination within the statutory 30-day or 90-day period triggers the 60-day

notice requirement.

A worker's last day of employment is considered the date of that worker's layoff.

The first and each subsequent group of affected employees is entitled to a full 60 days' notice.

The point in time at which the number of employees is to be measured for purposes of determining coverage under the Act is the date on which the first notice is required to be given (*20 CFR Sec. 639.5*).

Definitions. The WARN Act defines the preceding terms as follows:

- "Mass layoff" is defined as a reduction in force that (a) does not result from a plant closing, but (b) will result in an employment loss at a single site of employment during any 30-day period for (1) between 50 and 499 employees if they make up at least 33 percent of the workforce (excluding part-time employees) *or* (2) at least 500 employees (excluding any part-time employees).

- "Plant closing" is defined as a permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at the single site of employment for 50 or more employees, excluding part-time employees, during any 30-day period.

- "Employment loss" is defined as (1) an employment termination other than a discharge for cause, voluntary departure, or retirement; (2) a layoff exceeding 6 months; or (3) a reduction in work hours of more than 50 percent during each month of any 6-month period.

Employment loss does *not* occur if the closing or layoff is the result of the relocation or consolidation of part or all of the employer's business and, before the closing or layoff:

(a) the employer offers to transfer the employee to a different site within a reasonable commuting distance with no more than a 6-month break in employment; or

(b) the employer offers to transfer the employee to any other site of employment regardless of distance with no more than a 6-month break in employment and the employee accepts within 30 days of the offer or of the closing or layoff, whichever is later

(*29 U.S.C. Sec. 2101*).

Separate and distinct actions. Employment losses for two or more groups at a single site within a 90-day period, each of which involves fewer than the minimum number of employees to qualify as a plant closing or mass layoff but, in the aggregate, do exceed the minimum number of employees, will be considered a mass layoff or

plant closing *unless* the employer can demonstrate that there were two separate and distinct actions and there was no attempt to evade the WARN Act requirements (*29 U.S.C. Sec. 2102*).

What is a single site of employment? According to federal regulations, a "single site of employment" is either a single location or separate facilities that are in geographic proximity, used for the same purpose, and that share staff and equipment (*20 CFR Sec. 639.3*).

Determination of these factors is fact specific. For example, in one case, an employer was found not to be subject to WARN because the employers' multiple construction sites were not geographically near (to headquarters or each other), employees were not assigned to the headquarters, work was not assigned at headquarters, and employees did not report to headquarters.

Yet, had any of the factors been different, the sites would have been considered a single site of employment, and WARN would have applied. (*Bader v. Northern Line Layers Inc.,* 503 F.3d 813 (9th Cir. 2007)).

Employers should carefully consider any obligations that may apply to their specific circumstances under a strict interpretation of the law.

Determining whether a departure was "voluntary." Federal courts have interpreted "voluntary departure" to include employees' entering into severance agreements following layoff announcements; however, failure to report to work after announcement of layoff, without reasons other than the shutdown, may not be enough to constitute voluntary departure. (*Ellis v. DHL Express,* 633 F.3d 522 (7th Cir. 2011)); (*Collins v. Gee West Seattle,* 631 F.3d 1001 (9th Cir. 2011)).

Thus, employees who stop coming to work when a plant closing is imminent may still need to be counted for purposes of determining if the WARN Act applies.

Under these circumstances, employers should consult with an experienced employment law attorney in their jurisdiction for advice on their obligations under the WARN Act or similar state law.

Extension of layoff period. When a layoff that was initially announced to be a layoff of 6 months or less lasts more than 6 months, it is treated as an employment loss unless:

- The extension to longer than 6 months was caused by a business circumstance not reasonably foreseeable at the time of the initial layoff; *and*
- Notice was given when it became reasonably foreseeable that the layoff would last longer than 6 months (*29 U.S.C. Sec. 2102*).

Notice Requirements

Employers must provide different types of information to employees depending upon whether or not they are unionized.

Employers must always notify the state.

Notice may be sent by any method designed to ensure receipt at least 60 days before separation, e.g., first-class mail, personal delivery, or insertion of a notice into pay envelopes (*20 CFR Sec. 639.6 to 639.8*).

Union employees. If employees are unionized, only the chief elected union representative must be given notice. The notice must contain:

- The name and address of the employment site where the plant closing or mass layoff will occur and the name and telephone number of a company official to contact for further information;
- A statement as to whether the planned action is expected to be permanent or temporary and whether the entire plant is to be closed;
- The expected date of the first separation and the anticipated schedule for making separations; *and*
- The job titles of positions to be affected and the names of workers currently holding these jobs.

Unionized employers should seek additional legal advice because the WARN Act and the **National Labor Relations Act** may have different notice and bargaining requirements.

The Supreme Court has ruled that unions may sue on behalf of their members for WARN Act violations (*United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.,* 517 U.S. 544 (1996)).

Nonunion employees. Employees who may reasonably be expected to experience an employment loss and who are not represented by a union must be notified individually in writing.

While part-time employees are not counted in determining if a plant closing or mass layoff had occurred, these workers must still receive notice if they will experience an employment loss.

The notice must include:

- A statement as to whether the planned action is expected to be permanent or temporary and whether the entire plant is to be closed;

• The expected date when the plant closing or mass layoff will begin and the expected date when the individual employee will be separated;

• An indication of whether bumping rights exist; *and*

• The name and telephone number of a company official to contact for further information.

State notification. Employers must also notify the state dislocated worker unit and the chief elected official of the local government unit within which the closing or layoff will occur.

The notice must include:

• The name and address of the employment site where the plant closing or mass layoff will occur;

• The name and telephone number of a company official to contact for further information;

• The nature of the planned action, including whether it is a plant closing or a mass layoff and whether it is expected to be permanent or temporary;

• The expected date of the first separation and the anticipated schedule for making separations;

• The job titles of positions to be affected and the number of employees in each job classification;

• An indication of whether or not bumping rights exist; *and*

• The name of each union representing affected employees and the name and address of the chief elected officer of each union.

Exceptions to the WARN Act Notice Requirements

The WARN Act's notice requirements do not apply if:

• The closing is of a temporary facility;

• The closing or layoff is the result of the completion of a particular project when the employees involved were hired with the understanding that employment was limited to the duration of the facility or the project; *or*

• The closing or layoff constitutes a strike or lockout (*29 U.S.C. Sec. 2103*).

Additionally, there are three other important exceptions to the 60 days' notice requirement that are explained in the U.S. Department of Labor's regulations interpreting the WARN Act (*20 CFR 639.9*).

Employers claiming these exemptions are required to give as much notice as they can, along with a brief statement of why the notification period has been reduced. The employer has the burden of proving that the conditions for an exception have been met.

These exceptions are:

- The faltering company exception;
- The unforeseen business circumstances exception; *and*
- The natural disaster exception.

Faltering company exception. The faltering company exception, which is narrowly construed, applies only to plant closings and not mass layoffs.

In order for it to apply, the employer must have been actively seeking capital or business, at the time notice would have been required, that was realistically obtainable and, if obtained, would have allowed the employer to avoid or postpone the shutdown.

In addition, the employer must have reasonably and in good faith believed that giving the required notice would have prevented the employer from obtaining the financing or business.

This means that the employer must be able to objectively show that it believed that a potential customer or source of financing would have been unwilling to provide business or financing to the new business if the public knew that there might be a closing.

Practice tip: One way to satisfy the faltering company exception is by showing that the finance or business source would not choose to do business with a troubled company or with a company whose workforce would be looking for other jobs.

This exception will be viewed in a companywide context, so a company with access to financing or with cash reserves may not use it based solely on the financial condition of the plant that is being closed.

Unforeseen business circumstances exception. This exception applies to plant closings and mass layoffs caused by business circumstances that were not reasonably foreseeable at the time that the 60-day notice would have been required.

An important indicator that a circumstance is not reasonably foreseeable is that it is caused by some sudden, dramatic, and unexpected action or condition outside the employer's control.

Examples include a principal client's sudden termination of a major contract, a

strike at a major supplier, or an unexpected and dramatic economic downturn.

The test for determining when circumstances are reasonably foreseeable focuses on an employer's business judgment.

The employer must exercise the same commercially reasonable business judgment that a similarly situated employer would in predicting the demands of its particular market. The employer, however, does not have to accurately predict general economic conditions.

Government actions. A government-ordered closing of an employment site that occurs without prior notice may also fall under the unforeseen business circumstances exception.

Natural disaster exception. This exemption applies to plant closings and mass layoffs due to any form of a natural disaster. Examples include floods, earthquakes, droughts, storms, tidal waves or tsunamis, and similar events.

The employer must be able to demonstrate that its plant closing or mass layoff was, in fact, due to the natural disaster.

While a disaster may preclude full notice, as much notice as possible must be given.

Plant closings or layoffs that are the indirect result of a natural disaster are not covered by this exception, but may fall under the unforeseen business circumstances exception.

Damages

Any employer that violates the Act's notice requirements may be liable to each affected employee who suffers an employment loss.

An aggrieved employee may claim back pay for each day of the violation period in an amount equal to his or her average regular rate for the previous 3 years or final regular rate. The employer may also be held liable for lost benefits and be subject to civil fines for each day it is in violation of the Act.

