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18th EDITION

EMPLOYMENT LAW HANDBOOK

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- Year-round focus on identifying, remediating, and preventing pay equity issues
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- Model internal equity
- Benchmark external competitiveness
- Recommend strategies for remediation
- Develop an effective communication plan
- Update continuously with key events such as new hires, performance reviews, and more



Employment Law Handbook

Indiana and Federal Employment Law

18th Edition

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Dear Reader:

There is only one resource in Indiana that provides employers with a detailed description of the entire landscape of federal and Indiana employment laws: the ***Employment Law Handbook***. Faegre Drinker Biddle & Reath LLP is again pleased to work with the Indiana Chamber of Commerce to provide Indiana employers with this 18th Edition of the ***Handbook***.

With over 1,300 attorneys, Faegre Drinker is among the 50 largest law firms headquartered in the United States. In addition, the firm has more than 100 lawyers firm-wide who devote their practices to the representation of employers in labor and employment matters. Faegre Drinker can handle any type of labor or employment problem confronting employers. The attorneys on Faegre Drinker's Labor & Employment Practice Group pride themselves on being practical problem-solvers. It is this non-legalistic approach that has made the ***Employment Law Handbook*** the preeminent layman's guide to employment law in Indiana.

We appreciate our partnership with the Indiana Chamber of Commerce and hope that you will find the ***Handbook*** to be helpful as you respond to the labor and employment issues facing your organization.

Very truly yours,

Stuart R. Buttrick



Faegre Drinker Biddle & Reath is a leading law firm in Indiana and one of the 50th largest law firms in the United States. Faegre Drinker provides a global reach with offices in 21 locations in the United States, United Kingdom, and China.

Faegre Drinker’s labor and employment practice features more than 100 lawyers who cover the spectrum of issues affecting the employment relationship, employee mobility, compensation, and benefits. The firm helps employers navigate complex work force issues and advise product and service providers operating in the retirement and compensation markets.

Faegre Drinker has the size and depth to support specialization in key areas of employment and benefits law, leveraging professionals’ knowledge by collaborating with each other to ensure that clients receive integrated, strategic representation from the lawyer or team of lawyers who can most effectively assist them. Areas of labor and employment practice include:

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- Employment counseling and compliance
- Employment litigation
- Executive compensation
- Federal/state employment laws and regulations
- Human resources advice and training
- Immigration and global mobility
- Labor management relations
- Leave and disability management
- Social media counseling and guidance
- Trade secrets litigation
- Worker’s compensation management
- Workplace safety and OSHA

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Overview

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Stuart has defended and prosecuted numerous unfair labor practice charges before the NLRB and has represented employers in over a hundred arbitrations, unfair labor practice trials and contract negotiations. He has represented employers before the NLRB in 25 states. Stuart's success in labor arbitrations has involved issues such as terminations and discipline (including of union leadership), subcontracting, workplace violence, customer and patient abuse, and a variety of contract interpretation matters.

Stuart has successfully represented hundreds of clients around the country in the manufacturing, energy, health care and retail sectors in obtaining concessionary labor agreements with their unions, defeating strike activity and union organizing drives, decertifying unions, and handling union jurisdictional disputes.

Stuart has particular proficiency in construction labor law and represents union and non-union construction companies around the United States.

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Stuart also represents employers in employment litigation and administrative charges. He has defended employers in hundreds of state and federal court cases and administrative charges in 23 states and has handled appellate work before multiple federal Circuit Courts of Appeal. Stuart also offers his clients practical solutions to challenging personnel and policy issues.

Preface

You have in your hands what we believe to be the most current, comprehensive and user-friendly handbook covering Indiana and federal employment laws. It is designed to assist the business community in its effort to comply with the numerous and often complex employment laws affecting Indiana business.

Through the substantial efforts of attorneys with the law firm Faegre Drinker Biddle & Reath LLP, the Indiana Chamber is proud to present the Indiana business community with the 18th edition of this handbook. We congratulate the authors on doing an outstanding job of making the material understandable and concise.

We hope that you will utilize this handbook to answer many of your day-to-day employment law questions. However, if you have an issue or a set of facts for which you cannot readily find an answer and you are a member of the Indiana Chamber of Commerce, feel free to call the Chamber's HR helpline at (317) 264-3167 and we will be happy to assist you with your issue.



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Human Resources Director

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Michelle holds a B.S. in management from Indiana Wesleyan University and is a certified Senior Professional in Human Resources (SPHR) and SHRM-SCP.

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Introduction

Understanding Which Laws Apply to Your Company

With ever-increasing employment legislation at the federal, state, and even local levels, understanding which laws apply to your organization can sometimes be an overwhelming and daunting task. This guide is designed to help you determine which laws cover your organization and provide you with an overview regarding many employment issues such as interviewing, discrimination, working with independent contractors, employing foreign employees, drugs and alcohol in the workplace, and various other important topics.

Below you will find a table designed to help you determine which laws apply to your organization. Please note: even if a particular law does not apply, that does not mean you should ignore it. All of these laws were created with the employee-employer relationship in mind. Even if they do not apply, you may find them to be helpful in designing your policies and procedures. Please note: In the table below, the letter “S” indicates a state law; the letter “F” indicates a federal law.

Employment-Related Federal and State Laws Applicability by Number of Employees	
Rule/Regulation	Number of Employees
Age Discrimination in Employment Act (ADEA) (F)	!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!! 20 employees
Americans with Disabilities Act (ADA) (F)	!!!!!!!!!!!!!!!!!!!!!!!!!!!!!! 15 employees
“Bring-Your-Gun-to-Work” (S) and Disclosure of Firearm or Ammunition Information (S)	! 1 employee
Civil Rights (S)*	!!!!!! 6 employees
Civil Rights Act of 1964 (F)	!!!!!!!!!!!!!!!!!!!!!!!!!!!!!! 15 employees
Consolidated Omnibus Budget Reconciliation Act (COBRA) (F)	!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!! 20 employees
Consumer Credit Protection Act (CCPA) (F)	! 1 employee
Employee Polygraph Protection Act (EPPA) (F)	! 1 employee
Employee Retirement Income Security Act (ERISA) (F)	! 1 employee
Equal Pay Act (EPA) (F)	! 1 employee
Expressing breast milk (S)	!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!! 25 employees
Fair Credit Reporting Act (FCRA) (F)	! 1 employee
Fair Labor Standards Act (FLSA) (F)	! 1 employee
Family and Medical Leave Act (FMLA) (F)	!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!! !!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!!! 50 employees

* Indiana’s law prohibiting age discrimination in employment applies to organizations with one or more employees, unless the organization is covered by the federal ADEA. Therefore, with respect to age discrimination, Indiana law covers employees with one or more employees. Indiana’s law prohibiting disability discrimination applies to organizations with 15 or more employees.

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Federal Insurance Contributions Act (FICA) (F)	1 employee
Genetic Information Nondiscrimination Act (GINA) (F)	15 employees
Health Insurance Portability and Accountability Act (HIPAA) (F)	1 employee
Immigration Reform and Control Act (IRCA) (F) National origin discrimination Citizenship discrimination	1 employee 4 to 14 employees 4 employees
Income tax withholding (S and F)	1 employee
Indiana Occupational Safety and Health Act (IOSHA) (S)/OSHA (F)	1 employee
Labor Management Relations Act (LMRA) (F)	1 employee
Mental Health Parity Act (MHPA) (F)/Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA) (F)	51 employees
Minimum Wage Law (S and F)	1 employee if business has \$500,000 or more in annual sales or if employee works in interstate commerce (F) 2 employees (S)
National Labor Relations Act (NLRA) (F)	1 employee
New Hire (S)/Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (F)	1 employee
Newborns' and Mothers' Health Protection Act (NMHPA) (F)	1 employee
Off-Duty Use of Tobacco by Employee (S)	1 employee
Patient Protection and Affordable Care Act (PPACA) (F)	Generally, 50 full-time employees
Pregnancy Discrimination Act (PDA) (F)	15 employees
Sarbanes-Oxley Act (SOX) (F)	No employee threshold: Covered entities are any company with a class of securities registered under Section 12 of the Securities Exchange Act or that is required to file reports under Section 15(d) of that act. Its subsidiaries, contractors, subcontractors, or agents may also be covered.
Smoke-Free Air Law (S)	1 employee
Social Security Act (F)	1 employee
Unemployment Act (S) / Federal Unemployment Tax Act (FUTA) (F)	1 employee
Uniformed Services Employment and Reemployment Rights Act (USERRA) (F)	1 employee
Women's Health and Cancer Rights Act (WHCRA) (F)	1 employee
Worker Adjustment and Retraining Notification Act (WARN) (F)	100 employees
Worker's compensation (S)	1 employee

Chapter 1

Employment-at-Will

Employment-at-Will Doctrine

A starting point for a discussion of Indiana law on employment relationships is the doctrine of employment-at-will. In Indiana, an employment relationship that is not for a fixed term is presumed to be at-will. At-will means that either the employee or the employer may terminate the employment relationship at any time and for any reason — a good reason, a bad reason or no reason at all.

The importance to employers of the employment-at-will doctrine is not that it allows them to fire people for no reason. Why would an employer want to? Rather, it allows an employer to discharge an employee for what the employer considers sufficient reason; the employer does not have to prove the basis or sufficiency of that reason to any third party — not to an arbitrator, an administrative agency or a court (unless, of course, the former employee challenges his/her termination in a subsequent legal action).

Employment Relationships That Are Not At-Will

Employment relationships in which termination of employment is governed by contract are not at-will. These include the following:

- Employment according to a contract of employment for a fixed term (i.e., a contract by which both the employer and the employee bind themselves to the relationship for a fixed time). Where there is such a contract, the employer is bound by the terms of the contract and generally can discharge the employee during the term of the contract only for cause. A contract for a fixed term of one year or less can be oral; a contract for a term of more than one year must be in writing to be enforceable. A contract that may or may not be performed within one year — e.g., a contract for lifetime employment — is not subject to the writing requirement. A contract for employment until retirement if the parties intend retirement to be in more than one year must be in writing.
- Employment according to a collective-bargaining agreement that provides for termination of employment only with cause.
- Employment that the employer has promised is permanent employment and for which the employee has given independent consideration. Promises of permanent employment include: representations that employment will be for life, until retirement, or for as long as the employee does his or her job or stays out of trouble; or representations (e.g., in employee handbooks) that suggest that termination of employment must be for cause. Indiana courts have found independent consideration sufficient to support such a promise in several circumstances, including:
 - in an employee's release of claims against the employer;
 - in an employee's assignment of a valuable lease to the employer; and
 - in a 1987 case, the Indiana Supreme Court ruled that the independent consideration requirement was satisfied where the employee alleged that:
 - his prior employment uniquely qualified him for the new job;

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- he had lifetime employment in his prior job;
- the employer recruited him to fill the new job;
- he advised the employer that he would leave his prior position only if the new job offered the same permanence, advancement, and benefits; and
- the employer told him he would have permanent employment.

Although an employee's simply leaving his or her prior employment is not consideration for a promise of permanent employment, where the employer knows the employee has a job with assured permanency (or assured non-arbitrary firing policies) and the employee accepts the new job only upon receiving assurances that the new employer could guarantee similar permanency, those facts elevate the employment relationship to one in which the employer needs just cause to terminate the employee's employment without liability. This is an example of independent consideration.

Promises of Permanent Employment

For many years, Indiana courts have held that an employer's promises or representations that employment would be permanent, or that the right to discharge would be restricted, were not enforceable in the absence of independent consideration. Courts in Indiana have held that it is not consideration for such promises when the employee:

- performs his or her work, even above and beyond reasonable expectations;
- relinquishes existing employment or gives up a new business that has little income;
- moves his or her household or family; or
- purchases a home in the new location.

Indiana courts have held that, with such actions, the employee is not giving the employer independent consideration but, rather, is simply putting himself or herself in a position to accept the new employment.

Including at-will statements or contract disclaimers in handbooks and other statements of policy impedes a discharged employee's efforts to show that the employer intended to contract respecting job security or that the employee reasonably could have relied on a job security promise. (However, Indiana court decisions over the last few years make clear that a contract's job security provision will rebut the presumption of employment-at-will.)

Absent independent consideration, an employee may still be able to enforce an employer's promise of permanent or continued employment if the employee relied on that promise to his detriment. If the employee prevails on such a promissory estoppel claim, the employee's damages are limited to those resulting from the employee's detrimental reliance; the employee will not have the benefit of the court altering the employment relationship from at-will to one that requires just cause for termination.

Exceptions to Employment-at-Will

The historical meaning of "employment-at-will" should be revised to specify that an at-will employee can be discharged for any reason, provided that it is not for one of the reasons forbidden by statute or judge-made law. These forbidden reasons are the exceptions to employment-at-will.

Statutory Exceptions

Federal and Indiana statutes that prohibit an employer from discharging an employee for particular reasons trump the employment-at-will doctrine and create causes of action for discharged employees against their former employers.