Damages paid to any aggrieved employee will be reduced by any wages paid by the employer to the employee during the violation period, any voluntary and unconditional payment by the employer to the employee that is not required by some legal obligation, and any payment by the employer to a third party or trustee on behalf of the employee during the violation period (*29 U.S.C. Sec. 2104*).

Computation of damages. The damages an employer may have to pay if it violates the WARN Act have been the subject of several court cases.

The majority of federal circuit courts of appeal have ruled that employers are liable

for each "work" day within the violation period.

However, the 3rd Circuit has held that employers are liable for each "calendar" day during the violation period.

At least one court has held that back pay includes tips and holiday pay that employees would have earned had they been working (*Local Joint Executive Board of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.,* 244 F.3d 1152 (9th Cir. 2001)). In the same case, the court held that WARN Act damages may not be reduced by severance pay or accrued vacation pay that the employer was otherwise obligated to pay.

Waivers. Employers often ask their employees to sign releases waiving their rights under the WARN Act in return for additional consideration.

The Department of Labor (DOL) has stated that employees cannot be required to waive their right to the WARN Act notice. However, employees may agree to waive their rights to make claims against the employer.

− Alternatives to Layoff

In some cases, employers can avoid layoffs by instituting other cost-cutting measures so that the financial burden of an economic downturn is shared among employees.

Employees benefit despite the hardship of reduced hours and/or pay, because they are able to keep their jobs. Employers also benefit by maintaining a well-trained workforce ready to resume maximum production or service levels when the economy improves.

Additionally, when employers try to avoid layoffs, they often gain the goodwill and loyalty of their employees.

Examples of alternatives to layoffs include:

- Work sharing;
- Reduced pay;
- Furloughs;
- Reduced benefits; *and*
- Early retirement.

Work sharing. Work sharing allows employees to share the work that remains

after some jobs are lost due to adverse economic conditions.

Under a work-sharing arrangement, employees may work a reduced week or work every other week. Their hourly pay remains the same but reflects the reduced hours.

In some states, the unemployment compensation laws allow employees to collect partial unemployment benefits during a work-sharing period.

Reduced pay. A reduction in pay works best if it is shared by all employees, including management.

It may be acceptable to employees if their unemployment benefits during a period of layoff would be less than the reduced pay.

Furloughs. Employers can require employees to take unpaid time off—either a few days or a full week or more.

In the absence of a state law to the contrary, employers may allow or require furloughed employees to use vacation or PTO time.

Sometimes, employers will temporarily shut down a facility, thereby saving not only wages but energy and other administrative costs as well.

Caution: Exempt workers. If improperly applied, layoff alternatives such as work sharing, reduced pay, furloughs, and shutdowns may jeopardize employees' exempt status.

Exempt employees are not subject to minimum wage and overtime laws. Under federal law, most exempt employees must be paid on a salary basis, which means they must be paid the same salary if they work any part of a workweek, regardless of the quantity or quality of their work.

Instituting a furlough or temporary shutdown without jeopardizing an employee's exempt status can be particularly challenging for employers. However, if an employer sets up a weeklong furlough or shutdown and does not pay exempt employees, there is no risk of losing the employees' exempt status.

This is because the wage and hour regulations provide that exempt employees need not be paid for any workweek in which they perform no work.

On the other hand, if an employee sets up a partial-week furlough and deducts the pay of exempt employees for the furlough days, those employees are at risk of losing their exempt status and may be entitled to overtime.

Also, it is critical that employees perform no work at all during a furlough or shutdown, including checking work e-mails, making business phone calls, etc.

Remember, nonexempt employees must be paid for hours worked and, as noted

above, exempt employees must be paid their full salary for any week in which they perform *any* work.

To ensure that no work is performed during a furlough or shutdown, many employers require employees to turn in their personal digital assistants, laptops, and other employer-owned communication devices before they leave.

Reduced benefits. Sometimes, employers can cut costs by reducing employee benefits. For example, employers may eliminate or reduce their contribution to employees' 401(k) plans.

Employers' options in this area may be limited if there is a union contract or other employment contract in place.

Employers must also make sure that they comply with the requirements of ERISA.

Early retirement. Employers can reduce their workforce by offering attractive incentives to employees who are about to reach retirement age.

The advantage of retirement incentives is that they allow employers to cut costs without requiring employees to leave their jobs involuntarily.

However, the employer may lose some employees it would prefer to keep.

− Other Issues to Consider

Employers need to be aware of other considerations when laying off employees, whether or not the requirements of the WARN Act apply.

Discrimination

Employers should always avoid unlawful discrimination when considering layoffs. Each layoff decision should be made according to objective, business-related criteria and be well-documented.

Avoiding bias in layoff selection. Once an employer has determined that a layoff is necessary, it should identify the supervisors who will facilitate the layoff. These supervisors should be directed to select employees for layoff on the basis of nondiscriminatory criteria such as job performance, employee skills, or seniority.

Additionally, the selection should be made with any policies or employment contracts in mind.

Note that the EEOC has stated that if productivity is a layoff criterion, employees with disabilities cannot be penalized if their productivity has been negatively affected as a result of an accommodation.

Once employees have been selected for layoff, a statistical analysis should be done to determine if the layoff would have a disparate impact on employees within a protected group (race, gender, national origin, workers over the age of 40, etc.).

If so, the selections should be reexamined.

Remember, the employer may be required to show that a business necessity justifies the criteria that have a disparate impact on a protected group.

Employees on Leave

An employer may lay off an employee who is out of work on short-term disability, even in cases when the leave is qualified under the **Family and Medical Leave Act (FMLA).**

The test is whether the employee would have been selected for layoff if he or she was not out of work on disability. Therefore, the employer should make sure the reasons for selecting this employee are job-related and well documented.

If an employee on leave is the only employee selected for layoff in a unit or at a facility and there are others in similar jobs not being laid off, the employer is vulnerable to a claim that this employee was selected because he or she was exercising rights under the FMLA, workers' compensation, or other leave law.

Foreign Workers

Employers instituting layoffs must be particularly careful if they employ foreign workers. Depending on the type of visa, employers may need to notify the Department of Labor or the U.S. Citizenship and Immigration Service of layoffs, reduced hours, or reduced pay.

There are several different types of visas for foreign workers, each with its own rules and regulations.

Therefore, employers with foreign workers should consult with experienced counsel when considering a layoff that will include foreign workers.

Health Insurance Continuation

The Consolidated Omnibus Budget Reconciliation Act (COBRA) requires

employers with 20 or more employees to offer continued group health insurance after terminations for any of a number of reasons, including some layoffs.

State continuation laws may provide additional rights.

Outplacement Services

As a matter of goodwill, some companies provide outplacement services to laid-off employees.

Outplacement counseling is designed to help terminated employees prepare themselves for a new job or a new career, to lend assistance in providing outside resources, to receive training, and to help employees cope with the stress of leaving the company.

Outplacement services include assistance in rewriting resumes, job placements, career counseling, conducting employee skill surveys, and providing pre-layoff employment service registration.

Larger organizations may hire outplacement services to assist employees, whereas smaller organizations may hire a single counselor or use existing resources to assist employees.

Employers should consider providing outplacement services if employees have been working at the same company for a long period of time and may not have the tools necessary to successfully find another job.

Severance Pay

Severance benefits are payments made to employees upon termination of employment caused by events that are beyond their control, such as workforce reductions, plant closings, company takeovers, and mergers.

Severance benefits are not required by federal law and are only required by a handful of states.

However, many companies do offer severance pay. The payments themselves may be paid in a lump sum or over a period of time.

These benefits are usually calculated by the employee's length of service with the company (e.g., 1 week of severance pay given for every year employed with the company).

Final Paychecks

Most states have laws regarding when final paychecks must be given to terminated employees.

Some states specify when laid-off employees must be paid.

Employers need to make sure that they are aware of these laws when conducting a layoff.

Uniformed Services Employment and Reemployment Rights Act

Regulations issued under the **Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)** specifically address an employer's obligations in the event of a layoff or reduction in force.

The regulations provide:

- If an employee is laid off with recall rights, he or she is still an employee for purposes of USERRA. If the employee is on layoff and begins service in the uniformed services or is laid off while performing service, he or she may be entitled to reemployment on return if the employer would have recalled the employee to employment during the period of service.
- If the employee is sent a recall notice during a period of service in the uniformed services and cannot resume the position of employment because of the service, he or she remains an employee for purposes of USERRA. As a result, if the employee is otherwise eligible, he or she is entitled to reemployment following the conclusion of the period of service even if he or she did not respond to the recall notice.
- If the employee is laid off before or during service in the uniformed services, and the employer would not have recalled him or her during that period of service, the employee is not entitled to reemployment following the period of service simply because he or she is a covered employee. This is because reemployment rights under USERRA cannot put the employee in a better position than if he or she had remained in civilian employment (*20 CFR Part 1002.42*).

− Layoff Survivors

Shortly after a layoff is completed, management should inform remaining employees why the layoffs were necessary.

An employer's honesty will be appreciated by employees; if further layoffs are possible, say so. Additionally, employers should acknowledge the extra effort that may be required of the remaining employees.

Layoff survivors may be experiencing a range of sometimes conflicting emotions such as relief, guilt, insecurity, distrust of management, anxiety, and a lack of motivation.

It is important for employers to make sure that layoff survivors know that they are valued employees and to help them stay engaged and productive. Managers should be available to discuss the concerns of layoff survivors.

In some situations, it may be appropriate to refer layoff survivors to the organization's employee assistance program.

− Rehiring

A collective bargaining agreement may mandate the order of rehiring after a layoff. Otherwise, employers usually rehire employees in reverse order of layoff.

Problems may arise if employers rehire out of order, if employees choose to remain on layoff status rather than accept a lower-paying job, or if employees are kept on recall status for too long a period of time. Employers may want to limit the eligibility period for rehiring.

Staying in touch with laid-off employees and establishing clear procedures for recall and reporting back to work will help the rehiring process run more smoothly.

− Workforce Innovation and Opportunity Act

Effective July 1, 2015, the **Workforce Innovation and Opportunity Act (WIOA)**superseded the **Workforce Investment Act of 1998 (WIA).**

Like its predecessor, the WIOA is a federal workforce development law that provides for state and federal employment, education, job-training, and support services.

The law is designed to help jobseekers access employment, education, training,

and support services and to match employers with the skilled workers they need.

How Does the Act Work?

The WIOA is intended to develop strong regional economies. In line with this goal, state and local governments have primary responsibility for implementing all programs.

State governors must designate local workforce investment areas and oversee local workforce investment boards with the following goals in mind:

- Work up front with employers to determine local or regional hiring needs and design training programs that are responsive to those needs;
- Offer work-based learning opportunities with employers—including on-the-job training, internships, and preapprenticeships as training paths to employment;
- Make better use of data to drive accountability, inform what programs are offered and what is taught, and offer user-friendly information for jobseekers to choose what programs and pathways work for them and are likely to result in a job;
- Measure and evaluate employment and earnings outcomes;
- Promote a seamless progression from one educational stepping stone to another, and across work-based training and education, so individuals' efforts result in progress;
- Break down barriers to accessing job-driven training and hiring for any American who is willing to work, including access to supportive services and relevant guidance; *and*
- Create regional collaborations among American Job Centers, education institutions, labor, and nonprofits.

Additional information. Additional information on WIOA implementation, including links to guidance, technical assistance events, and tools, are available on the Employment and Training Administration's WIOA Resource Page at www.doleta.gov/WIOA (http://www.doleta.gov/WIOA) .

American Job Center "One Stop" Approach. The cornerstone of the WIA was the "One Stop" service delivery system, which was designed to make information about and access to a wide array of job training, education, and employment services available for workers and employers at a single neighborhood location.

The WIOA supports and further streamlines this one-stop career service approach.

Through these one-stop American Job Centers, employers have a single point of contact to provide information about current and future skills their workers need to possess and to list job openings.

In addition, a directory of state American Job Center "One Stop" websites is available at http://www.doleta.gov/usworkforce/onestop/onestopmap.cfm (http://www.doleta.gov/usworkforce/onestop/onestopmap.cfm).

Additional Information

The Department of Labor has set up a website to answer both employer and employee questions about the WIOA and the WARN Acts.

The website can be found at http://www.doleta.gov (http://www.doleta.gov).

Additional information about each state's WIOA programs, including youth services, funding, accountability, Job Corps, Veteran's Programs, etc., can be obtained by contacting a state's dislocated worker unit.

UNEMPLOYMENT COMPENSATION

– Summary

Unemployment compensation is regulated by the **Federal Unemployment Tax Act (FUTA)** and jointly administered by federal and state authorities. Under the FUTA, the individual states are free to set their own limits on weekly benefit amounts, unemployment tax rates, taxable wage bases, and unemployment eligibility and disqualification requirements. Unemployment benefits are financed by a tax on a certain portion of wages paid to employees. This taxable wage base varies from state to state.

– Joint Federal-State Program

Unemployment compensation is regulated by the **Federal Unemployment Tax Act (FUTA)** (*26 U.S.C. 3301 et seq.*) and jointly administered by federal and state authorities. Under the FUTA, the individual states are free to set their own limits on

weekly benefit amounts, unemployment tax rates, taxable wage bases, and unemployment eligibility and disqualification requirements. Unemployment benefits are financed by a tax on a certain portion of wages paid to employees. This taxable wage base varies from state to state.

In response to the spike in unemployment brought on by the COVID-19 pandemic, Congress expanded unemployment benefits in several ways (see "COVID-19 Benefits Expansion," below).

— Who Is Covered?

General test. Virtually all employers must pay federal and state unemployment tax. Employers pay the federal tax if, during the current or preceding year, they:

- Paid wages of $1,500 or more in any calendar quarter; *or*
- Employed one person for some part of the day during any 20 weeks of the year (*26 U.S.C. Sec. 3306*).

Agricultural employers and employers of domestic workers have different tests for liability.

Domestic employers test. Employers of domestic employees must pay state and federal unemployment taxes if they pay cash wages to household workers totaling $1,000 or more in any calendar quarter of the current or preceding year (*26 U.S.C. Sec. 3306*). A household employee is an employee who performs household work in a private home, local college club, or local fraternity or sorority chapter.

Agricultural employers test. Employers must pay federal unemployment taxes if (1) they pay employees cash wages of $20,000 or more in any calendar quarter, or (2) in each of 20 different calendar weeks in the current or preceding calendar year, there was at least 1 day in which they had 10 or more employees performing service in agricultural labor (*26 U.S.C. Sec. 3306*). The 20 weeks don't have to be consecutive weeks or the same 10 employees, nor must all employees be working at the same time of the day. Generally, agricultural employers are also subject to state unemployment taxes.

Exclusions. Under the FUTA, the states are not required to provide unemployment compensation to certain individuals, including, for example:

- Students performing services at schools where they regularly attend classes and students engaged in work-study programs;

- Employees working for a close relative, unless they are over the age of 21 and working for a parent;
- Insurance agents and solicitors who earn only commissions;
- Interns and student nurses working in hospitals;
- Newspaper carriers under the age of 18; *or*
- Certain railroad employees (*26 U.S.C. Sec. 3306*).

No federal unemployment tax is collected on the wages of people in these occupational categories nor on the wages of state or federal employees.

– Benefits

The amount an individual receives for a compensable week of unemployment, known as the weekly benefit amount, varies according to state law. Usually the amount is equal to 50 percent or 60 percent of the claimant's normal weekly earnings up to a maximum prescribed by state law. Benefits typically continue for up to 26 weeks. There is an initial waiting period in most states before benefits begin, typically 1 week.

"Able and available" requirement. Unemployed individuals must be able to and available for work in order to receive benefits. This "able and available" requirement applies only to the weeks of unemployment for which an individual claims benefits. State laws define "availability" in different ways, and some states have special rules for students or those performing military reserve services.

– Payment of Taxes

Tax sharing. Employers pay taxes to both the federal government and the state. The federal tax rate is 6.0 percent of the first $7,000 of each employee's calendar-year wages (*26 U.S.C. Sec. 3301*). The $7,000 is the federal wage base. Your state wage base may be different. Employers generally can claim a credit against the gross FUTA tax based on the state unemployment taxes they pay (*26 U.S.C. Sec. 3302*). The credit may be as much as 5.4 percent of the FUTA taxable wages. An employer is entitled to the maximum credit if it paid its state unemployment taxes in full, on time, and on all the same wages as are subject to the FUTA tax (as long as the state is not determined to

be a credit reduction state).

In some states, the wages subject to state unemployment tax are the same as the wages subject to the FUTA tax. However, certain states exclude some types of wages from state unemployment tax, even though they are subject to the FUTA tax (e.g., wages paid to corporate officers, certain payments of sick pay by unions, and certain fringe benefits). In such circumstances, an employer may be required to deposit more than 0.6 percent FUTA tax on those wages.

Successor employer. If an employer acquires a business from an employer that was liable for the FUTA tax, the acquiring employer may be able to count the wages that the employer paid to the employees who continue to work for the successor employer when figuring the $7,000 FUTA tax wage base.

Depositing the FUTA tax. For deposit purposes, employers should figure the FUTA tax quarterly. Employers should stop depositing the FUTA tax on an employee's wages when the employee reaches $7,000 in taxable wages for the calendar year.

If an employer's FUTA tax liability for a quarter is $500 or less, the employer does not have to deposit the tax. Instead, the employer may carry it forward and add it to the liability figured in the next quarter to see if the employer must make a deposit. If the FUTA tax liability for any calendar quarter is over $500 (including any FUTA tax carried forward from an earlier quarter), the employer must deposit the tax by electronic funds transfer (EFT).

Employers must deposit the FUTA tax by the last day of the first month that follows the end of the quarter. If the due date for making the deposit falls on a Saturday, Sunday, or legal holiday, employers may make the deposit on the next business day. If an employer's liability for the fourth quarter (plus any undeposited amount from any earlier quarter) is over $500, employers should deposit the entire amount by the due date of Form 940 (January 31). If it is $500 or less, employers can make a deposit, pay the tax with a major credit card, or pay the tax with their Form 940 by January 31.

Timely payment. The FUTA tax payment should be made by the last day of the first month that follows the end of the quarter. If the due date falls on a Saturday, Sunday, or legal holiday, the payment can be made on the next business day. The federal credit for state tax contributions depends in part on prompt payment of the federal tax. Employers must file their federal tax return for the previous calendar year by January 31 or risk losing a portion of the credit. Prompt payment is also essential to avoid interest charges and other possible penalties.