Federal statutes include the following:

- The **National Labor Relations Act (NLRA)** prohibits employers from discharging employees because of activities on behalf of or in support of unions; for engaging in protected concerted activity; or for filing a charge with the National Labor Relations Board or participating in the investigation or prosecution of such a charge.
- **Title VII of the Civil Rights Act of 1964** prohibits employers with 15 or more employees from discharging employees because of their race, sex (including sexual orientation), color, national origin, religion, or because they have filed a Title VII charge or lawsuit or engaged in other activity protected by the statute.
- The **Civil Rights Act of 1866** prohibits employers from discharging employees because of race.
- The **Immigration Reform and Control Act (IRCA)** prohibits employers with four or more employees from discharging employees because of national origin or citizenship.
- The **Age Discrimination in Employment Act (ADEA)** prohibits employers with 20 or more employees from discharging employees because of age if they are age 40 or older or because they have filed an age discrimination charge or lawsuit or engaged in other activity protected by the statute.
- The **Americans with Disabilities Act (ADA)** makes it unlawful for employers with 15 or more employees to discharge employees on the basis of disability, a perception of disability, association with a person who is disabled, or because they have filed a charge or lawsuit or engaged in other activity protected by the statute.
- The **Rehabilitation Act** prohibits certain employers, including those with federal government contracts or receiving federal financial assistance, from discharging qualified employees with a disability because of that disability.
- The **Employee Retirement Income Security Act (ERISA)** makes it unlawful for employers to discharge employees for exercising rights under that statute, which, among other things, deals with employee benefit plans.
- The **Occupational Safety and Health Act (OSHA)** forbids employers from discharging employees for making a workplace safety complaint or report, or for participating in a proceeding under that act.
- The **Fair Labor Standards Act (FLSA)** makes it unlawful for an employer to discharge employees for filing a complaint or for participating in a proceeding under that act.
- The **Consumer Credit Protection Act (CCPA)** makes it unlawful for an employer to discharge employees because their wages are subject to garnishment for any one indebtedness.
- The **Bankruptcy Act** prohibits an employer from discharging employees for filing for bankruptcy protection or for being associated with such a person.
- The **Jury System Improvement Act of 1978** makes it unlawful for an employer to discharge employees for serving on a federal jury (or for the attendance/scheduled attendance in connection with such jury service).

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- The **Family and Medical Leave Act (FMLA)** makes it unlawful for an employer to discharge employees for taking family and medical leave protected under the act or otherwise exercising rights protected under the act. This provision has been supplemented by the Families First Coronavirus Response Act of 2020 (FFCRA), which adds additional protections and benefits for employees taking leave related to COVID-19.
- The **Uniformed Services Employment and Re-employment Rights Act (USERRA)** makes it unlawful for an employer to discharge employees on the basis of military status, participation in military service, or exercising rights protected under the act. Moreover, it contains provisions that convert the at-will relationship into a discharge for cause relationship under certain circumstances after employees return to work following military leave of a minimum specified duration.
- The **Sarbanes-Oxley Act (SOX)** makes it unlawful for an employer to discharge employees for filing, testifying, participating, or otherwise assisting in a proceeding filed or about to be filed under that act.
- The **Employee Polygraph Protection Act of 1988 (EPPA)** makes it unlawful for private employers to use polygraph (lie detector) tests either for pre-employment screening or during the course of employment, with certain exceptions.
- The **Genetic Information Non-Discrimination Act of 2008 (GINA)** prohibits discrimination or harassment against prospective job applicants or current employees on the basis of genetic information. GINA also restricts employers' ability to request, require, purchase, obtain, or disclose genetic information.

State statutes include the following:

- The **Indiana Civil Rights Law** prohibits most employers with six or more employees from discharging employees because of race, religion, color, sex, disability, national origin or ancestry, or because they filed a complaint, testified in a hearing, or assisted in an Indiana Civil Rights Commission investigation.
- The **Indiana Age Discrimination Law** prohibits most employers not covered by the federal Age Discrimination in Employment Act from discharging employees between the ages of 40 and 75 on the basis of their age.
- The **Indiana Veterans' Affairs Law** prohibits employers from discharging reservists for taking statutorily protected training leaves.
- The **Indiana Occupational Safety and Health Act (IOSHA)** makes it unlawful for employers to discharge employees for making a complaint under that law or for testifying or preparing to testify under the law.
- Indiana law prohibits employers from discharging an employee because the employee has filed a petition for **protective order** (whether or not the protective order itself has been issued) or based on the actions of the person against whom the protective order is sought.
- Indiana law prohibits employers from discharging employees for performing **jury duty** or responding to a **witness subpoena** in a criminal case.
- A provision of the **Uniform Consumer Credit Code** prohibits employers from discharging employees because of wage garnishments.
- The **Minimum Wage Law of 1965** prohibits employers from discharging or otherwise discriminating against any employees for instituting any action to recover wages under the Law,

for participating in the institution of any action to recover wages under the Law, or for demanding the payment of wages under the Law.

- A provision of the **Health Code** makes it unlawful for an employer to discharge employees for complaining to the State Board of Health that an employer has failed to comply with requirements for providing training on infection control measures used to prevent the transmission of dangerous communicable diseases, including AIDS.
- Indiana's **Labor and Safety Code** prohibits private employers under public contract from dismissing or taking other adverse employment actions against employees who report in writing the existence of a violation of a federal law or regulation, state law or rule, ordinance of a political subdivision, or the misuse of public resources.
- A provision of Indiana's **Public Safety Code** makes it unlawful for private employers to discipline employees who are volunteer firefighters or volunteer members (and have notified the employer in writing of such) for specified reasons relating to employees' emergency firefighting, emergency response, or to injuries that occur while the employee is engaged in emergency firefighting or emergency response.
- An Indiana statute dubbed the **Smoker's Rights Law** prohibits employers from discharging employees for tobacco use outside the workplace.
- The **Indiana Military Family Leave Act** makes it unlawful for an employer to interfere with, restrain, or deny an employee's request for military family leave protected under the statute or for exercising rights under that statute.
- The **Possession of Firearms and Ammunition in Locked Vehicles Law** prohibits employers from adopting or enforcing policies that prohibit or have the effect of prohibiting an employee from possessing a firearm or ammunition that is locked in the trunk of the employee's vehicle, kept in the glove compartment of the employee's locked vehicle, or stored out of plain sight in the employee's locked vehicle. Exceptions are made for certain types of property, including but not limited to: childcare centers/institutions, emergency shelter childcare institutions, private secure facilities, group homes and emergency shelter group homes. Employers are also prohibited from:
 - inquiring into whether a job applicant or employee owns, possesses, uses or transports firearms or ammunition, unless the disclosure concerns the possession, use, or transportation of a firearm or ammunition used in fulfilling the duties of employment of the individual; and
 - conditioning the terms of employment on a job applicant or employee foregoing the right to lawful ownership, possession, storage, transportation, or use of a firearm or ammunition.

Many of these federal and Indiana statutes are discussed in detail in later chapters.

Judicial Exceptions

Indiana courts have created two additional exceptions to the employment-at-will doctrine based on the public policy of the state. In other words, the courts have added two more reasons that an employer may not discharge an at-will employee without incurring liability.

In some states, public policy exceptions to employment-at-will have become so numerous and unpredictable that exceptions have nearly subsumed the rule. In Indiana, however, the courts have continually narrowly construed the public policy exceptions.

Discharge for Exercising a Statutorily Conferred Right

Indiana was one of the first states to recognize a public policy exception to employment-at-will. In *Frampton v. Central Indiana Gas Co.* (known as *Frampton*), the Indiana Supreme Court held that it is unlawful for an employer to discharge an employee for filing a worker's compensation claim. Otherwise, the court reasoned, the fear of being discharged would deter employees from exercising their statutory right to receive worker's compensation for injuries sustained in the course of employment. The court also pointed to the express provision in the worker's compensation act forbidding any device that would operate to relieve an employer of its obligations under that act. The court held that the threat of discharge for filing a worker's compensation claim would be such a device, and, therefore, a clear violation of the public policy expressed in the act. Thus, the clearly established law in Indiana is that it is unlawful for an employer to fire (or constructively discharge) an employee in retaliation for the employee's making a worker's compensation claim or expressly announcing his or her intention to do so.

What is not as clear is what other statutory rights are similarly protected. In *Frampton*, the Supreme Court stated what sounded like a broader general rule: "When an employee is discharged solely for exercising a statutorily conferred right, an exception to the general rule [of employment-at-will] must be recognized." Despite that broader statement, since *Frampton*, the state courts in Indiana have largely not allowed claims based on the exercise of statutory rights other than those involving worker's compensation. For example, the Supreme Court recently determined that the public policy exception to employment at-will reached "testimony compelled by a subpoena or other statutory duty" in the context of an unemployment hearing.¹ However, to the contrary, one court declined to apply the public policy exception in a case in which the employee claimed to have been discharged for filing an action in small claims court and in another case in which the employee alleged he had been fired for filing an unemployment compensation claim. The Indiana Supreme Court also refused to extend *Frampton* to the claim of a management employee who was discharged because he refused to discharge a subordinate employee with a worker's compensation claim. A few decisions of the federal district courts in Indiana, however, have applied *Frampton* more broadly. Under those cases, as examples, an employer would violate public policy by discharging an employee for refusing to participate in a scheme to set back odometers or for refusing to engage in a conspiracy in restraint of trade.

Discharge for Refusing to Commit an Unlawful Act

The Indiana Supreme Court has since identified a second public policy basis for a wrongful discharge (including constructive discharge) claim. In *McClanahan v. Remington Freight Lines*, the court held that it is unlawful for an employer to discharge an employee for refusing to commit an unlawful act for which he or she would be personally liable. In that case, the employee claimed he had been fired for refusing to drive an overweight load, a violation of the law for which he would have been personally liable. Subsequent cases have determined that the illegal act can be a violation of state or federal law. For example, the Indiana Court of Appeals ruled in *McGarrity v. Berlin Metals, Inc.*, that it was proper to allow a jury to decide whether to impose liability where a former corporate financial officer claimed he was discharged for refusing to certify false financial and tax records that, among other things, could have violated various provisions of the Indiana Code and subjected him to criminal liability.

¹ *Perkins v. Mem'l Hosp. of S. Bend*, 141 N.E.3d 1231, 1241 (Ind. 2020)

Remedy

The Indiana Court of Appeals has held that employees who prove they were fired for a reason that violates public policy are entitled to tort rather than contract damages. Tort damages could include lost future wages, other pecuniary losses, other damages attributable to the wrongful discharge and punitive damages. The fact-finder determines the amount of lost future wages by presuming continued employment for a reasonable time and subtracting amounts the plaintiff earned during the period or would have earned if he or she had mitigated damages by seeking comparable employment.

No Exception for Whistle-Blower Claims

Unlike the courts in many other states, Indiana's courts have refused to apply either of these public policy exceptions to employees who claim to have been fired because they blew the whistle on misdeeds of their employer. Indiana state and federal courts have dismissed claims in this area, including the following:

- A pilot's claim that he was fired for refusing to fly an airplane he deemed not airworthy.
- A drug company employee's claim that he was fired for complaining about unsafe practices.
- An employee's claim that he was fired for reporting that a company officer was receiving kickbacks.

State employees, however, are protected from discharge for reporting violations of law by a whistle-blower statute.

Other Restrictions

Public employees have additional protections under the United States Constitution. Here are two examples:

1. Public employers may not discharge an employee for exercising rights of free speech protected by the First Amendment.
2. Public employers may not discharge an employee without affording due process if the employee has a recognized property interest in the employment. Such a property interest exists where the employment is permanent or terminable only for cause by virtue of a state statute or the state's common law; an at-will employee in the public sector has no such protected property interest.

State employees also are protected by a whistle-blower statute that prohibits the discharge of an individual for reporting violations of law or misuse of public resources.

Unintended Contractual Obligations

In many jurisdictions, courts have whittled away the employment-at-will doctrine using contract theories to impose duties on employers that they may not have intended to undertake. In those jurisdictions, contractual duties have been found in employers' employment applications, statements, policies and provisions in employee handbooks. With Indiana courts constantly being pressed to join those jurisdictions, employers should always take care to protect against unintended contractual obligations. Precautionary measures include the following:

- Eliminating terms such as "permanent employment" or "guaranteed employment" from advertisements and application forms.

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- Including in the employment application statements that:
 - the application is not intended to be a contract; any resulting employment is for no fixed period of time; and the employment relationship may be terminated at any time by the individual or the employer;
 - printed materials such as policies, practices, handbooks, or other documents do not (and are not intended to) create any guarantee of employment. Employment applications also should state that the employer has the right to modify or terminate policies, practices, benefit plans or other programs at any time; or
 - no individual, other than a specified officer, has authority to enter into an agreement for any specific period of time or to make an agreement contrary to the statements above. Any such agreement must be in writing and signed to be binding.
- Having applicants sign an acknowledgement that they have read these provisions in the application.
- Teaching those involved in the interview process to avoid statements such as:
 - “As long as you perform well, you will have a job”;
 - “We are looking for someone for permanent employment”;
 - “We are looking for individuals for the long-term”; or
 - “We always have a good reason before we terminate someone.”
- Avoiding language that suggests employment for a definite period (i.e., references to how long a period the person will spend in training, in the entry-level position, or at one location, and statements that suggest there are any restrictions on the employer’s right to discharge).
- Using employee handbooks to emphasize the at-will nature of the relationship, by including statements such as:
 - “The handbook is not an employment agreement or contract”;
 - “Employment is for no definite duration”;
 - “The employment relationship is at-will and may be terminated at any time by either the employee or the employer”;
 - “No company representative, other than one specifically identified, has the power to enter into an agreement contrary to the at-will provision”; or
 - “The terms and provisions of the handbook and company policies are subject to change.”
- Avoiding language suggesting that:
 - the individual is guaranteed employment or has permanent employment;
 - the handbook is a contract;
 - the employee will be employed as long as he or she performs his or her job satisfactorily; or
 - employment will be terminated only for just cause.

Employees who have completed their probationary or trial period should be called regular employees, not permanent employees. Explanations concerning the trial period should avoid any implication that, once

it is completed, employees obtain some additional right to continued employment. Consider having certain benefits begin at the end of the trial period to distinguish it from regular employment in a way unrelated to the at-will nature of either status.

Provisions in employee handbooks regarding discipline should make clear that the employer has reserved its discretion to determine appropriate discipline. If progressive discipline procedures are set out, the handbook should state that they are only guidelines and that the employer may deviate. If the handbook includes specific reasons for discharge, state that those reasons are merely examples.

Allow flexibility in terms of commitments about performing employee evaluations. It is better to say that performance will be evaluated periodically or that the employer will attempt to evaluate employee performance annually rather than promising evaluations on a schedule the employer may not be able to keep.

Finally, employees should sign an acknowledgement that they have received and read the handbook and any subsequent amendments or revisions.

This chapter was edited by Alexander Preller, Associate.

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Written Employment Contracts

Formalities

As discussed in the preceding chapter, most employment relationships are at-will and not governed by a written contract. If the employment relationship is to be for some definite period of time or if the termination of such relationship is to be limited in some way, a written employment contract should be used. Additionally, in certain instances a written employment agreement may be desirable in the context of an at-will relationship to memorialize certain of the terms and conditions of the employment.

A written employment agreement should be prepared individually to address the particular employment relationship. The document should state the rights and obligations of the employer and the employee on such important matters as compensation; description of employment; duties of the employee; term of employment; and provisions for termination. Employers may want to consider including a dispute resolution provision that would require disputes to be resolved by arbitration or other alternative dispute resolution procedures. There are pros and cons to an alternative dispute resolution provision, and employers should consult with legal counsel before including such provision in an employment agreement.

Employment contracts must be signed by both the employer and employee. In some cases, however, the employment contract may be deemed to create a binding contract when signed only by the employer if the employee begins to perform the services as detailed in the writing. Thus, employers must be careful not to imply a contract if that is not their intent. Employers should avoid writing and signing offer letters that could be misconstrued as employment contracts if such contractual obligations are not intended. If a contract is intended, employers should include all necessary elements as discussed in this chapter in any offer letter sent to a prospective employee so that it will later be enforceable. Because Indiana imposes a different statute of limitations (the time that an employee can bring a claim against the employer) for written employment contracts than it does for oral contracts, an employee may argue that a written offer letter extends the period of time that the employee can bring such an action. Where employment is intended to be at-will, clear language to that effect should be included. If employment is for a specific term, the contract should include elements regarding when, how and for what reasons termination will occur.

Historically, Indiana case law has not supported the creation of an employment contract based upon written employee handbooks or other writings posted or distributed by an employer. However, at least one Indiana case has held that an employer's agreement to limit its right to discharge an employee may be enforceable if both parties intended the provisions in handbooks, policies, or statements regarding job security, wages, benefits or other conditions of employment to be part of their employment contract and the employee began or continued working in reliance on those provisions. For example, policies in an employee handbook that provide for annual performance evaluations, job security, opportunities for advancement, a progressive discipline system, and a grievance procedure could, under the holding of this case, plausibly be deemed a written employment contract in Indiana unless clear language to the contrary is included. Other jurisdictions have, to varying degrees, found similar writings to constitute employment contracts.

Indiana employers should take care to include specific recitals in handbooks or other writings concerning conditions of employment that clearly, consistently and prominently state that the handbook or writing is not

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a contract of employment, that the employment relationship is at-will and that the employer reserves the right at any time to modify, amend or terminate the provisions of the writing. (See Chapter 1, “Employment-at-Will.”)

Compensation

Any contract of employment should set forth the compensation arrangement. There are various components of compensation that should be considered.

Salary

The written agreement should cover the salary or other pay rate amount and the standards, procedures and mechanisms for possible pay increases or decreases. If the employer intends for a salaried employee — who otherwise qualifies for an exemption under the Fair Labor Standards Act (FLSA) — to be exempt from the overtime pay requirements of the FLSA, steps must be taken to meet all of the criteria of the FLSA salary basis test. (See Chapter 14, “Wage and Hour Requirements.”) The agreement should provide that the employee regularly will receive a set amount, constituting all or part of compensation that is not subject to reduction because of variations in the quality or quantity of the work performed. The FLSA regulations list only a limited number of permitted deductions from exempt employee pay.

Commissions

This portion of the written agreement should identify the subject matter or product with respect to how commission will be paid. It also should provide details regarding the percentage, fixed amount, or formula for determining the commission the employee will receive. The written agreement should also address any advances or draws against anticipated commissions, when and under what conditions commissions are earned and time for payment.

The general rule is that a person employed on a commission basis is entitled to those commissions when the order is accepted by the employer, but an employer and employee are free to agree to a different basis for when commissions are earned, including, for example, that commissions will not be paid after the employee’s employment ends or that commissions will be paid for only a designated period of time after termination of employment. Thus, written provisions covering all aspects of commissions payable, if any, after termination of a commissioned salesperson’s employment should be made part of the written agreement.

In the absence of a written statement, the general rule would apply that the employee is entitled to commissions after the employment has terminated for sales made prior to termination. Failure to pay those commissions may result in exposure to treble damages under the Indiana wage laws, together with attorneys’ fees and costs.

Bonus

The written employment agreement also should include the method for determining or calculating any bonus compensation, the timing of payment, and any conditions for payment. It is wise to clarify whether, upon termination, the employee is eligible to receive any prorated amount of bonus monies that the individual may argue is accrued or owed him or her. Bonuses paid at the discretion of the company generally are not payable as wages upon an employee’s termination of employment. However, a bonus that an

employee could argue looks like wages because it is paid on a periodic basis according to the time worked by the employee may be payable to him or her upon termination. As is the case for unpaid commissions upon termination, failure to pay bonuses that are wages may result in exposure to treble damages, attorneys' fees and costs under the Indiana wage laws.

Description of Employment and Employee's Duties

Most contracts of employment contain a description of duties or essential functions of the job or position for which the employee is being hired. Language can be added permitting the employer to modify or amend the duties from time to time, or reference can be made to an attached job description that the employer reserves a similar right to modify.

Term of Employment

Unless provided otherwise, employment in Indiana is at the will of the employer and employee. (See Chapter 1, "Employment-at-Will.") Therefore, it is paramount that a written contract of employment indicates whether the employment is at-will or for a specific term unless terminated sooner for reasons set forth in the contract. If the parties choose an at-will relationship, appropriate disclaimers should be made that the employment is for no definite period, and the relationship may be terminated by the employer or the employee, at any time, without the need to indicate a specific cause or reason.

Termination

Many written employment agreements provide for termination upon the occurrence of certain events, including one or more of the following:

- Employee's death
- Failure to perform duties or obligations under the employment agreement
- Willful misconduct, dishonesty or other good cause without notice
- A specified number of days' notice in writing by either party to the other
- Employer's filing for protection under bankruptcy laws
- Employee's permanent disability, which should be carefully defined

In addition, employers would be well served to consider the possibility of future corporate developments such as a corporate transaction (sale, merger or spin-off) resulting in a change of management.

Employers should avoid written employment agreements that contain a for "cause" termination provision that does not specifically define what constitutes grounds for "cause" termination. It is imperative that the employer articulate all the grounds that will allow it to terminate the employee's employment for "cause" or at least provide guidance as to the type of conduct that will warrant a for "cause" termination.

Severance

With the possible exception of the Worker Adjustment and Retraining Notification Act (WARN) (see Chapter 21, "Worker Adjustment and Retraining Notification Act"), an Indiana employer is not required to

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provide any special notice of termination or payment of severance compensation. Sometimes, to balance the interests of the employer and the employee, contract provisions may provide for the awarding of severance pay if certain conditions are met. Of course, the fact that Indiana has no provision for severance payment does not diminish the obligation for the payment of the employee's accrued vacation pay or last earnings. (See Chapter 14, "Wage and Hour Requirements.")

Arbitration

In the past, disagreements concerning a party's performance under the terms of a written employment agreement typically have been resolved in the courts. Initiatives more recently, however, by bar associations, courts and private parties have increased the consideration and use of arbitration or other alternative dispute resolution procedures. The United States Supreme Court has held that mandatory arbitration agreements in the employment setting are lawful and enforceable provided certain conditions are fulfilled.

The Court's ruling has broadened the use of arbitration provisions in employment-related contracts. In the case of an enforceable arbitration provision in a written contract of employment, neither party will have access to the courts for litigation of an employment dispute except where, upon the narrowest of grounds, an arbitrator's decision is vacated by the court. A written agreement stating that the parties agree to submit their disputes under the agreement to binding arbitration may be enforceable in Indiana. The Supreme Court has declared that employees do not lose substantive rights when their claims of discrimination must be arbitrated where the standard courtroom procedures are exchanged for the relative "simplicity, informality and expedition" of the arbitration process.

Based on the Supreme Court's decisions, care must be taken when drafting an arbitration agreement if the employer wishes to utilize arbitration to resolve claims of unlawful termination. Consider the following points when implementing an arbitration agreement:

- In the absence of a written employment agreement, use a stand-alone agreement to provide an employee's signed acknowledgment of the agreement to arbitrate and its rules or procedures. An arbitration clause in a handbook will require a separate sign-off document.
- Use plain, understandable English in the agreement, with translations for non-English-speaking employees.
- Although Indiana law provides that hiring the employee or continuing employment will be sufficient consideration for the agreement, in some cases of adoption of an arbitration agreement, an offer of something of value to the employee in exchange for the agreement may be desirable.
- Use a full and complete list of the disputes or claims that will be subject to the arbitration.
- Consider stating that the Federal Arbitration Act governs the arbitration provision.
- Use language establishing mutual promises to arbitrate by the employer and the employee.
- Avoid language providing for unilateral changes by the employer.
- Use language incorporating a selection procedure by a professional arbitration association (such as the American Arbitration Association and its protocols for employment-related disputes). Set forth reasonable procedures for fair selection of a neutral arbitrator, an appropriate amount of discovery, requirements for written opinions and the right to counsel.
- Provide that the same damages are available to the employee through arbitration as are available by law or statute.

- Consider including a provision that requires the employer to pay all or substantially all arbitration costs, except for those of the employee's private attorney, or at least keep the employee's portion as minimal as possible.
- Use language maintaining "at-will" employment status, to be acknowledged by the employee while also acknowledging that disputes must be arbitrated under the agreement.
- Cover due process or procedural elements such as time for filing, service or notice, subpoenas, evidentiary rules, limited discovery, dispositive motions, the hearing location, use of a court reporter, payment of the attendant costs, final written arguments, and other matters going to the procedure throughout the time following the submission of the formal complaint.
- Consider including confidentiality restrictions on both employee and employer to the extent reasonable.
- Include a clear statement that each party is waiving his or its right to a trial by jury.

Confidential Information

An employer may wish to protect the disclosure and use of confidential information acquired by the employee during his or her employment with the employer. Therefore, inclusion of a section in the written employment agreement identifying and setting the ground rules for non-disclosure of confidential information should be considered by employers who have technical, business, financial, or other sensitive or proprietary information that they wish to protect from disclosure to any other person or company.

The term "confidential information" typically is defined as information disclosed to the employee (or known by the employee) through employment by the company that is not generally known in the industry that the company is or may become engaged. Employees can learn confidential information regarding the company's products, processes and services. This includes information relating to research, development, inventions, manufacturing methods, purchasing, accounting, engineering, marketing, merchandising, selling, customer requirements, customer habits and customer lists. Note that the confidential information may include work product created by the employee during the course of his or her employment.