Experience ratings. Experience ratings are a method of determining how much

each individual employer must pay to its state unemployment fund. The ratings are based on the employer's experience with unemployment, as shown by the number of former employees who have collected benefits. The FUTA doesn't require the states to use experience ratings, but all of them do. Although methods vary from state to state, the objective in every state is to allow employers to qualify for a lower rate if they keep labor turnover down and keep ineligible employees from drawing benefits.

State Unemployment Tax Act (SUTA) Dumping Prevention Act of 2004. The amount an employer pays for unemployment insurance is directly related to its experience rating. As a result, in order to avoid higher costs, employers that had significant turnover or layoffs began transferring employees to other subsidiaries or companies that had better experience ratings and lower unemployment insurance costs. In reaction to this practice, the federal government enacted legislation requiring each state to amend its unemployment compensation laws to prevent employers from avoiding the higher compensation rates associated with their employment practices. The laws must provide for the transfer of the experience rating with the employees. State laws must include civil and criminal penalties. The Act also gives state unemployment agencies access to the federal listing of newly hired workers so that states can more easily identify individuals who are not eligible for benefits or who may have received overpayments because they are working.

Voluntary contributions. One way for an employer to reduce its tax liability for the following year is to make voluntary contributions to the state unemployment tax fund, where allowed.

━ How to Restrict Benefits to Ineligible Ex-Employees

Consistent auditing of charges and protesting benefit awards to ineligible ex-employees can save in state unemployment taxes and result in the maximum credit allowed under the FUTA. Employers should:

- Keep close track of benefit charges made to their accounts;
- Obtain signed statements from employees who resign, including the employees' reasons for leaving the job (voluntary separation without good cause disqualifies a claimant from benefits under most state laws);
- Document in detail all discharges for misconduct and similar causes (discharge for cause reduces or eliminates benefits under most state laws);
- Maintain accurate records on periods of employment, earnings, and reasons for

separation;

• Carefully check all notices concerning rate determinations; *and*

• Make sure that claimants who are receiving other compensation (such as vacation pay or severance pay) do not receive benefits at the same time. Report any vacation, separation, retirement, or pension payments made to a terminated employee to the proper state agency. Often, these payments are deducted from the amount of unemployment benefits that a claimant is eligible to receive. In many states, unemployment benefits are reduced or eliminated if the claimant is collecting disability, Social Security, or other such benefits.

How to Contest Unemployment Compensation Claims

Employers should handle unemployment compensation claims carefully. Employers receive written notice from the state unemployment agency when a former employee has filed a claim for benefits. In general, an employer may acknowledge the claim as valid or dispute it. Because unemployment compensation tax is closely tied to a company's claims history, an employer should immediately challenge any claim that is believed to be unjustified. Not all claims are worth contesting, of course, only those for which an employer has a strong, well-documented case. In many states, it is assumed that a claim is valid if no information to the contrary is supplied by the employer within a statutory deadline, typically 7 to 14 days of receipt of the claim notice. Once the response deadline passes, it is usually too late to object to the worker collecting benefits. For this reason, the employer wish to consider sending an objection to the agency by certified mail.

In general, the grounds for disqualification are narrow and are interpreted in a way favorable to the separated employee whenever possible. However, workers can be legitimately denied benefits for a number of reasons, e.g., simply not earning enough in wages to qualify, following a discharge for misconduct, or for voluntarily resigning “without good cause.” Good recordkeeping is essential in successfully contesting any claim. Employers should keep track of the facts surrounding each separation and know the state unemployment law.

Hearings. An in-person hearing usually will be scheduled shortly after the filing of a written protest of the claim. The employer will receive a written notice of the date, time, and place to report. If an employer representative fails to appear at the hearing, the likelihood is that the employer will forfeit its right to contest the claim any further.

Employers should be familiar with the procedures used by their state unemployment agency in claims processing, particularly in how hearings are conducted. Many states publish detailed guidance about the overall process. Check with the agency about the availability of an employer handbook or similar information. Typically, this information also can be accessed by visiting the agency's website.

In general, careful preparation for the hearing (usually conducted by a hearing officer or referee) is essential. The top priority is to achieve mastery of the facts of the case and the ability to present your side in a concise, professional manner. Equally important is a good grasp of the rules and law that apply to your case (be sure that the law supports your view that the worker was separated under disqualifying conditions such as misconduct or voluntary separation without good cause). Bring all relevant records and witnesses to the hearing. Legal representation at the hearing may be appropriate—particularly in contentious situations when other employment-related litigation may be anticipated. The hearing officer will issue a written decision shortly after the hearing. Although this may not be cost-effective, employers that are dissatisfied with the outcome of the hearing can generally protest the hearing officer's decision to one or more appeals within the state unemployment agency itself and then through the state court system.

Termination for cause. If you are protesting a fired employee's eligibility for benefits, prepare to show misconduct on the employee's part. An employee who is fired for poor performance or judgment will usually collect benefits. However, an employee who intentionally or deliberately disregards certain standards of conduct or behavior may be denied benefits. Fighting, insubordination, stealing, committing illegal acts on company property, failing a drug test, etc., are often legitimate grounds for a misconduct-based disqualification depending on the state. In addition, if an employer has a written policy setting out standards of conduct and behavior and the employee knew about the policy, intentional violation of the policy may rise to the level of misconduct and result in denial of unemployment benefits. If there is clear documentation that the worker's conduct was completely unacceptable, that the employee knew or should have known that it was punishable by termination, and that customary disciplinary procedures were followed, you may be on solid footing to contest a claim. Furthermore, be sure that you can offer evidence establishing that the employee was not singled out for discharge but given fair treatment under your company's established policies and work rules.

Voluntary termination. Employees who resign voluntarily and without good cause are usually disqualified from receiving unemployment compensation. While

“voluntariness” is seldom an issue, “cause” comes up frequently. “Good cause” (or an equivalent term such as “just cause”) is generally understood to mean a real, substantial, and compelling reason that would lead a reasonable person to quit under like circumstances. In most states, the employee must establish that he or she had good cause to leave the job and that the reason for leaving can be attributed, at least in part, to the employer's actions or lack of action, e.g., failure to correct sexual harassment in the workplace.

An employers' best defense to an employee's claim that he or she had good cause and should be granted unemployment benefits is a signed resignation letter or statement from the employee setting forth the specific reasons for separation. The best time to do this is while the employee is still on the job, preferably as soon as you learn that the employee intends to resign. A detailed resignation statement pins the employee down to the reasons stated, and it gives the employer a basis for determining whether the claim should or should not be contested. Moreover, if the employee claims that he or she is leaving because of sexual harassment, retaliatory discipline, unsafe working conditions, or discrimination (related to race, disability, gender, national origin, religion, age, etc.), the employer can launch an immediate investigation and contact legal counsel. A resignation may be found to be tantamount to a “constructive discharge” if the conditions on the job are so unpleasant that the employee is forced to leave.

Exception—domestic violence. In most cases, good cause for quitting must be related to the job and not purely personal to the employee. The most notable exception to this is voluntary termination by an employee due to a domestic violence situation at home. An increasing number of states are now including domestic violence in the list of good-cause reasons for voluntarily terminating employment. Although state laws vary, most provide at a minimum that an employee may be deemed to have left work with good cause, and thus eligible for benefits, if he or she left employment to protect himself or herself or his or her children from domestic violence abuse. Many states require the employee to provide documentation of the abuse or to have tried reasonable alternatives before quitting, such as a temporary restraining order. In addition, many states do not charge employer unemployment insurance accounts for compensation provided to victims of domestic abuse.

− Disaster Unemployment Assistance

Disaster Unemployment Assistance (DUA) is a program administered by states as

agents of the federal government to provide financial assistance to individuals who have lost their jobs or their self-employment as a direct result of a major disaster declared by the president. To be eligible for assistance under this program, an individual must prove that he or she is not eligible for regular unemployment insurance benefits and must meet a list of eligibility qualifications.

This assistance is available the first day of the week after the date the disaster began. Eligibility continues for up to 26 weeks after the president has declared the situation to be a major disaster, as long as an individual continues to be unemployed as a result of the disaster. The amount of weekly benefits available to an individual is determined by the law of the state in which the disaster occurred. Claims must be filed according to the specific requirements of the individual's state. Contact the appropriate state unemployment insurance agency for more information. For more information about the DUA, visit http://workforcesecurity.doleta.gov/unemploy/disaster.asp (http://workforcesecurity.doleta.gov/unemploy/disaster.asp).

– Unemployment Compensation for Ex-Servicemembers

Unemployment compensation is available for eligible ex-servicemembers. The program is administered by the individual states as agents for the federal government. Generally, individuals are eligible for unemployment benefits if the individuals were on active duty with a branch of the U.S. military and were separated under honorable conditions. The law of the state (under which the claim is filed) determines benefit amounts, number of weeks benefits can be paid, and other eligibility conditions. Benefit applicants should have a copy of their separation papers (DD Form-214). For more information, visit http://workforcesecurity.doleta.gov (http://workforcesecurity.doleta.gov/unemploy/ucx.asp).

Note: There is no payroll deduction from the servicemember's wages for unemployment insurance protection. The various branches of the military pay for the benefits.

– Trade Readjustment Allowances

Trade readjustment allowances (TRAs) are income support to persons who have exhausted unemployment compensation and whose jobs were affected by foreign

imports.

The **Federal Trade Act** provides special benefits under the Trade Adjustment Assistance (TAA) program to individuals who were laid off or had hours reduced because their employer was adversely affected by increased imports from other countries.