Inventions or Other Intellectual Property

Some employers may have a special need to protect intellectual property of various kinds, including inventions, discoveries, concepts and ideas, whether or not patentable, and works of authorship. These include work product, processes, methods, formulas and techniques, as well as improvements or know-how concerning any present or prospective activities of the employer that the employee creates or that the employee becomes acquainted with as a result of his or her employment. The agreement should provide that the employer owns the intellectual property rights relating to such works and inventions and that the employee assigns his or her rights in such works and inventions to the employer.

Non-Disclosure Restrictions

The employer will want to include language restricting the employee from using or disclosing to others any confidential information, inventions or intellectual property, or other data of the employer during and at any time after termination of employment. In addition, the restrictive language should require the employee to return to the employer all documents (and electronic data) or copies of documents (and electronic data) relating to technical, business or financial information or otherwise containing confidential information.

Remedies

Employers are best protected by inclusion in the employment agreement of a clear provision that, in the event of the actual or threatened breach by the employee of the restrictive provisions concerning confidential information, the employer will be entitled to an injunction restraining the employee from disclosure. In addition, provisions in the agreement should retain for the employer its right to pursue any other available remedies for the breach, including the recovery of damages from the employee.

Restrictive Covenants

Another area of major concern in written employment contracts is restrictive covenants (also known as “non-competition covenants”). Employers typically use restrictive covenants to prohibit former employees from competing with the employer after the employee’s termination of employment. For a post-employment restrictive covenant to be enforceable, it is essential that the employer have a valid protectable interest that would be injured if the restrictive covenant were not enforced. Protectable interests generally fall into two categories: (1) goodwill with customers; and (2) confidential information. Notably, Indiana courts have held that the general skills and knowledge acquired by an employee as a result of his or her employment are not the types of interests, by themselves, that will support a covenant not to compete.

Under the common law, an employee owes a duty of loyalty to an employer during the term of employment. Prior to termination, an employee must refrain from actively or directly competing with the employer and must exercise best efforts on behalf of the employer. Possible exceptions to the common law duty may include making arrangements to compete such as making investments, purchasing equipment, incorporating a business, or obtaining a business loan.

Restrictive covenants in a written employment agreement are enforceable if the employer has a protectable interest. The covenant must, however, be reasonable as to the scope of the activity restricted, the geographic area in which the activity is restricted, and the time period during which the activity is restricted.

Guidelines for Reasonable, Enforceable Restrictive Covenants

The party seeking to enforce a restrictive covenant bears the burden of proving the facts and circumstances that justify the enforcement. Covenants not to compete are disfavored by the law because they are contracts in restraint of trade. Thus, these covenants are strictly construed and will be deemed unenforceable unless clearly reasonable. A restriction is deemed unreasonable if it is more expansive than necessary to protect the employer’s legitimate interests.

Although the existence of an employer’s protectable interest and the reasonableness of the geographic and temporal scope of a covenant will be decided upon the specific facts of each case, some general guidelines have developed. Customer lists and information that are not available through industry or media sources generally will be considered confidential information. Covenants that restrict an employee from competing in certain capacities with the employer within the geographic area where the employee worked while an employee, or that restrict the employee from competing with the employer regarding customers with whom the employee had contact during employment, generally will be viewed as reasonable. Also, a post-employment temporal duration of two years or less usually is generally considered reasonable.

Consequences of Overly Broad Restrictive Covenants

If a restrictive covenant is overly broad, the court will not rewrite it to make it reasonable and enforceable. However, if the covenant contains restrictions that are severable, the court will remove the unenforceable provisions and enforce the remaining restrictions. Restrictions that a court deems so excessive as to prevent the employee from engaging in the employee's customary business at any place at any time will likely not be enforced on the basis that the restrictions are overly broad and constitute penalties. It is imperative that the non-competition covenants be reasonable in terms of time, geography and scope of prohibited activity because Indiana law does not allow a court to rewrite the terms to make them reasonable.

Consideration for Requiring Employees to Sign Restrictive Covenants

In determining whether to enforce a restrictive covenant, courts often look to see whether there has been sufficient consideration, namely value given to the employee by the employer sufficient to support the restriction upon the employee. A covenant not to compete signed at the time the employment relationship begins will provide sufficient consideration for the covenant not to compete.

Indiana courts have determined that the continuation of an at-will employment relationship is sufficient consideration to support a restrictive covenant. This means that an employer can have an at-will employee sign a covenant not to compete either at the time of hire or at a later time. Note, however, that courts in many other states have reached contrary conclusions on this point.

An employer does not have to show just cause for terminating an at-will employee as a condition for enforcing an otherwise valid restrictive covenant. However, if there is a showing of ill motive or bad faith, equitable principles may preclude enforcement of the restriction.

Features to Include in Restrictive Covenants

First and foremost, the agreement should be carefully drafted as narrowly as possible with reference to the length of time and geographic area restrictions while still protecting the employer's interests. Careful attention should be given to the scope of the geographic area and the time limits. The scope of the activities being restricted also must be reasonable; courts do not like, and often will not enforce, a restriction that prohibits a former employee from being employed by a competitor in any capacity. The focus should be upon the employer's reasonable, legitimate business interests rather than upon penalizing an employee who seeks to use certain information. Knowledge by the employee of sensitive trade secrets or confidential information may provide special circumstances that justify broader time and geographic area restrictions. The more typical case involves a comparison of the actual geographic area in which the employer claims an interest and the area in which the employee served the employer.

Although lack of geographic limitations usually will result in a determination that the employer may not enforce a restrictive covenant, courts in Indiana have allowed a restriction relating to customers as a substitute for a geographic restriction. For example, prohibiting competitive contact with existing clients or customers of the employer may be enforceable, given a reasonable restriction in time.

The agreement should be written with precision because courts will generally construe the meaning of the written agreement against the drafting party, which usually is the employer.

Because the court may divide the covenant, enforcing reasonable provisions and striking unreasonable ones, the written agreement should be drafted by the employer so that the various restrictions are divisible.

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Moreover, the written agreement should include a provision stating that to the extent a clause is deemed unenforceable, the remainder of the agreement remains enforceable.

Remedies

To obtain an injunction enforcing a covenant not to compete, an employer must establish that irreparable injury will follow if the employee is not enjoined from the breach or threatened breach. This means that the employer must prove that legal remedies such as damages will be inadequate if the employee is permitted to capitalize upon confidential information received while in the employ of the employer and in violation of a reasonable covenant, or if the employee seeks to compete to the detriment of the employer. The granting or denial of a preliminary injunction rests with the sound discretion of the court, with appellate review limited to a determination of whether there was a clear abuse of discretion.

Employers typically try to include language in restrictive covenants providing that the employee agrees that threatened or actual breach of the agreement by the employee will give rise to irreparable harm, thereby providing a basis for injunctive relief. In addition, employers also should include a provision that expressly reserves all legal remedies for provable damages caused by the threatened breach or breach of the restrictive covenant.

Some employers have placed liquidated damage provisions in the remedies language of restrictive covenants in written employment agreements. For the employer to obtain enforcement, the court must determine that the liquidated damage clause is a reasonable estimate of the potential damages and not a penalty. Courts in Indiana have refused to enforce liquidated damage formulas in instances in which the amount of damages set is not linked to the likely harm resulting from the breach or in which the liquidated damages amount is so excessive that it is penal in nature.

Trade Secrets

Indiana Statute

Indiana has adopted the Uniform Trade Secrets Act (UTSA). The UTSA defines a trade secret as information that is not generally known to or readily available by proper means by other people who would gain economic value from the information and is subject to reasonable efforts to maintain its secrecy.

The statutory remedies for the improper disclosure or use of a trade secret include injunctive relief and recovery of monetary damages. A willful violation can result in a penalty of double damages and an assessment of attorneys' fees.

Federal Defend Trade Secrets Act (DTSA)

The federal Defend Trade Secrets Act of 2016 (DTSA) was promulgated into law in 2016. The DTSA provides federal protections for trade secrets that are defined in a manner similar to the UTSA. The DTSA grants both criminal and civil immunity to individuals who disclose trade secrets in the course of reporting suspected violations of the law to a governmental body. The DTSA also allows an individual to disclose the trade secret information to his or her attorney and the court under seal, in the event that the individual files a lawsuit for retaliation by an employer allegedly as the result of reporting a suspected violation of law to a governmental body. Notably, the DTSA requires that employers give notice to their employees and contractors

of such protections in any contracts or agreements that govern the use of trade secrets. Thus, any agreement containing a provision restricting the disclosure of trade secrets or confidential information should contain notice language as mandated by the DTSA.

Covenants Not to Disclose or Use Trade Secrets

To the extent that a former employee attempts to use confidential information that meets the definition of a trade secret under the UTSA and/or the DTSA, an employer may also seek remedies under the UTSA and/or the DTSA, respectively, rather than rely solely on a confidential information provision in the written employment agreement. However, not all information considered confidential information by an employer will qualify as a trade secret under the UTSA or the DTSA. Therefore, employers should consider the use of confidential information provisions, with remedies, in written employment agreements.

Consult Legal Counsel

Any employer who is considering implementing a written employment agreement would be well served by consulting legal counsel to ensure that the contract is drafted properly.

This chapter was edited by David Given, Partner.

Checklist for Creating a Written Employment Contract

Has the contract been created with the particular employee in mind? .. Yes No

Does the contract describe in detail the employee's compensation (salary, commission, bonuses, etc.)? Yes No

Does the contract include a description of the employee's job duties and responsibilities (including language permitting the employer to modify or amend the duties)? Yes No

Does the contract include whether the employment is at-will or for a specific time period? Yes No

Does the contract include disclaimers regarding at-will employment, if applicable? Yes No

Does the contract include termination provisions? Yes No

Does the contract specify the financial implications of each termination provision? Yes No

Does the contract discuss non-disclosure of confidential information and trade secrets? Yes No

Does the contract include non-competition restrictions? Yes No

Is there a visible place for both the employer and employee to sign the contract? Yes No

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Pre-Hire Employment Policies

Employment law is a dynamic area. The hiring decision is one of the most important employment decisions an employer can make. Turnover can be both financially and operationally costly for employers, not to mention detrimental to efficiency and morale.

This chapter identifies key processes employers can implement to improve the quality of new hires and assure legal compliance. It provides guidance on relevant federal and Indiana discrimination laws as they affect hiring procedures and common personnel policies. Unlike the other chapters that deal with a specific area of law, this chapter is designed to provide practical guidance in the implementation of employment policies.

Employment Advertisements

An employer's first contact with a future employee – and potential plaintiff – is the want ads placed for job openings. They are also the first place an employer may protect itself. An advertisement soliciting applications may only include information about the position that is lawful under federal and state laws. Lawful points to include in an advertisement are job qualifications, position description, job-related educational requirements, hours of work, wage, benefits, experience required, method to apply for position, and positive statements about the employer.

Employers should avoid words or phrases that suggest they discriminate against candidates in the hiring process. For example, “stay-at-home moms” suggests discriminatory screening on the basis of sex. Employers should also avoid statements that suggest refusal to accommodate religious practices, such as “Sunday work required.” Additionally, language in an advertisement that promises or implies permanent employment may undermine an employee's at-will status.

Further, it is helpful to advertise the company's status as an equal opportunity employer. If the company also is a federal government contractor or subcontractor subject to affirmative action requirements, this status is communicated by adding the phrase, “M/F/V/D” to the advertisements.

Employment Application Forms

An employer should scrutinize its application closely to be sure that it includes protective language yet does not include phrases that might prove troublesome. Of course, an application is only useful if fully completed. Therefore, make sure all new hires have completed all questions on the application. Employers may adopt a policy of rejecting incomplete applications. If such a policy is adopted, the application should clearly state that incomplete applications will not be considered.

Employers should also consider adopting a policy that deems applications inactive after a period of time. The time limit (commonly 30 or 60 days) should also be included on the application itself. This puts applicants on notice that they will not be under consideration for open positions indefinitely. Rather, if they wish to continue to be considered for employment after the application has expired, it will be necessary for them to complete a new application.

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At the end of the application, employers may require applicants to make certain affirmations. For example, applicants should be asked to certify that they personally completed the application and attest to the truthfulness and completeness of the information provided.

Even if an employer relies on resumes when filling upper-level positions, it should have all applicants complete an application form at the interview stage or at least pre-hire. The employer then will have a consistent body of information for all employees and a complete record for its files. If the employer is a federal contractor or subcontractor subject to affirmative action regulations, it will also need to collect race and sex data from applicants. (See Chapter 8, "Affirmative Action.")

Employers should delete from the application questions that suggest discriminatory characteristics are taken into account in employment decisions. For example, asking about a person's age, military reserve commitments or religious observances can be risky. Additionally, asking questions that may indirectly reveal such information (i.e., dates of graduation) is also risky.

Federal law prohibits discrimination against persons who serve in the uniformed services. A person's membership, application for service, or obligation for service in the uniformed services may not be a motivating factor in an employer's decision to deny initial employment or re-employment. An employer is better off not asking about military service on an application or in an interview.

Under the Americans with Disabilities Act (ADA) and Indiana law, it is unlawful to ask applicants questions that seek information about their medical status. Thus, the following types of questions should not appear on employment applications:

- Do you have any physical or mental impairments?
- How many days of work did you miss at your previous employer due to illness or injury?
- Have you ever filed for or received worker's compensation benefits?
- Have you been hospitalized in the past five years? If so, for what?

Similarly, an employer should not include medical questionnaires with the employment application form. (See Chapter 6, "Disability Discrimination.") Employers should review the language in the acknowledgement and release at the end of the application to make sure there is no suggestion they will be seeking medical information about the applicant before making their hiring decision.

As noted earlier with respect to job advertisements, employers should state on their applications that the company is an equal opportunity employer and considers individuals without regard to race, sex, color, religion, creed, national origin, age, disability, genetic information, participation in military service, sexual orientation and/or gender identity or any other protected status. The following is an example of such a statement:

It is [Company Name's] policy that equal employment opportunities be available to all employees and applicants without regard to race, sex, color, religion, creed, national origin, age, disability, genetic information, participation in military service, sexual orientation and/or gender identity or any other protected status.

Keep in mind that certain counties and cities have adopted laws expanding the range of protected classifications offered under federal law. The above language may need to be modified to suit the requirements of an employer's particular location.

Because the ADA requires an employer to affirmatively inform applicants that it recognizes its obligations for reasonable accommodation, the equal employment opportunity (EEO) statement should also contain the following sentence:

[Company Name] will comply with its obligation to provide reasonable accommodation to qualified individuals with disabilities.

Many application forms contain a comments or remarks section for use by the interviewer — the “not to be filled out by applicant” section. Because these remarks are intended for internal ears and eyes only, it is best not to make them a part of the application form. Any such remarks or comments by the interviewer should be recorded on a separate sheet of paper.

Pre-employment Interviews

Just as the employment application form should not contain questions or words that could suggest that the company filters applicants based on protected characteristics or status, all persons involved at any step of the interview process should be instructed about the “dos and don’ts” of interviewing. The employer might consider preparing a list of questions or a script for interviews to ensure all relevant inquiries are made in a lawful manner. For example, ask questions that are short, clean, complete and job-related. Employers should not inquire about marital status, past union membership, worker’s compensation injuries, date of birth, arrest records, sexual orientation and/or gender identity, credit history or membership in religious groups. Employers also should not inquire into whether an applicant owns, possesses, uses or transports a firearm, unless the use of the firearm will be used to fulfill the duties of the job position. Occasionally an interviewee offers information about his/her protected class. In such cases, the interviewer should respond that the employer makes all of its decisions based upon job-related criteria and does not take into account an applicant’s membership in a protected class.

If interviewers are specifically asked about the company’s policy with respect to individuals with disabilities, they should be instructed to say something such as the following:

It depends on the circumstances, and all situations are looked at individually. Our company takes into account the nature and severity of the particular disability, the essential functions of the job that the person is applying for, and whether there is a reasonable accommodation available that would not cause an undue hardship.

Interviewers should be instructed that it is unlawful to discriminate against an individual because of his or her relationship or association with a disabled person. Thus, if an interviewee indicates he or she has a disabled family member, an employer may not refuse to employ that person because of the concern that the employee will be an attendance problem due to his or her responsibilities to the disabled family member or the concern that the employee’s insurance claims will be significant. The EEOC has established guidelines on treatment of workers with caregiving responsibilities. These guidelines reiterate that employers’ decisions at all stages of employment should be based on legitimate business reasons and actual job performance rather than on assumptions or stereotypes.

Remember, job applicants as well as employees are protected by the ADA. Therefore, when you schedule an interview, it is permissible to ask, “Are there any special accommodations we can make for your interview here?”

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Although employers are restricted in the kinds of questions that can be asked on the employment application and in pre-employment interviews, you may inquire about information that will help you assess the applicant's attendance and discipline record. For example, you may ask:

- How many Mondays and Fridays were you absent last year other than approved vacation leave?
- Are you currently using illegal drugs?
- Can you perform the functions of the position you are applying for with or without an accommodation?
- Have you been disciplined at or terminated from a previous employer? What were the circumstances?

Keep pre-employment interviews simple. Ask only what you need to know and avoid questions that elicit irrelevant personal information. When asking interviewees about their backgrounds, keep the questions focused on job experience and skills required for the open position. Checking Facebook, Instagram, LinkedIn, Twitter and personal blogs may provide benefits in allowing the employer to verify information provided during other stages in the recruiting and interviewing process while giving the employer better insight into whether the applicant will be a good fit for the company. However, running a social media check may reveal information about an applicant's protected status under antidiscrimination laws. An employer should become familiar with applicable laws and make sure to refrain from making hiring decisions based on the applicant's protected status or protected off-duty conduct. Because many laws may affect an employer's use of social media, employers should consult counsel.

Taking notes in interviews is routine. When taking notes be sure all notations and comments made are job related. Use factual, objective terms rather than recording subjective, opinionated descriptions. While an interviewer may know within the first five minutes of an interview that someone is not qualified for the job, it is still critical for the interviewer's notes to contain enough information from which a stranger to the interview could easily determine why the applicant was rejected. An applicant may show very little enthusiasm for the prospect of working for the employer or give short, generic responses to questions. All of these issues are fair grounds for employment decisions and may be in the interview notes. They form the basis of a good faith, non-discriminatory reason for rejecting the applicant.

Interview notes should not include "conclusions" without supporting facts. For example, "the candidate seemed lazy" is not as effective as documenting, "the candidate seemed frustrated with the amount of overtime at her last job." Ultimately, the better the interview notes document what was said at the interview as opposed to the conclusions of the interviewer, the easier it will be to objectively demonstrate whether a candidate was the most qualified for the position and that impermissible criteria was not used in the hiring decision.

Conducting Employment Reference Checks

Virtually all employment applications request prior employment history and references. One way to avoid future problems and potential claims is not to hire individuals who will turn out to be a disciplinary problem. In other words, avoid the "bad apple" before it gets into the barrel. Thus, it is important to perform employment verifications and reference checks that are valid and reliable but non-discriminatory. Another good reason to conduct these checks is to protect the company from claims of negligent hiring. A negligent hiring claim may arise if, for example, an employee causes someone else injury and the employer could have learned of the employee's violent tendencies and/or termination for similar reasons from his or her

prior job had the employer performed the appropriate checks. The reference check should avoid the inquiries previously described as being inappropriate on the application and during the interview.

Indiana law requires an employer to issue a former employee a termination letter upon the former employee's written request. The letter must state the nature and character of the former employee's position, how long the employee worked in that position and the reason(s) behind the employee's resignation or termination. Because termination letters may provide helpful information about a job applicant's previous employment, employers may want to consider requiring that job applicants supply a termination letter from two or three former employers.

Be on the lookout for red flags that may signal problem employees. These may include the following:

- Applicants who frequently change jobs
- Applications that are replete with errors or woefully incomplete
- Applications turned in far past the deadline
- Applicants who refer disparagingly to a previous employer, or give reluctant or vague answers

Conducting Background Checks

Careful use of background checks may reveal false resume information, indicate a job mismatch or uncover potential liabilities. Prudent employers will check out gaps in work experience, probe unclear statements or answers, document inquiries in writing and request conviction information. Under Indiana law, several categories of occupations must undergo mandatory criminal background checks, including, in some cases, national and state sex offender registry checks. These occupations include the following:

- Hazardous material drivers
- Childcare workers
- Home health/personal service workers
- Licensed health care professionals
- Teachers
- Loan brokers
- Real estate appraisers
- Wholesale drug distributors

The Fair Credit Reporting Act (FCRA) places additional burdens on Indiana employers seeking background information on applicants and employees. The Act applies to information deemed a "consumer report" that is obtained for the employer by a "consumer reporting agency." Consumer reports include obvious items such as credit reports, but under some circumstances, they can also include less obvious information such as criminal records, court records, driving records and even references from private employers. Before an employer may obtain a consumer report on an employee or applicant, the employer must provide written notice that a report may be obtained and used. The employer must also obtain the individual's written authorization before asking a consumer reporting agency for the report.

Before an employer takes any adverse action against an employee or applicant based in whole or in part on the report, the employer must give the individual a pre-adverse action disclosure that includes a copy of the individual's consumer report furnished by the consumer reporting agency and a copy of "A

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Summary of Your Rights Under the Fair Credit Reporting Act” — a document prescribed by the Federal Trade Commission (FTC). The term “adverse action” is defined very broadly to include all business, credit and employment actions affecting consumers that can be considered to have a negative impact such as denying or canceling credit or insurance, or denying employment.

After an employer has taken an adverse action, the employer must give the individual notice either orally, in writing, or electronically, of the adverse action. The FTC prescribes the form and content of notices required by the FCRA. Employers may adopt the Commission’s forms. There is a presumption of compliance with the Act if notices used by an employer are substantially similar to those prescribed by the Commission. See the FTC’s web site at www.ftc.gov.

Employers who fail to obtain an applicant’s permission before requesting a consumer report or who fail to provide pre-adverse action disclosures and adverse action notices to unsuccessful job applicants face legal consequences. The FCRA allows individuals to sue employers for damages in federal court.

Limits on the Use and Disclosure of Applicant’s Criminal Histories and Background Check Law

On occasion, an employer may want to seek a criminal history or other background check of a prospective employee. Most employers in Indiana may do so as long as the individual who is the subject of the request has applied for employment with the employer. The Equal Employment Opportunity Commission (EEOC), the Federal Trade Commission (FTC), and the Indiana legislature all have recently weighed in on the extent to which employers can look into applicant’s background and criminal histories.

EEOC and FTC Joint Guidance Issued on Background Checks, Including Criminal History

In a collaborative effort, the EEOC and the FTC co-published guidance addressing legal requirements in using background checks for employment purposes. There are separate publications for employers and for employees and job applicants, with the latter providing information about where readers can go for help if they believe an employer violates the law. This guidance is available on the EEOC web site at www.eeoc.gov. Some key points are as follows:

- Background checks must be conducted and applied evenhandedly, without regard to protected status such as race, religion, sex, national origin, disability or age (40 or older). Selective checks made on an individualized basis create risk of discrimination claims, and screening criteria should be consistent among candidates. Beware of screening criteria that would significantly disadvantage individuals in a protected class, such as disqualifying candidates for information technology positions who received their college degrees more than 20 years ago.
- Employers may not make medical inquiries before extending a conditional job offer, and even then are generally prohibited from making inquiries about the applicant’s or employee’s family medical or genetic history.
- Employers may need to allow exceptions for problems revealed during a background check that were caused by a disability, such as a credit history that shows substantial medical bills with some delayed payments.

- Employers that obtain background information, such as criminal history, from companies that are in the business of compiling background information must follow certain procedures, including the following:
 - Telling the applicant or employee, in writing and in a stand-alone format (i.e., separate from other disclosures and not part of the employment application) that the organization might use the information in making decisions about his or her employment
 - Telling the applicant or employee of his or her right to a description of the nature and scope of the investigation
 - Getting the applicant or employee's written permission before doing the background check
 - Before taking any adverse action based on the result of the background check (such as disqualifying an applicant from further consideration), notifying the applicant or employee of the potential action and providing a copy of the background check (the "consumer report") relied upon in making the decision as well as a copy of the FTC's summary of rights under the FCRA
 - After taking any such adverse action, telling the applicant or employee that (a) he or she was rejected because of information in the report; (b) the contact information for the company that provided the report; (c) that the company that provided the report did not make the employment decision and cannot give reasons for the decision; and (d) that he or she has the right to dispute the accuracy or completeness of the report with the reporting company, and to get an additional free copy of the report from the reporting company within 60 days
- Background check information must be retained for at least one year (two years for educational institutions, state and local governments, and certain federal contractors), or until the case is concluded if the applicant or employee files a charge of discrimination.
- Do not toss background check information in the wastebasket once the retention period has expired. The law governing disposal of consumer report information requires that it be disposed of securely, such as by burning, pulverizing or shredding for paper records and eradication in a manner that prohibits later reading or reconstruction for electronic records

The EEOC has also issued specific guidance on employers' use of criminal history. The EEOC generally agrees that employers can look at criminal history information and make an employment decision, but ought to be making individualized assessments of each applicant or employee. The EEOC considers the use of arrest records in employment decisions to be particularly problematic. The reason for this is that arrest records do not in themselves establish that certain conduct has occurred. An employer may be able to take an adverse employment action based on the conduct underlying the arrest but should not rely on the fact of an arrest alone to make an employment determination. Before deciding to eliminate someone from consideration on the basis of only an arrest, you should consult with legal counsel.

For convictions, the employer needs to consider:

- the nature and gravity of the offense or conduct;
- the time that has passed since the offense;
- conduct or completion of the sentence; and
- the nature of the job held or sought.