The available benefits include paid training for a new job, financial assistance for searching for a job in other areas, or relocation to an area where there are more jobs. Qualifying individuals may be entitled to a weekly TRA after their unemployment compensation is exhausted. To file a claim, employees should contact their state unemployment agency. For more information on TRAs, visit http://workforcesecurity.doleta.gov (http://workforcesecurity.doleta.gov/unemploy/tra.asp).

− Self-Employment Assistance

States may voluntarily create a Self-Employment Assistance (SEA) program to help unemployed individuals create jobs for themselves by forming their own small businesses. Under an SEA program, an eligible individual receives a weekly self-employed allowance (instead of unemployment benefits) to start up his or her business. To be eligible for the allowance, the individual must be eligible for unemployment compensation benefits, must have been permanently laid off from his or her job, and must be identified as a person likely to exhaust regular unemployment benefits. An individual also must take part in self-employment activities, such as entrepreneurial training. To learn whether their state has an SEA program and/or to file a claim, employees should contact their state unemployment agency. For more information on SEA programs, visit http://workforcesecurity.doleta.gov/unemploy (http://workforcesecurity.doleta.gov/unemploy/self.asp).

− COVID-19 Benefits Expansion

During the 2020 COVID-19 pandemic, Congress expanded unemployment benefits in response to the sudden, astronomical increase in unemployment brought on by the virus and the resulting shutdown orders.

The **Families First Coronavirus Response Act** authorized $1 billion in emergency funding for state unemployment insurance programs, contingent on

states meeting certain employer notice and procedural requirements. Half of these funds were set aside for states that ease waiting periods and work search requirements for employees, as well as refrain from penalizing employers "directly impacted" by coronavirus or a related quarantine.

The **Coronavirus Aid, Relief, and Economic Security (CARES) Act** created three major new unemployment compensation programs to supplement the traditional statutory benefits: Federal Pandemic Unemployment Compensation (FPUC), Pandemic Unemployment Assistance (PUA), and Pandemic Emergency Unemployment Compensation (PEUC).

Some states have announced that unemployment claims related to COVID-19 won't be charged to employers. Others, though, have acknowledged the increased payouts may mean higher unemployment insurance tax rates.

For the latest federal guidance on the new laws and other COVID-19 issues, see the Employment and Training Administration (ETA) website at https://oui.doleta.gov/unemploy/coronavirus (https://oui.doleta.gov/unemploy/coronavirus).

CARES Act Programs

The FPUC program allows states to provide an additional $600 weekly benefit to individuals who are collecting regular unemployment compensation. FPUC benefit payments are fully federally funded, and states may not charge any FPUC benefits paid against the employer's experience rating. FPUC benefit payments will end after payments for the last week of unemployment before July 31, 2020.

PUA is available to individuals not eligible for regular unemployment compensation or extended benefits under state or federal law or PEUC, including those who have exhausted all rights to such benefits. Covered individuals also include self-employed individuals, those seeking part-time employment, and individuals lacking sufficient work history. Depending on state law, covered individuals may also include clergy and those working for religious organizations who are not covered by regular unemployment compensation. Benefit payments under PUA are retroactive, for weeks of unemployment, partial employment, or inability to work due to COVID-19 reasons from January 27 through December 31, 2020.

The up to 13 weeks of extra benefits available as PEUC apply to weeks of unemployment ending before December 31, 2020. This program covers individuals who have exhausted all rights to regular UC under state or federal law and remain able to work, available for work, and actively seeking work. However, states must offer flexibility in meeting the "actively seeking work" requirement if an individual cannot

search for work because of COVID-19—for example, due to illness, quarantine, or movement restriction. A state may not change its regular computation method so as to reduce the average WBA or the number of weeks of benefits payable (i.e., maximum benefit entitlement).

− Additional Information

The ETA administers federal government job training and worker dislocation programs, federal grants to states for public employment service programs, and unemployment insurance benefits. These services are primarily provided through state and local workforce development systems. For more information on unemployment insurance, visit http://workforcesecurity.doleta.gov (http://workforcesecurity.doleta.gov/unemploy/uifactsheet.asp).

− Who Is Covered?

Virtually all employers are subject to unemployment insurance taxes under the **Tennessee Employment Security Law** (*TN Stat. Sec. 50-7-101 et seq.*). For example, coverage extends to:

- Employers that paid wages of $1,500 or more during any calendar quarter in either the current or preceding calendar year;
- Employers that employed at least one worker for some portion of a day in each of 20 different weeks in either the current or preceding calendar year;
- Anyone who acquires the business of a covered employer;
- Tax-exempt nonprofit corporations that employed four or more people for some portion of a day in each of 20 different weeks in either the current or the preceding calendar year;
- The state of Tennessee and its political subdivisions;
- Employers that are liable for the **Federal Unemployment Tax Act (FUTA)** and have at least one employee in Tennessee;

• Employers of agricultural labor that either paid $20,000 for that labor in any quarter of either the current or preceding calendar year or employed 10 or more workers for some portion of a day in each of 20 different weeks in either the current or the preceding calendar year;

• Employers of domestic workers that paid wages of $1,000 or more in any quarter of the current or preceding calendar year; *and*

• Employers that voluntarily elect to be covered (*TN Stat. Sec. 50-7-205* and *TN Stat. Sec. 50-7-207*).

Exceptions to Coverage

The law excludes certain services from coverage, including, for example, services provided by:

• Students working for schools, colleges, or universities;

• Students working for work-study programs;

• Spouses of students working for schools;

• Real estate and insurance salespersons;

• Certain newspaper distributors (e.g., minors);

• Product demonstrators pursuant to a written contract;

• Full-time students working for certain organized camps;

• Patients working for a hospital; *and*

• Election officials and election workers who earn less than $1,000 in a calendar year (*TN Stat. Sec. 50-7-207*).

− Payment of Taxes

Taxable wage base. For the current taxable wage base, visit https://www.tn.gov/workforce/employers/tax-and-insurance.html (https://www.tn.gov/workforce/employers/tax-and-insurance.html). The term “wages” refers to all remuneration paid for personal services from whatever source, including commissions, bonuses, certain reported tips, and the cash value of all remuneration in any medium other than cash (*TN Stat. Sec. 50-7-213*).

Rates. See the above link for the current tax rate. New employers pay a certain set percentage.

Experience rating. After a new employer period, an employer receives an “experience rating” that determines its tax rate for the coming year. The rating is calculated based on the total amount of taxes paid in, the total amount of benefits paid out, and the size of the taxable payroll. A relatively high volume of unemployment claims yields a higher tax rate.

State Unemployment Tax Act (SUTA) Dumping

As required by federal law, Tennessee has enacted a statute providing that employers transferring employees to a new company or enterprise with substantially common ownership, management, or control will have their unemployment experience rating transferred as well. The law is aimed at employers that attempt to avoid higher unemployment rates by transferring employees out of companies with bad experience ratings after layoffs and terminations. Employers that knowingly attempt to violate the SUTA dumping provisions may be subject to civil and criminal penalties.

− Benefits

Eligibility

Claimants are not entitled to benefits if their base period earnings are less than 40 times their weekly benefit amount (*TN Stat. Sec. 50-7-301*). Additionally, no claimant will be entitled to benefits if the claimant’s base period earnings, outside the claimant’s highest calendar quarter of earnings, are less than the lesser of six times the claimant’s weekly benefit amount or $900.

Waiting period. There is a 1-week waiting period for claimants (*TN Stat. Sec. 50-7-302*).

Conditions affecting eligibility. Claimants may be disqualified from receiving benefits for various reasons. For example, claimants may be ineligible if they:

- Refuse suitable work;
- Are discharged for misconduct;
- Use fraud to obtain benefits;

• Leave work voluntarily without good cause;

• Are unemployed because of a labor dispute in which they are participating;

• Are receiving wages in lieu of notice, compensation for temporary partial disability under the workers' compensation laws of any state or the United States, or unemployment benefits from another state or the United States; *or*

• Test positive for drugs or quit to avoid taking a drug test (*TN Stat. Sec. 50-7-303*).

Benefit Amounts

Weekly benefit amount. The weekly benefit amount is based on the average of the claimant's total wages in the 2 highest base-period quarters (*TN Stat. Sec. 50-7-301*). The state has a benefit table that specifies the weekly benefit available at each wage level.

Partial benefits. Claimants who earn wages in a week that are less than their weekly benefit amount are eligible for partial benefits (*TN Stat. Sec. 50-7-301*). The amount of their benefits for that week are reduced by the amount that the week's earnings exceed $50 or 25 percent of the claimant's weekly benefit amount, whichever is greater.

Total benefit amount. The total amount payable is the lesser of 26 times the claimant's weekly benefit amount or $^{1}/_{4}$ of base-period wages (*TN Stat. Sec. 50-7-301*). The duration of benefits may be extended in periods of high unemployment.

– The Claims Process: Reviews, Notifications, and Appeals

Tennessee has a designated appeals process (*TN Stat. Sec. 50-7-304*). For more information, visit https://www.tn.gov/workforce/unemployment/appeal-an-agency-decision.html

– Notices and Reports

Employers can find various unemployment compensation forms at https://www.tn.gov/workforce/general-resources/forms.html (https://www.tn.gov/workforce/general-resources/forms.html).