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In addition, employers should also consider factors such as the number and nature of convictions, the individual's age at the time of conviction, the individual's rehabilitation efforts, and the individual's character or job references. Further, after conducting this analysis, if the employer decides to exclude the applicant, the individual should be afforded the opportunity by the employer to provide additional information or an explanation to establish that the exclusion should not be applied. If an applicant does not provide additional information, the employer is free to make an employment decision based on the original information.

The EEOC issued this guidance under concerns that employers are applying blanket policies which serve to exclude all individuals from all employment based on any criminal history. The EEOC's position is that a "one size fits all" policy is a red flag and can lead to an adverse impact on African American or Hispanic male groups that are arrested for or convicted of crimes more frequently than other racial ethnic groups.

Indiana's Background Check Law

Indiana's background check law that imposes limits on the information employers may receive and requests regarding employees' criminal histories, and specifically allows individuals not to disclose certain parts of their criminal histories on employment applications. In particular, infractions such as traffic citations and other minor violations that do not subject the person to criminal conviction or are not punishable with jail time need not be disclosed if the judgment has been satisfied and five years has passed since the satisfaction of the judgment, nor can the clerk of court disclose information related to such infraction. This is also true if the individual is alleged to have committed an infraction but is not actually found to have committed the infraction, or the adjudication is later dismissed or vacated.

Indiana's background check law limits the information criminal history providers may provide to employers. Criminal history providers will not provide information related to the following:

- An infraction, arrest, or charge that did not result in a conviction
- An expunged record
- A record that has been restricted by a court or rules of a court
- A record indicating a Class D felony conviction if the conviction was entered as a Class A misdemeanor conviction or was converted to a Class A misdemeanor
- Any record that the criminal history provider knows is inaccurate

These exclusions will limit the information employers will receive from their criminal history providers and, particularly, will even limit information about certain felony convictions. Indiana judges may convert a Class D felony conviction to a Class A misdemeanor upon an individual's petition under certain circumstances, which means that employers may not know that an applicant or employee was actually convicted of a Class D felony (although information regarding the Class A misdemeanor should still be available). Examples of crimes that can be expunged include aggravated battery, theft, operating a vehicle while intoxicated and dealing or possessing a controlled substance. Certain crimes, including homicide, manslaughter and certain sexual crimes, cannot be expunged.

Another significant aspect of Indiana's background check law is that an individual may legally state on an employment application or any other document that he or she has not been arrested or convicted of a felony or misdemeanor if that felony or misdemeanor is a restricted record that the clerk of court may not disclose pursuant to the above. In addition, employers cannot circumvent this by asking employees or applicants whether the individual's criminal records have been sealed or restricted. At minimum, employers

should revise their employment applications and background check processes to comply with this law. The statute provides model language considered acceptable for application forms: "Have you ever been arrested for or convicted of a crime that has not been expunged by a court?"

A violation of the law may result in a Class C infraction, and the violator can be held in contempt of court. Employers are also subject to civil suit and payment of attorney fees.

This overhaul of Indiana's Second Chance Law, originally passed to help combat growing unemployment of those convicted of certain crimes, arguably strikes a better balance than previous versions by removing obstacles to employment while simultaneously offering some, though not absolute, protection to employers. For instance, in any third-party suit against an employer alleging negligence or other fault based on the actions of an employee with an expunged record, the expungement order may be introduced as evidence of the employer's due care in hiring, retaining, licensing or certifying the employee. In theory, employers should not be held liable for failing to discover information about an employee that was not actually available, and employees are limited in their ability to repeatedly shield such information from discovery. With limited exceptions, an individual can have only one conviction expunged in a lifetime.

Obtaining the Criminal History

The employer may make the request via the internet or must obtain a Limited Criminal History (LCH) request form from the Division of Central Records of the Indiana State Police (I.C. 10-13-3-1 *et seq.*). A modest fee may be charged for such limited criminal history requests. In certain circumstances, the fee may be waived for requests made by not-for-profits or other entities, such as school corporations.

Limited criminal histories may also be obtained by contacting the Indiana State Police Department's Central Records Division on the web at www.in.gov/ai/appfiles/isp-lch.

Employers wishing to do more comprehensive background checks should contact their local law enforcement agencies to determine the procedures and resources available.

Medical Exams and Drug Testing

There currently is nothing in Indiana law making it illegal to conduct applicant drug screening tests. Employers who wish to conduct drug screening should prepare a comprehensive written policy outlining testing procedures and consequences of policy violations. Any such policy must then be uniformly and consistently applied. Test results obtained under the policy should be treated as confidential records.

The ADA and Indiana law restrict employers' use of medical examinations. Prior to an offer of employment, disability-related questions and medical exams are impermissible. An employer may require a medical examination after extending a "real" offer of employment and before employment commences. Where an employer issues an offer contingent on multiple events, courts have found that a "real" offer was not extended. An employer may condition an employment offer on the results of a medical examination, provided that all entering employees in the same job category are subjected to such an examination. However, if the medical examination screens out disabled individuals, it must be shown to be job-related and consistent with business necessity. After employment begins, employer-mandated medical exams must be job-related and consistent with business necessity. When an employee requests a reasonable accommodation, employers may also seek medical information from the employee.

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Under the ADA, certain tests are not considered medical examinations, such as tests to determine the illegal use of drugs and physical agility or fitness tests, which measure an employee's ability to perform actual or simulated job tasks. Fitness and agility tests must be used with caution. If the test includes a medical component such as measuring heart rate or blood pressure, they may be deemed a medical exam.

Recordkeeping

For quick reference and prompt response to any claims or charges by applicants, be sure to keep good records of your recruiting and hiring processes and procedures. The following are guidelines regarding what documents should be kept for how long.

- **One Year:** Records relating to job applications, resumes, replies to job advertisements; job orders submitted to an employment agency or union; records of employer administered aptitude or other tests; job advertisements
- **Two Years:** Records relating to affirmative action program and EEO data; reasonable accommodation requests
- **Three Years:** Employment eligibility verification (I-9)

Of course, if an applicant brings a charge of discrimination or other action, all relevant records must be maintained until final disposition of the charge irrespective of the time periods described above. Moreover, note that state and federal laws place many other recordkeeping obligations on employers. Those listed above concern only the pre-hire phase.

Just as there are laws governing how records must be maintained, there is also a law addressing disposal of records. The Fair and Accurate Credit Transaction Act of 2003 (FACT Act), and a corresponding rule adopted by the Federal Trade Commission require employers that possess or maintain personally identifying information (also known as "employee identifying information," or "EII") to take reasonable measures to protect against unauthorized access or improper use in connection with information disposal. (16 C.F.R. Part 682, "Disposal of Consumer Report Information and Records.")

EII includes, but is not limited to, the following:

- Social Security numbers (SSNs)
- Telephone numbers
- Addresses
- Drivers' license numbers
- Email addresses
- Information obtained from credit reports
- Credit card information
- Insurance information

This information can be contained in the employer's paperwork as well as computer database systems and is vulnerable to penetration by both insiders and outsiders. All employers are required to destroy EII before it is discarded. Employers should review their internal policies and procedures governing the collection, use, distribution and disposal of EII. Where such policies and/or procedures are inadequate, new ones should be implemented. Security measures should include periodic evaluation of EII safeguards.

To minimize potential liability, take precautions to reduce the chances of theft or improper disclosure of EII. The following steps are not exhaustive. EII security policies and procedures should be customized to meet the needs and legal requirements of an employer's specific industry and activities.

- **Establish a Security Policy.** Employers should develop a policy that identifies the circumstances under which EII may be collected from job applicants and employees, the types of information to be collected, and how and when the employer may use and disclose the information. The policy should limit the collection, use, and disclosure of EII to the minimum necessary for its intended purpose. For example, employers should evaluate how and when they collect employees' SSNs and consider alternative replacements for their use.
- **Audit Information Acquisition.** Employers should determine if all information collected is essential for business or government reporting purposes. Discontinue collecting and properly dispose of any information that is not essential.
- **Restrict Access.** Keep all job applicant and employee records in secure areas and limit access to those individuals with responsibility for the records. Those with access to such records should be subject to background checks, clearly identifiable by the company and should receive training on the proper handling and distribution of EII. Be sure that an individual's access to the company's computer network and data is cut off immediately upon the termination of employment.
- **Review Record Disposal Policies.** Employers are required to adopt and implement a document destruction policy or contract with a document/data destruction company to do so. Several examples of reasonable methods of destruction are shredding, burning, pulverizing and the destruction or erasure of electronic records that contain consumer information. Computer hard drives should be erased professionally prior to being removed from the premises.
- **Examine Computer Systems Security.** Employers should assess the vulnerability of their HR information Systems and computer systems as well as take effective steps to secure networks from infiltration. Employers should ensure that an array of protective measures for electronic data are in place (e.g., operating systems security patches current; virus protection software utilized and updated; firewalls installed and maintained, etc.). In addition, employers should review the company's electronic communications policy to ensure that employees know what policies and procedures they are required to follow.
- **Develop a Contingency Plan.** Employers should develop a plan that addresses how the company will deal with security breaches as well as how to assist affected employees. One resource employers might suggest to affected employees is the FTC's web site at www.consumer.gov/idtheft.

This chapter was edited by Brian Garrison, Partner.

Test Your Hiring Knowledge

Answer “true” or “false” to the following questions:

1. An advertisement stating “Car Dealership Seeks a Spanish-speaking Salesperson to Assist with Sales” is acceptable.
2. An advertisement that includes the sentence “perfect work for retirees” is acceptable.
3. “Weekends required” is acceptable text in a job advertisement.
4. It is acceptable to ask a candidate the reason for leaving previous employment.
5. A job candidate who is obviously pregnant comes in for an interview. During the interview, it is acceptable to ask how long she intends to take off for maternity leave.
6. All job applications should include a place for employees to record their graduation dates from respective schools.
7. Medical questions and inquiries regarding disabilities should not be included on the application.
8. It is acceptable to ask a future candidate whether he or she has ever filed for worker’s compensation benefits.

Answers:

1. True. It is lawful for an employer to require an applicant to speak a foreign language or have an understanding of an ethnic culture if the position requires such skills (i.e., seeking a salesperson to work a territory that is heavily populated by an ethnic group.)
2. False. This statement could be considered age discrimination.
3. False. This statement could be considered religious discrimination.
4. True.
5. False. The Pregnancy Discrimination Act prohibits employers from excluding pregnant women from employment.
6. False. This statement could be considered age discrimination.
7. True. The ADA prohibits disability-related questions before an offer of employment is made.
8. False. This could be considered an unlawful attempt to gain disability or medical related information about the applicant.

Chapter 4

Employment Discrimination

This chapter is intended to provide an overview of employment discrimination laws including Title VII of the federal Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, the Civil Rights Act of 1991, the Indiana Civil Rights Act, Indiana Code § 22-9-1 *et seq.*, and other federal and state anti-discrimination laws.

Federal and Indiana laws make it unlawful to discriminate against an applicant/employee with respect to hiring, firing, promotion or any other terms or conditions of employment because of certain characteristics that place the applicant/employee in a protected class.

Under Indiana state laws, an applicant/employee is protected from discrimination in regard to any of the following:

- Race
- Color
- National origin/ancestry
- Sex
- Religion
- Age (for persons 40 or older; Indiana does not protect individuals beyond 75 years of age, however)
- Mental or physical disability
- Military service status
- Pregnancy, childbirth, or related medical condition

This chapter presents an overview of the various federal and Indiana anti-discrimination laws and their effect on employer actions.

Theories of Discrimination

Disparate Treatment Theory

Disparate treatment is “different” treatment by an employer. Disparate treatment is unlawful under the following three federal laws (and state laws described later in this chapter):

1. Title VII when based upon race, color, sex (including sexual orientation and gender identity), religion, or national origin
2. The Age Discrimination in Employment Act (ADEA) when based upon age
3. The Americans with Disabilities Act (ADA) when based upon disability, perceived disability, or a record of disability

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The issue in a disparate treatment case is not “just cause” or fairness, but whether intentional discrimination exists. In a disparate treatment case, the central question is whether the employer’s actions were motivated by discriminatory intent.

The United States Supreme Court has established a framework for the analysis of disparate treatment cases. Unless there is “direct” evidence of discrimination (e.g., a statement by the decision maker showing that the decision was based on discriminatory factors), the individual complaining of discrimination must present evidence to support the inference that discrimination has occurred (a *prima facie* case). If he or she does so, the employer must present evidence of a legitimate, non-discriminatory reason for its actions. If the employer does this, the inference of discrimination disappears, unless the applicant/employee can prove that the reason given by the employer was, in fact, a pretext for unlawful, intentional discrimination.

Evidence of a *prima facie* case depends on the circumstances. In general, to establish a *prima facie* case, the applicant/employee must show that:

- he or she is a member of a protected class;
- he or she was qualified for a job he or she applied for (or held in termination cases);
- he or she was subjected to a materially adverse action (e.g., being rejected for a position, subjected to a material loss of pay, or fired); and
- similarly situated employees outside the protected class were treated more favorably, or the circumstances surrounding the adverse employment decision make it logical to infer that the reason for the adverse action was the individual’s protected class.

The degree of proof necessary to establish a *prima facie* case is minimal. A *prima facie* case will usually withstand efforts to dismiss the case early on in the action where the individual can simply show that he or she is a member of a protected class and was subjected to some adverse employment action.

Once the charging party establishes a *prima facie* case, the burden is on the employer to present some legitimate, non-discriminatory reason for its action. In hiring cases, employers may point to such reasons as inexperience, a more qualified candidate, and so forth. In discharge cases, common reasons include poor performance, violation of work rules, insubordination, or absenteeism. If the employer can present such a legitimate, non-discriminatory reason, then the burden shifts back to the applicant/employee, who has the right to show that the reason presented was, in fact, a pretext for discrimination. To establish pretext for discrimination, the applicant/employee can present a variety of different types of evidence, including evidence of:

- other similarly situated individuals who were not members of the protected class and were treated differently;
- prior suspect acts of the employer;
- statements of the employer’s decision makers indicating prejudice against the protected class;
- inconsistencies in the employer’s explanation for the personnel action; or
- adverse actions toward other members of the protected class.

Supreme Court authority has established that if the alleged victim shows that the employer’s reasons are false, a jury may infer that discrimination was the real reason for the employer’s challenged conduct. Disparate treatment is the most common theory of discrimination.

Disparate Impact Theory

As discussed previously, disparate treatment focuses on discriminatory intent. By contrast, the disparate or adverse impact theory of liability focuses on discriminatory results. The Supreme Court has held that a practice or procedure that is neutral on its face and even neutral in its intent (i.e., applied equally to everyone) may be unlawful, even absent a showing of discriminatory intent, because it has an adverse impact upon a protected group. For example, certain written employment tests have been found unlawful because the results tended to adversely affect a protected class of individuals. Due to the nature of this theory, applicants/employees often try to establish disparate impact cases through statistical evidence. If the statistics demonstrate an adverse impact, the employer must show that the practice is justified by a legitimate business purpose. In all but age discrimination cases, the applicant/employee can rebut the employer's proof of business necessity by showing that there were methods to achieve the employer's business purpose that had a less adverse impact on the protected class of individuals (the "business necessity test").

In cases involving allegations of a disparate impact based on age, an employer may prevail by showing that the challenged policy is based on "reasonable factors other than age" (RFOA test). In April of 2012, the EEOC's final rule on "Disparate Impact and Reasonable Factors Other than Age Under the Age Discrimination in Employment Act" became effective. Among other things, the final rule clarified that the reasonableness of a non-age factor is evaluated from the perspective of an employer that is "mindful of its ADEA responsibilities." The rule provides a non-exhaustive list of considerations relevant to the RFOA analysis. Historically, the RFOA test has been more lenient than the test applied in other disparate impact claims, under which the plaintiff can prevail if there are other ways for the employer to achieve its goals that do not result in disparate impact. The impact of the EEOC's final rule on ADEA litigation is yet to be determined.

One Supreme Court decision limits an employer's ability to attempt to avoid practices that have a disparate impact. In *Ricci v. DeStefano*, 557 U.S. 557 (2009), the Supreme Court found that the City of New Haven engaged in reverse discrimination and violated Title VII of the Civil Rights Act of 1964 when it invalidated a qualification test due to its disparate impact on minorities. The Court determined that the City's fear of being sued by black applicants on a claim of disparate impact discrimination was not strong enough to justify taking an action that constituted disparate treatment based on race. To justify such race-based action, an employer must "demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate-impact statute" and the City could not meet that standard (557 U.S. at 563). Based on *Ricci*, an employer must meet a high standard before invalidating test results due to disparate impact.

Retaliation

Employers may not retaliate against persons because of their activities in pursuit of the enforcement of employment discrimination laws. The retaliation prohibition is quite broad and includes retaliation against a person who objected to a practice that is legal but that he or she reasonably believed to be illegal. Moreover, the Supreme Court held that employees do not need to initiate a complaint to fall within Title VII's anti-retaliation provision. The Court found that Title VII prohibits employers from retaliating against employees who "oppose" unlawful employment practices, and that an employee's disclosure of potentially discriminatory or harassing behavior, even if it is made in response to an employer inquiry, will almost always qualify as "opposition" of an unlawful employment practice.

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An employee who thinks he or she has been discriminated against has the right to bring the matter forward to a supervisor, other persons in management, or a governmental agency. Any retaliation for making a complaint is strictly illegal. A complaint should not be viewed as a sign of disloyalty. It should be taken seriously and investigated objectively – even a complaint that could potentially, after an objective investigation, turn out to be insincere.

The protection against retaliation is not limited to applicants and employees, but reaches all individuals, including former employees. In the case of former employees, the most common retaliation allegation is that the former employer took retaliatory action to interfere with the employee's new employment or job prospects, such as by giving a poor job reference.

As noted above, a discrimination claim must include proof that the employee was subjected to a "materially" adverse action. The Supreme Court has held that in the retaliation context, an action is "materially" adverse if it would have dissuaded a reasonable worker from making or supporting a charge of discrimination. Thus, retaliation claims can be based on a broader variety of employment events than other types of claims. However, in 2013, the Supreme Court issued the more employer-friendly decision of *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517, which held that retaliation claims must be proved according to traditional principles of "but for" causation (in other words, the harm would not have occurred but for the employer's retaliatory motive). This standard of proof is more challenging for the employee, who is less likely to prevail if poor performance or violation of uniformly enforced policies also played a role in the adverse action.

Complaint Process

To bring a discrimination claim under Title VII or the ADA, a charge must be filed with the Equal Employment Opportunity Commission (EEOC) within 300 days of the allegedly unlawful "employment practice." In most circumstances, an employment practice occurs when it happens (such as the case of a discharge). However, if the employee alleges unlawful harassment, a charge of discrimination will preserve all allegations of harassment that are sufficiently related to be considered with the scope of the same employment practice. Moreover, with respect to alleged discrimination in compensation, the limitations period is governed by the "paycheck rule." Under the paycheck rule, employees may recover lost compensation, regardless of when the discriminatory decision was made, so long as an impacted paycheck is issued within the statutory period. In Indiana, a charge may be filed with the Indiana Civil Rights Commission (ICRC) or other local agencies and will be considered dually filed with the EEOC. In this circumstance, either the EEOC or the ICRC may investigate the charge.

An applicant/employee cannot bring a lawsuit until he or she has exhausted the administrative process. If the charge has been dually filed with the EEOC and the ICRC, the claimant cannot bring a lawsuit until after the investigating agency has issued a right-to-sue notice. A right-to-sue notice is a document that may be requested from the investigating agency after 180 days, and it terminates the investigation and gives the applicant/employee the right to sue in federal court. The subsequent lawsuit, which must be filed within 90 days of the right-to-sue notice, may only address issues within the scope of the charge. For example, the complaining party cannot file a charge alleging only sex discrimination and then file a lawsuit alleging claims of race and sex discrimination. With ADA charges, if not specifically alleged in the charge, a failure to accommodate claim cannot be litigated in a subsequent lawsuit. Courts have explained that a failure to accommodate claim is separate and distinct from another claim of discriminatory treatment under the ADA.

Employers' Defenses

Employers can establish several defenses to discrimination claims. Most commonly, the defense to a discrimination claim will be that the employer made the decision at issue for legitimate, non-discriminatory reasons. In addition, even if discrimination is proven, there is an exception to the ban on discrimination based on religion, sex, or national origin for a bona fide occupational qualification (BFOQ). This exception does not apply to discrimination based on race or color. The defense is very narrow and is only legitimate where the employer can establish that, as a matter of the specific requirements of that job, the individual in the protected class is inherently unable to perform the work. A BFOQ will typically only be allowed when all members of one class are physically incapable of performing the job. However, the exclusion may not be based on customer preference or on stereotyping one sex as better at certain tasks than another.

An employer also can utilize a business necessity defense. Where an employer has a practice that appears neutral but has an adverse impact, the employer can prove that a legitimate business purpose exists such that the practice is necessary for the safe and efficient operation of the business, and that the challenged practice effectively fulfills that business purpose. With the exception of age discrimination cases, if there is an alternative practice that would accomplish the business purpose equally well with less discriminatory impact, the defense may fail. In the age discrimination context, the employer may prevail by establishing that the practice was based on “reasonable factors” other than age.

Federal Laws Prohibiting Discrimination

Civil Rights Act of 1964 (Title VII)

Congress adopted Title VII of the Civil Rights Act in 1964. Title VII makes it unlawful for an employer to discriminate against an applicant/employee with respect to hiring, firing, promotion, or any other terms or conditions of employment on the basis of that person’s race, color, religion, sex, or national origin. In 2020, the United States Supreme Court held that Title VII’s protections against discrimination “because of sex” extend to sexual orientation and gender identity. That conclusion arose from the following three cases:

1. *Bostock v. Clayton County, Georgia*, involving the firing of Bostock after participating in a gay recreational softball league for “conduct ‘unbecoming’ a county employee”
2. *Zarda v. Altitude Express* (for which the opinion was consolidated with *Bostock*), with Zarda being fired days after mentioning he was gay
3. *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission*, stemming from the firing of an employee who presented as male when initially hired and was fired after informing her employer she planned to live and work as a woman

These cases generally hold that an employer who fires an employee merely for being gay or transgender violates Title VII because the decision is made based – at least in part – on sex. These cases expand upon past precedent not necessarily involving sexual orientation or gender identity, but rather, holding that an employer violates Title VII by taking adverse action against individuals who do not conform to stereotypical expectations for that person’s anatomical gender (e.g., a woman acting or appearing “too masculine”).

As stated above, Title VII prohibits discrimination at all stages of employment, from hiring to firing, and tangible employment decisions in between (e.g., pay decisions, promotions, disciplines, etc.). The Seventh Circuit has held that testers posing as job applicants have standing to sue under Title VII, even if they are

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not truly interested in employment. Title VII also forbids harassment because of a protected status (such as sexual or religious harassment), which is covered in Chapter 24, "Workplace Harassment." Title VII applies to employers who have 15 or more employees (for each working day in 20-plus calendar weeks in the current or preceding calendar year) and are engaged in an industry affecting commerce. The phrase "industry affecting commerce" has been interpreted to include almost every business.

Title VII was amended in 1972, when it was extended to states and their political subdivisions, and in 1978, when the Pregnancy Discrimination Act (PDA) was added, making it unlawful to discriminate against individuals based on pregnancy, childbirth, or related medical conditions. Title VII was again amended by the Civil Rights Act of 1991, which expanded available remedies and broadened certain aspects of the law that had been narrowed by judicial interpretation.

Pregnancy Discrimination Act of 1978

The Pregnancy Discrimination Act (PDA) amended Title VII to prohibit discrimination against employees or applicants on account of pregnancy, childbirth, or related medical conditions with respect to fringe benefit plans, leaves of absence, reinstatement rights, and employment actions. Discrimination because of pregnancy or a related medical condition is, by legislative definition, intentional sex discrimination and illegal under Title VII where it cannot be justified by the BFOQ defense explained previously. Additionally, the Pregnant Workers Fairness Act (PWFA) was signed into law on December 29, 2022 and will become effective June 27, 2023. The PWFA generally requires employers to accommodate pregnant applicants and employees (including temporary workers) in the same manner as individuals with disabilities. The PWFA essentially codifies the U.S. Supreme Court's ruling in *Young v. UPS*, 135 S. Ct. 1338 (2015), which held that the PDA requires employers to accommodate pregnant employees in the same way it has accommodated others similar in their ability or inability to work. Accordingly, employers should ensure that light-duty policies applicable to some categories of employees (such as those with on-the-job injuries) also apply to pregnant employees. The PWFA also prohibits employers from unilaterally placing pregnant employees on leave (even if paid) if the employee's limitations can be reasonably accommodated on the job. A requested accommodation may be denied on grounds of undue hardship, but only following an interactive process of exploring alternative accommodations.

It is important to note that in addition to the PDA, a pregnant employee may also seek an accommodation under the Americans with Disabilities Act (ADA) for any pregnancy-related medical condition. The 2008 amendments to the ADA extend the scope of the law to require employers to provide necessary accommodations to pregnant employees with pregnancy-related conditions that meet the definition of "disability." In short, the key concept with respect to compliance under the PDA, PWFA, or ADA is to treat a pregnancy-related work restriction like any other similar disability and administer policies and benefit programs in a manner that does not differentiate against a female based on her pregnancy, childbirth, or related medical condition.

Fringe Benefit Plans

Employers must treat pregnancy in the same manner as any other similar disability and the same as others "similar in their ability or inability to work." However, an employer is not required to provide disability benefits for pregnancy-related conditions if such benefits are not provided to others.