— COVID-19 Benefits Expansion

In April 2020, Tennessee began providing the benefits authorized by the federal **Coronavirus Aid, Relief, and Economic Security (CARES) Act.**

An individual who is quarantined or ordered to isolate by a medical professional or health authority may receive unemployment benefits if all other eligibility requirements are met and the individual intends to return to the job. Employers closing temporarily should file a mass claim. For the latest on the state's implementation of CARES Act relief, visit https://www.tn.gov/workforce/covid-19.html (https://www.tn.gov/workforce/covid-19.html).

— Additional Information

For additional information about the Tennessee Employment Security Law, including obtaining a handbook for employers, visit https://www.tn.gov/workforce/employers.html (https://www.tn.gov/workforce/employers.html).

COBRA

(Health Insurance Continuing Coverage)

− Summary

What is COBRA? The **Consolidated Omnibus Budget Reconciliation Act (COBRA)** is intended to ensure that employees and their dependents can maintain their group healthcare coverage following certain events that otherwise would result in termination of coverage. COBRA's protections are temporary and are intended as a stopgap until insurance is obtained from another source, such as a new employer. Employers do not have to pay for any portion of the premiums for COBRA coverage, but the beneficiaries get to maintain their insurance at less expensive group rates.

− What Is COBRA?

The **Consolidated Omnibus Budget Reconciliation Act (COBRA)** is intended to ensure that employees and their dependents can maintain their group healthcare coverage following certain events that otherwise would result in termination of

coverage. COBRA's protections are temporary and are intended as a stopgap until insurance is obtained from another source, such as a new employer. Employers do not have to pay for any portion of the premiums for COBRA coverage, but the beneficiaries get to maintain their insurance at less expensive group rates.

− COBRA Coverage

COBRA requires group health plans sponsored by covered employers to allow qualified beneficiaries to have "COBRA continuation coverage" in the event that they lose group health plan coverage for specified reasons. COBRA applies only to employers that had 20 or more employees on more than 50 percent of typical business days during the prior calendar year. In some situations, insured employees have continuation rights under both federal and state law. In such cases, employees may choose the more favorable law. Under both federal and almost all state laws, continuation requires the insured to pay the full premium (including the former employer's share), but the insured does get the advantage of cheaper group rates.

Covered Employers: The Small Employer Exemption

Federal COBRA continuation does not apply to any employer-sponsored group health plan if the employer normally employed fewer than 20 employees during the prior calendar year. An employer is considered to have normally employed fewer than 20 employees during a particular calendar year if it had fewer than 20 employees on at least 50 percent of its typical business days during that year. When counting employees for this purpose, only "common-law employees" are counted. Thus, self-employed individuals, independent contractors, and directors are not counted. Employees of all members of a controlled group are counted, including employees of a foreign member of the controlled group. Part-time employees are also counted as a fractional equivalent of a full-time employee. The fractional equivalent is calculated by dividing the hours that the part-time employee works per week by the number of hours that an employee must work in order to be considered a full-time employee.

Covered Employees and Qualified Beneficiaries

Covered employees. A "covered employee" is an individual who is eligible to be covered under a group health plan by virtue of the performance of services for the employer maintaining the plan or membership in the employee organization maintaining the plan. Self-employed individuals, independent contractors (and their employees), and corporate directors are considered to be "covered employees" if their

relationship to the employer maintaining the plan makes them eligible to be covered under the plan.

Qualified beneficiaries. A "qualified beneficiary" is an individual who, on the day before a “qualifying event,” is covered by a group health plan maintained by an employer. The individual can be a covered employee, the spouse of a covered employee, or a dependent child of the covered employee. A special rule allows a child who is born to or placed for adoption with a covered employee during a period of COBRA continuation coverage to be a qualified beneficiary.

Group health plan. A “group health plan” for purposes of COBRA is defined as an employee benefit plan providing “medical care” to participants or beneficiaries directly or through insurance, reimbursement, or otherwise. Coverage may be provided through insurance, an on-site facility, or be self-funding. This definition is quite broad and includes plans that are both contributory and noncontributory. However, specifically excluded from coverage are plans where substantially all the benefits are for qualified long-term care services.

Medical care. Medical care includes the diagnosis, cure, medication, treatment, or prevention of disease, or any other undertaking for the purpose of affecting any structure or function of the body. It also includes transportation that is essential to such health care. On the other hand, medical care does not include benefits that are merely beneficial to the general health of an individual, such as a vacation.

Qualifying events. Qualifying events are the events whose occurrence entitle an individual to COBRA continuation coverage if the event causes loss of coverage.

COBRA Continuation Coverage

COBRA continuation coverage is an extension of the coverage that the qualified beneficiary had immediately before the qualifying event. The plan sponsor must provide an opportunity for qualified beneficiaries of a plan to continue coverage if they would lose coverage as a result of a qualifying event. COBRA continuation coverage must be the same as the coverage provided to similarly situated beneficiaries with respect to whom a qualifying event has not occurred. Modifications to the plan will apply to qualified beneficiaries if such modifications apply to similarly situated beneficiaries for whom a qualifying event has not occurred.

− Qualifying Events/Length of COBRA Continuation Coverage

The length of time an insured must be allowed to continue coverage depends upon

the qualifying event, i.e., the reason the individual has lost group coverage. In cases where an employer is covered by both state and federal law, the law *more favorable to the employee* applies. For specific state-law continuation rights,

Qualifying Events

The following events qualify an individual for COBRA continuation coverage if the event causes loss of coverage for a qualified beneficiary:

- Termination or reduction of hours of a covered employee (other than because of the employee's gross misconduct);
- Death of a covered employee;
- Divorce or legal separation;
- The covered employee becomes entitled to Medicare benefits;
- "Aging out" of a child, (i.e., he or she ceases to be a dependent child under the age requirements of the plan); *and*
- Bankruptcy of the employer from which the covered employee retired.

Gross Misconduct

Termination for gross misconduct is not a qualifying event, and COBRA continuation coverage does not have to be offered to an employee terminated for gross misconduct and his or her spouse and dependent children. The term "gross misconduct" is not defined either in the statute or in the regulations, and no standard has been consistently articulated or applied by courts or regulators. Accordingly, any decision to deny COBRA coverage based on an employee's gross misconduct should be reviewed by an attorney.

Length of Continuation Coverage

In general, benefits under COBRA continuation coverage begin on the date of the qualifying event. Thus, the beginning date for calculating how long the benefits last is usually the date of the qualifying event. COBRA continuation rights are generally limited to either 18 or 36 months (with the exception of bankruptcy as the qualifying event).

18 months. A qualified beneficiary is entitled to continue coverage under COBRA for a maximum period of 18 months if coverage would otherwise end due to:

- Termination of employment; *or*

• Reduction of hours.

36 months. A qualified beneficiary who is a spouse or dependent child is entitled to continue coverage under COBRA for a maximum period of 36 months if coverage would otherwise end due to:

• Death of the covered employee;

• Divorce or legal separation from the covered employee;

• Entitlement of the covered employee for Medicare benefits; *or*

• Disqualification of a child as a dependent because of age.

Second qualifying events. If a qualified beneficiary is otherwise entitled to a maximum of 18 months of continuation coverage, the qualified beneficiary may become entitled to an additional 18-month extension (giving a total maximum period of 36 months of continuation coverage) if the qualified beneficiary experiences certain second qualifying events. Such events include:

• The death of a covered employee;

• The divorce or legal separation of a covered employee;

• A covered employee becomes entitled to Medicare; *and*

• A loss of dependent child status under the plan.

However, the second event can be a second qualifying event only if it would have caused the qualified beneficiary to lose coverage under the plan in the absence of the first qualifying event.

Lifetime of retiree. A qualified beneficiary who is a retired employee and his or her spouse and dependent children are allowed to continue coverage for the retiree's lifetime if coverage would otherwise end due to a bankruptcy proceeding plus an additional 36 months for a surviving spouse and dependent children.

━ Extension of COBRA Coverage for Disabled Qualified Beneficiaries

Qualified beneficiaries become eligible for a disability extension of 11 additional months (to a total of 29 months) if any of the individuals who lost coverage because of the same qualifying event is determined to be disabled for Social Security purposes during the first 60 days following the qualifying event. Thus, the employee, his or her spouse, and any dependents who were covered before the employee losing his or her job or having a reduction in hours are all separately entitled to the extension if any

one of them meets the disability criteria.

The disabled qualified beneficiary (or another person on his or her behalf) must also notify the plan of the disability determination before the end of the 18-month period following the qualifying event (i.e., the covered employee's termination of employment or reduction of hours). The plan can set a time limit for providing this notice of disability, but the time limit cannot be shorter than 60 days, starting from the latest of:

- The date on which the Social Security Administration (SSA) issues the disability determination;
- The date on which the qualifying event occurs;
- The date on which the qualified beneficiary loses (or would lose) coverage under the plan as a result of the qualifying event; *or*
- The date on which the qualified beneficiary is informed, through the furnishing of the summary plan document or the COBRA general notice, of the responsibility to notify the plan and the procedures for doing so.

The right to the disability extension may be terminated if the SSA determines that the disabled qualified beneficiary is no longer disabled. The plan can require qualified beneficiaries receiving the disability extension to notify it if the SSA makes such a determination, although the plan must give the qualified beneficiaries at least 30 days after the SSA determination to give such notice.

— Administration of COBRA Continuation Coverage

Coverage of Dependents

A child born or placed for adoption during the COBRA period is a qualified beneficiary. Thus, COBRA participants must be allowed to change their coverage status upon the birth or adoption of a child so that the child is covered for the balance of the continuation period. The length of the child's COBRA coverage is measured from the date of the original qualifying event.

Open Enrollment Rights

A COBRA beneficiary must be given the same open enrollment period rights as similarly situated active employees covered by the plan, including the right to switch to another plan, another benefit package, or to add or eliminate coverage of family members.

Adding Beneficiaries

A qualified beneficiary receiving COBRA coverage has the same special enrollment and open enrollment rights to add coverage for family members as do similarly situated active employees covered by the plan. Children born to or adopted by a qualified beneficiary are qualified beneficiaries, and COBRA coverage may be elected for them. New spouses may be added during special enrollment periods. Spouses and dependents may also be added to coverage during open enrollment periods if the plan allows active employees to do so. New spouses added during special enrollment periods and spouses and dependents added during an open enrollment period are not qualified beneficiaries and are not eligible for extended coverage if the qualified beneficiary experiences a second qualifying event.

Premiums

Continuees may be charged no more than 102 percent of the group rate. For self-insured plans, the charge may be based on actuarial estimates, or in certain cases on the previous year's costs, adjusted for inflation. Premiums from continuees are "timely" if received within 30 days of the due date (or the time allowed by the insurer, if longer).

– Events Cutting Off Continuation Rights

The right to COBRA continuation of coverage can be cut off prematurely if:

- The covered individual fails to pay the premiums in a timely manner;
- The beneficiary (former employee, spouse, or dependent) after electing COBRA becomes covered under another group health plan, through remarriage, or for another reason;
- The employer terminates its group health plan for all of its employees;
- The beneficiary, after electing COBRA, becomes entitled to Medicare benefits; *or*
- A qualified beneficiary engages in conduct that would justify the plan in terminating coverage of a similarly situated participant or beneficiary not receiving continuation coverage (e.g., fraud).

– Notice Requirements

Department of Labor (DOL) regulations clarify the various COBRA notice requirements (*29 CFR 2590.606-1et seq.*). The regulations cover the following:

- The general notice of COBRA rights that is provided to participants and spouses;
- The qualifying event notices employers must provide to plan administrators;
- The notice employees and family members must provide to plan administrators;
- The election notice that plan administrators must provide to qualified beneficiaries;
- The notice plan administrators must provide to individuals requesting COBRA coverage when the coverage is unavailable; *and*
- The notice plan administrators must provide to qualified beneficiaries when COBRA coverage is terminated before the individual's maximum coverage period ends.

Given the importance of Medicare availability to qualified beneficiaries, in May 2020 the DOL updated its model COBRA notices (both the general notice and the qualifying event notice) to elaborate on the consequences of Medicare entitlement.

The General Notice of COBRA Rights

The General Notice of COBRA Rights provides basic information about COBRA. It must be provided to covered employees and spouses by the latter of 90 days after plan coverage begins or 90 days after the plan first becomes subject to COBRA. Including the required information in the summary plan description (SPD), which must be distributed by the same deadline, can also satisfy the requirement. But note, the SPD only has to go to the covered employee, not to the spouse.

If “on the basis of the most recent information available to the plan” a married couple resides at the same address, one notice addressed to both can be used. If the employee and spouse enroll at different times, a separate notice must be sent to each. There is no requirement to furnish a general notice to dependent children. The regulation lists the required contents and includes a model notice that may be used and, when appropriately modified and supplemented, will be deemed to satisfy the content requirement.

Contents of the general notice. The general notice must be written so it can be understood by the average plan participant and must contain the following information:

- The name of the plan and the name, address, and telephone number of a party or parties from whom additional information about the plan and continuation coverage can be obtained;

- A general description of the continuation coverage under the plan, including identification of the classes of individuals who may become qualified beneficiaries; the types of qualifying events that may give rise to the right to continuation coverage; the obligation of the employer to notify the plan administrator of the occurrence of certain qualifying events; the maximum period for which continuation coverage may be available; when and under what circumstances continuation coverage may be extended beyond the applicable maximum period; and the plan's requirements applicable to the payment of premiums for continuation coverage;
- An explanation of the requirement that a qualified beneficiary notify the plan administrator of a qualifying event that is a divorce, legal separation, or a child's ceasing to be a dependent under the terms of the plan and the plan's procedures for providing this notice;
- An explanation of the requirement that a qualified beneficiary provide notice to the plan administrator of a determination by the SSA that a qualified beneficiary is disabled and a description of the plan's procedures for providing this notice;
- An explanation of the importance of keeping the plan administrator informed of the current addresses of all participants or beneficiaries under the plan; *and*
- A statement that the notice does not fully describe continuation coverage or other rights under the plan and that more complete information regarding such rights is available from the plan administrator and in the plan's SPD.

A model general notice may be obtained at https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra (https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra).

Delivery of the general notice. Plan administrators are to deliver the general notice by means reasonably calculated to ensure actual receipt of the material by plan participants and beneficiaries. The notice must be sent by a method or methods likely to result in full distribution. In-hand delivery to an employee at his or her worksite is acceptable, but merely placing copies of the material in a location frequented by participants is never okay. It is also acceptable to include the notice as a special insert in a periodical distributed to employees, such as a union newspaper or a company publication, if the distribution list for the periodical is comprehensive and up to date. Also, a prominent notice on the front page of the periodical should advise readers that the issue contains a notice about rights under the plan and the law that should be read and retained for future reference.

The notice may be distributed through the mail by first, second, or third class. However, distribution by second- or third-class mail is acceptable only if return and forwarding postage is guaranteed and address correction is requested. Any material

sent by second- or third-class mail that is returned with an address correction must be sent again by first-class mail or personally delivered to the participant at his or her worksite.

Electronic distribution. Electronic media may be used for the general notice in accordance with the procedures established by the DOL for other benefit plan disclosures.

Substituting the election notice for the general notice. It is possible that a plan administer may be required to provide an election notice before the time limit for providing the general notice has expired. In such a case, the DOL says that it will be sufficient to provide the election notice only.

Notices to the Plan Administrator

Employer's qualifying event notice to plan administrator. Employers must notify plan administrators of qualifying events, including terminations of employment, reductions in hours, death of the employee, bankruptcy of the employer, or the employee's Medicare entitlement, within 30 days of the event (*29 CFR Sec. 2590.606-2*).

Employee or family member notice to plan administrator. Employees or their family member must notify the plan administrator of qualifying events such as divorce or legal separation and loss of dependent status (including when these are second qualifying events) and of a qualified beneficiary's disability or cessation of disability (*29 CFR Sec. 2590.606-3*). Plans must establish a reasonable procedure for furnishing these notices. A plan's procedure generally will be deemed reasonable if it is described in the plan's SPD, specifies who is designated to receive notices, specifies how qualified beneficiaries must give the notice, and lists the required content of the notice. If a plan does not have reasonable procedures, notice will be deemed to have been provided if information adequately identifying a specific qualifying event is communicated to any of the parties that would customarily be considered in charge of the plan. A specific notice form may be required.

Warning: A plan without a reasonable procedure will have to accept written and oral notices that identify a qualifying event and are made in a way that is reasonably calculated to bring the information to the attention of either the organizational unit that customarily handles benefit matters or any officer of the employer. This means an oral notice to anyone with authority or responsibility for health benefits may satisfy the requirement.

A plan may not reject an incomplete notice as untimely if the notice is provided

within the plan's time limits and contains enough information to enable the plan administrator to identify the plan, the covered employee, qualified beneficiaries, the qualifying event or disability determination, and the date on which it occurred. The plan administrator can require qualified beneficiaries to supply the missing information.

The period for providing a notice of a qualifying event must run to at least 60 days following the qualifying event. If the plan provides that COBRA begins when coverage is actually lost, the 60 days begin then.

Election Notice from Plan Administrators

The notice that plan administrators provide to qualified beneficiaries must be in writing and must be provided within 14 days after receipt of a notice of a qualifying event from the employer or from the employee or family member (*29 CFR Sec. 2590.606-4*). In cases where the employer is the plan administrator, this notice is due within 44 days of the event or loss of coverage (whichever applies). This notice must include the following information:

• The name of the plan and the name, address, and telephone number of the party responsible for the administration of continuation coverage benefits;

• Identification of the qualifying event;

• Identification, by status or name, of the qualified beneficiaries who are entitled to elect continuation coverage and the date on which coverage under the plan will terminate (or has terminated) unless continuation coverage is elected;

• A statement that each individual qualified beneficiary has an independent right to elect continuation coverage, that a covered employee or a qualified beneficiary who is the employee's spouse may elect continuation coverage on behalf of all other qualified beneficiaries, or that a parent or legal guardian may elect continuation coverage on behalf of a minor child;

• An explanation of the plan's procedures for electing continuation coverage, including an explanation of the time limits;

• An explanation of the consequences of failing to elect or waiving continuation coverage, including how such a decision will affect the future rights to group health coverage free of preexisting condition limitations, guaranteed access to individual health coverage, and special enrollment rights, as well as a reference to where to obtain additional information about such rights, and a description of the plan's procedures for revoking a waiver of the right to continuation coverage;

• A description of the continuation coverage that will be made available under the plan, if

elected, including the date the coverage will begin, either by providing a description of the coverage or by referring to the plan's summary plan description;

• An explanation of the maximum period for which continuation coverage will be available and an explanation of any events that might cause continuation coverage to terminate early;

• A description of any circumstances under which the maximum period of continuation coverage may be extended due to the occurrence of a second qualifying event or a determination by the SSA that the qualified beneficiary is disabled and the length of any such extension;

• A description of the plan's requirements for qualified beneficiaries to provide notice of a second qualifying event, notice of a Social Security disability determination, and notice that a disabled qualified beneficiary has been determined to no longer be disabled, including the time limits for providing such notices and the consequences of failing to provide such notices;

• A description of the amount, if any, that each qualified beneficiary will be required to pay for continuation coverage;

• A description of the due dates for payments, the qualified beneficiaries' right to pay on a monthly basis, the grace periods for payment, the address to which payments should be sent, and the consequences of delayed payment and nonpayment;

• An explanation of the importance of keeping the administrator informed of the current addresses of all participants or beneficiaries under the plan who are or may become qualified beneficiaries; *and*

• A statement that the notice does not fully describe continuation coverage or other rights under the plan, and that more complete information is available in the plan's summary plan description or from the plan administrator.

This election notice must go to each qualified beneficiary except that a single notice may go to a covered employee and spouse residing at the same address, or to the covered employee or spouse for each dependent child residing at the same address. Determination of residence may be made "on the basis of the most recent information available to the plan."

Model Election Notice and Election Form. The DOL has issued a Model COBRA Continuation Election Notice and Election Form that includes all the required content. The model election notice may be obtained at https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra (https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra).

Since some qualified beneficiaries may want to consider and compare health

coverage alternatives to COBRA continuation coverage that are available through health insurance exchanges (or “marketplaces”), the DOL has modified the election notice under COBRA to include this information.

Additional COBRA Notice Requirements

Notice of unavailability of continuation coverage. The DOL's COBRA notice regulations add two additional notice requirements for plan administrators not specified in the COBRA statute. The first is the notice of unavailability of continuation coverage (*29 CFR Sec. 2590.606-4*). This notice must be provided after receiving a notice of a qualifying event from an employee or family member if the plan determines that an individual is not eligible for COBRA. This notice should explain why the individual is not entitled to continuation coverage and should be provided within 14 days after the plan administrator received notice of the qualifying event from the individual.

Notice of termination of continuation coverage. The second additional requirement is a notice of termination of continuation coverage that must be provided when the plan terminates coverage before the end of the maximum coverage period (*29 CFR Sec. 2590.606-4*). This notice must be in writing and contain the reason for the early termination, the date of the termination, and the rights the qualified beneficiary may have to alternative coverage. The early termination notice must be provided as soon as practicable following the decision to terminate.

The DOL has not issued model language for the notice of noneligibility for COBRA coverage and the notice of early termination of COBRA coverage.

− COVID-19 Extensions

In response to the COVID-19 outbreak, the DOL (through the EBSA) and Treasury (IRS) published a notice, and the EBSA issued a package of guidance and relief, for affected employee benefit plans. The EBSA’s package includes Disaster Relief Notice 2020-1 and COVID-19 FAQs for participants and beneficiaries (answering basic participant questions). This guidance includes important rules governing the extension of COBRA notice and election periods.

According to the EBSA/IRS notice, published May 4, 2020 (85 *Fed. Reg.* 26351), group health plans must disregard the “outbreak period” for purposes of determining certain COBRA-related deadlines. The defined “outbreak period” runs (retroactively) from March 1, 2020, until 60 days after the COVID-19 national emergency ends (or

such other date as the federal agencies announce).

If there are different outbreak period end dates for different parts of the country, the agencies will issue additional guidance for relevant areas. This could mean that the outbreak period could be different for different parts of the country (and, theoretically, different parts of certain states). With regard to COBRA compliance, the outbreak period must be disregarded for purposes of:

- The COBRA election period;
- The deadline to pay COBRA premiums; *and*
- The deadline for a plan administrator to provide COBRA election notices to qualified beneficiaries.

In applying the applicable COBRA time periods during the outbreak period, plan administrators need to consider how to implement these timing rules.

Aside from extending COBRA notice, election, and premium payment periods, Notice 2020-01 (https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/disaster-relief/ebsa-disaster-relief-notice-2020-01) provides some relaxed standards for delivery of required notices. A responsible plan fiduciary will not be in violation of ERISA for failure to timely furnish a notice, disclosure, or other required document during the outbreak period, if:

- The responsible fiduciary acts in good faith; *and*
- The notice, disclosure, or document is furnished as soon as administratively practicable under the circumstances.

Good faith includes using electronic alternative means of communicating with plan participants and beneficiaries who the plan fiduciary reasonably believes have effective access, including e-mail, text messages, and continuous-access websites (for example, an intranet site).

− Second-Chance Elections for Trade Adjustment Assistance-Eligible Individuals

The Trade Adjustment Assistance Act of 2002 requires that a “second-chance” COBRA election be provided to individuals who did not elect COBRA during the general election period, but who later became eligible for trade adjustment assistance (TAA). Workers who have lost their jobs as a direct result of competition from foreign trade or production being moved overseas may be eligible for TAA benefits. An individual is entitled to a second COBRA election period if he or she:

- Becomes eligible for TAA;
- Lost his or her group health plan coverage because of a job loss that resulted in eligibility for TAA; *and*
- Did not elect COBRA during his or her initial COBRA election period.

Second-chance election period. A TAA-eligible individual who previously did not elect COBRA may elect continuation coverage and may exercise a second-chance election during the 60-day period that begins on the first day of the month in which the individual becomes a TAA-eligible individual, but only if the election is made no later than 6 months after the date of the original loss of coverage.

━ Coordination with FMLA

Taking **Family and Medical Leave Act (FMLA)** leave is not always a qualifying event that sets off COBRA's notice requirements (*26 CFR Sec. 54.4980B-10*). A qualifying event occurs *only* if three conditions are met:

- The employee (or spouse or dependent) is covered on the day before the first day of FMLA leave (or becomes covered during the FMLA leave) by the employer's group health plan;
- The employee does not return to work at the end of FMLA leave; *and*
- The employee would, in the absence of COBRA, lose coverage under the health plan before the end of the maximum coverage period provided by COBRA.

If *all* three conditions are met, a qualifying event occurs on the last day of FMLA leave. The maximum COBRA coverage period is generally measured from the date of this qualifying event. If coverage would be lost on a later date, the maximum coverage period would be measured from that date.

The Internal Revenue Service (IRS) also states that:

- State and local laws that may require group health plan coverage during a leave of absence for more time than required by FMLA do not affect the determination of when a COBRA qualifying event has occurred.
- A qualifying event still occurs even if an employee fails to pay his or her share of group health plan premiums during the FMLA leave or declined group health plan coverage during the leave.
- The right to take COBRA continuation may not be conditioned upon repayment by an ex-

employee of any premiums paid by the employer for group health coverage during FMLA leave.

− Conversion Rights

COBRA requires that if a plan makes conversion options available to any participants, it must offer a qualified beneficiary the option to enroll under an individual health plan at the end of the applicable 18- or 36-month continuation period. The insured must pay the entire premium at the applicable individual rate, which may be more expensive.

− State Continuation Requirements

Both Tennessee law and the federal **Consolidated Omnibus Budget Reconciliation Act (COBRA)** permit employees to continue their group health coverage if they lose coverage for certain specified reasons. Tennessee's requirements apply to all insured group plans that provide hospital, medical, or surgical benefits (*TN Code Ann. Sec. 56-7-2312*). The law covers all such plans regardless of the size of the employer, but it provides for a shorter continuation period than does federal COBRA. According to federal law, when comparing state and federal continuation rights, employees may use the law that is more favorable to their situation.

Coverage

Tennessee law requires that group insurance, which provides hospital, surgical, or major medical benefits, allow an employee whose insurance has been terminated for any reason and who has been continuously insured under the group policy for at least three months to continue such coverage for the part of the policy month remaining at termination plus three additional policy months. Full payment of the entire monthly group premium for this continuation of coverage must be paid to the employer on or before the beginning of each month's coverage.

An employee is not entitled to have coverage continued if the group policy was terminated in its entirety or was terminated for the insured class to which the

employee belonged. The employee has the right to conversion if he or she loses coverage for these reasons.

An employee is not entitled to have coverage continued or a converted policy issued if the termination of the employee's insurance occurred because:

- The employee failed to pay any required contribution;
- The employee is eligible for Medicare; *or*
- The discontinued group coverage was replaced by similar group coverage within 31 days.

Individuals who lose group coverage because of divorce from the employee or because of the death of the employee are entitled to have their coverage continued under the group policy for the fractional policy month remaining at termination plus up to 15 additional policy months upon payment in advance to the employer of the full month's group premium on or before the beginning of each month's coverage, including any portion of the premium usually paid by the employer.

Individuals whose group coverage is terminated during pregnancy must be allowed to have their coverage continued under the group policy for the fractional month remaining at termination plus at least six months after the pregnancy ends but no more than the end of the six months after the end of the three-month period of continuation within which the pregnancy ended.

Conversion

"Conversion" is the right to convert to an individual policy when group coverage ends. Typically, a person who converts to an individual policy does so after the expiration of state or federal continuation rights.

Under state law, conversion must be offered at the end of the continuation period or when group coverage is lost for any other reason. The right to convert is not available if the person is eligible for Medicare or for similar benefits under another plan or under state law.