At least two federal district courts have permitted lawsuits to go forward where the plaintiffs alleged a violation of the PDA when the employer's benefit plan did not provide coverage for prescription oral

contraceptives. Under the EEOC's 2014 Enforcement Guidance, exclusion of prescription oral contraceptives is a violation of the PDA. The Guidance states that, to comply with Title VII, an employer's health insurance plan must cover prescription contraceptives on the same basis as prescription drugs, devices, and services that are used to prevent the occurrence of medical conditions other than pregnancy. The EEOC declined to speak to whether certain employers (such as closely held for-profit corporations whose owners hold faith-based beliefs against contraceptive use) may be exempt from this legal requirement under either the First Amendment or the Religious Freedom Restoration Act (RFRA). The enforceability of the Guidance is questionable on this point in light of the U.S. Supreme Court's decision in *Hobby Lobby*, where the Court held that, under the RFRA, closely held for-profit corporations cannot be required by the Patient Protection and Affordable Care Act to provide group health plan coverage of certain kinds of contraceptives that the owners find religiously objectionable.

Leaves of Absence and Reinstatement Rights

Leaves of absence and reinstatement rights related to an employee's pregnancy should be administered in the same fashion as any other leave of absence for a short-term disability and, as reiterated in the EEOC's Pregnancy Guidance, in the same fashion as any other leave of absence for individuals "similar in their ability or inability to work." As with fringe benefits, employers are not required to grant preferential treatment for maternity or pregnancy leaves of absence, although they may opt to do so. However, pregnancy leaves are impacted by the Family and Medical Leave Act (FMLA), which is addressed in Chapter 18, "Family and Medical Leave Act." Additionally, employers should keep in mind that under the ADA and the PWFA, a short period of leave could be a reasonable accommodation even if the employee is not eligible for leave under the FMLA.

Civil Rights Act of 1866

The Civil Rights Act of 1866, 42 U.S.C. § 1981, provides that "all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens..." Although the statute does not use the word "race," courts have interpreted the reference to same rights "as white citizens" as limiting § 1981's reach to instances of racial discrimination. The Supreme Court has given a broad interpretation to the concept of racial discrimination, so that § 1981 covers a variety of groups identified by their ancestry or ethnic characteristics. Groups that would not be classified as "races" under modern scientific principles are covered by § 1981. White individuals as well as members of racial minorities can utilize the statute to challenge racial discrimination in employment. For example, § 1981 is violated where a white individual is discriminated against based on his or her activities with African Americans or his or her association with African Americans.

Employers, regardless of the number of employees, are covered by § 1981. The Civil Rights Act of 1991 broadened § 1981's definition of "make and enforce contracts" from simply the creation of contractual relationships to include almost any benefit, privilege, or term or condition of employment (including "at-will" employment with no formal contract). Furthermore, § 1981 does not require plaintiffs to resort to the EEOC or the Indiana Civil Rights Commission before filing suit.

Executive Order 11246: Nondiscrimination Under Federal Contracts

Federal government contractors face legal requirements beyond those applicable to other businesses. Executive Order 11246 prohibits discrimination by these contractors against any employee or applicant because of race, color, religion, sex, or national origin. Additionally, in July of 2014, Executive Order 11246 was amended to protect both sexual orientation and gender identity. Executive Order 11246 also requires that federal contractors take affirmative action to assure that applicants and employees are treated in a non-discriminatory manner. This executive order applies to a contractor who has a single contract with the federal government or a covered subcontract that exceeds \$10,000. A contractor that has federal government contracts (including subcontracts) with an aggregate total value or expected value that exceeds \$10,000 in any 12-month period, even if no single contract equals or exceeds \$10,000, is also covered. Contractors who have at least 50 employees and federal contracts or subcontracts valued at \$50,000 or more must develop a written affirmative action compliance program for each of their establishments. (See Chapter 8, "Affirmative Action.")

Equal Pay Act

This act forbids certain sex-based wage differentials (including different treatment of fringe benefits) for work that requires equal skill, effort and responsibility and that is performed under similar working conditions. However, seniority systems, merit systems, or systems that measure earnings by quantity or quality of production, or any other factors other than sex are legitimate criteria to consider in establishing wage differences. The EEOC is authorized to investigate charges alleging a violation of the Equal Pay Act, but unlike Title VII, ADA, and ADEA claims, employees do not have to first file a charge with the EEOC in order to file a lawsuit under the Act. The Equal Pay Act is discussed in detail in Chapter 14, "Wage and Hour Requirements." This act applies to all employers with regard to their employees who also are covered by the Fair Labor Standards Act (FLSA).

Age Discrimination in Employment Act (ADEA)

Under this act, employers are prohibited from discriminating against employees who are 40 years of age or older with respect to hiring, firing, promotion, or any other terms or conditions of employment. Employers who have 20 or more employees (for 20-plus calendar weeks in the current or preceding calendar year) and are engaged in an industry affecting commerce are covered.

Age is not a factor when decisions are based on the terms of a bona fide seniority system or any bona fide employee benefit plan, such as retirement, pension, or insurance. Employee benefit plans may not, however, excuse the failure to hire any individual, and no such seniority system or employee benefit plan, except as described below, may require or permit the involuntary retirement of an individual upon attainment of any specific age. The mandatory retirement prohibition applies to all new and existing seniority systems and employer or benefit plans. Therefore, any system or plan requiring involuntary retirement is unlawful.

There are several very specific exceptions to the ADEA, depending on the profession of the employee. For example, one exception to the ADEA provides that it is not unlawful for a state or political subdivision, agency or instrumentality of a state to have a mandatory retirement age for firefighters and law enforcement officers. In addition, the ADEA permits persons who are in a bona fide executive or high policymaking capacity for at least two years before retirement and who will receive a retirement benefit of at least \$44,000 annually to be retired mandatorily at age 65.

The ADEA contains additional specific exceptions to its prohibition against age discrimination. It is not unlawful for an employer to take an action where:

1. age is a bona fide occupational qualification reasonably necessary to the normal operation of its business;
2. the action is based on reasonable factors other than age;
3. the action is in observance of a bona fide seniority system;
4. the action is in observance of a bona fide employee benefit plan;
5. the employer has good cause to discipline or discharge the employee; or
6. the practice involves an employee in a workplace in a foreign country and compliance with the ADEA would cause the employer to violate the laws of the foreign country where the workplace is located.

The Supreme Court has rejected so-called “reverse discrimination” age claims – claims based on the allegation that a worker who is over 40 was treated less favorably than an even older employee. Thus, it does not violate the ADEA to institute benefit programs (e.g., retirement plans) that accord preferential treatment to older employees.

A prevailing employee may be entitled to back pay, attorney’s fees, and front pay, along with double damages in cases of willful violations of the ADEA. Willful conduct is evidenced if an employer knows or shows reckless disregard for whether its conduct is prohibited by the ADEA. Claimants under the ADEA cannot recover compensatory damages (such as damages for emotional distress, pain and suffering, and humiliation), nor can claimants under the ADEA recover punitive damages.

Americans with Disabilities Act (ADA)

The employment law provisions of the Americans with Disabilities Act (ADA) provide that covered entities may not discriminate against any qualified individual with a disability with respect to any term, condition, or privilege of employment. The ADA applies to employers with 15 or more employees. Employers covered by the ADA are prohibited from discriminating against and are required to provide reasonable accommodation for qualified disabled workers. In certain cases, employers also must take affirmative steps to employ disabled individuals. (See Chapter 6, “Disability Discrimination.”) The ADA also prohibits employers from discriminating against an employee or applicant because of his or her relationship with a disabled person.

Rehabilitation Act of 1973

Employers that are directly or indirectly supported by the federal government are subject to the anti-disability discrimination provisions of the Rehabilitation Act. An employer that has a contract or subcontract (or combined contracts or subcontracts) in excess of \$10,000 with the federal government for the procurement of personal property or non-personal services is subject to the Act. The Act also applies to any employer that receives federal financial assistance. The Act requires that all contracts contain a provision requiring the contracting parties to take affirmative action to employ and advance the employment of qualified individuals with disabilities.

Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)

USERRA recodifies and clarifies the Veterans' Reemployment Rights Act (VRRRA), which previously governed the employment rights of veterans. USERRA is broader than the previous law, includes all uniformed services personnel and increases the scope of reemployment rights.

Specifically, USERRA extends the cumulative time a military employee may be absent for service to five years and retain re-employment rights (with certain exceptions), affords additional protections to disabled military employees, and focuses more intently on military employees' rights to participate in health and pension plans. It also provides military employees with the right to use vacation or other leave time during the period of service. USERRA applies to federal, state and local governments, and private employers, regardless of the number of employees. (See Chapter 19, "Veterans' Reemployment Rights.")

Religious Accommodation

Title VII prohibits employers from discriminating against an employee or applicant on the basis of religion. In addition to this prohibition against discrimination, employers are affirmatively required to reasonably accommodate employees' religious observances and practices unless such accommodation causes undue hardship to the employer.

The burden on the employer to accommodate a religious belief is lower than the burden to accommodate a disability under the ADA. Courts have ruled that a proposed accommodation of a religious belief is an undue hardship if it imposes more than a *de minimus* cost on the employer. The EEOC has stated that an employer can show undue hardship if accommodating an employee's religious practices requires more than ordinary administrative costs, diminishes efficiency in other jobs, infringes on other employees' job rights or benefits, impairs workplace safety, causes coworkers to carry the accommodated employee's share of potentially hazardous or burdensome work, or if the proposed accommodation conflicts with another law or regulation.

Importantly, employers need not violate the seniority rights or a collective bargaining agreement or preferences of other employees to accommodate employees' religious practices. For example, an employer need not require other employees to switch schedules or jobs to accommodate an employee's religious observances, although voluntary substitutions and swaps that do not result in lost efficiency or extra costs are permissible.

Whether the employer has to permit dress code deviations motivated by religious observances depends on the circumstances. Among other things, concerns of safety (e.g., where facial hair prevents proper fit of safety equipment), religious neutrality (e.g., public school teachers) and public image (e.g., a policy limiting facial piercing) might justify refusal to accommodate a religious practice that conflicts with the employer's dress code. On June 1, 2015, the U.S. Supreme Court in *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015), held an employer need not have actual knowledge of a potential conflict between one's religious beliefs (or religious observances) and a work requirement for it to be liable for failing to accommodate an applicant or employee. In other words, an applicant or employee need only show that the employer's decision was motivated by a desire to avoid having to provide an accommodation, regardless of whether the employer knew, or simply suspected, that such an accommodation would be necessary. The Supreme Court explained that "the rule for disparate-treatment claims based on a failure to accommodate a religious practice is straightforward: An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions." (*Id.* at 2033).

Civil Rights Act of 1991

Before the Civil Rights Act of 1991, Title VII cases were tried before judges and not juries, and the alleged victim was entitled only to back (or front) pay, benefits and reinstatement.

The Civil Rights Act of 1991 now permits the recovery of both compensatory and punitive damages for claims brought under Title VII for intentional discrimination.

There are specific dollar caps on those types of damages based on the size of the employer. They are as follows:

- 15-100 employees: \$50,000
- 101-200 employees: \$100,000
- 201-500 employees: \$200,000
- 501 + employees: \$300,000

Notably, the Supreme Court has held that front pay is not subject to the caps on damages under the Civil Rights Act of 1991.

Perhaps the most significant provision of the 1991 Civil Rights Act is that it permits Title VII claims of intentional discrimination to be tried by a jury.

The 1991 Civil Rights Act also specifically provides that the same types of damages (with the caps) are available to claimants under the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973. However, in disability discrimination cases, compensatory and punitive damages may not be awarded if the employer demonstrates good faith efforts (in consultation with the person with the disability) to identify and make a reasonable accommodation for that person that would provide that person an equally effective opportunity and would not cause an undue hardship on the operations of the business. Jury trials also are available for claims of intentional discrimination under the disability statutes.

Genetic Information Nondiscrimination Act (GINA)

The Genetic Information Nondiscrimination Act (GINA) became effective in November 2009. Its intent is to prohibit employers, employment agencies, labor unions, and health insurers from discriminating against employees and insureds based on their genetic information, as well as collecting or disclosing their genetic information. GINA also requires employers, unions, and employment agencies that obtain genetic information to treat such information as a confidential medical record.

Similar to Title VII, GINA requires individuals claiming employment discrimination based on their genetic information to exhaust available administrative remedies with the EEOC before initiating a lawsuit. If the EEOC provides the complainant with a right-to-sue letter, then the employee may file suit seeking compensatory and punitive damages, equitable relief, including front and back pay, and attorney's fees. Unlike Title VII, GINA only applies to intentional discrimination. GINA precludes claims originating from the adverse impact of facially neutral employment practices. GINA also includes "firewall" language, precluding a claim against an employer for both employment and health insurance discrimination.

Burdens of Proof in Disparate Impact Cases

The 1991 Civil Rights Act established a different burden of proof in Title VII disparate impact cases of discrimination. Where an alleged victim shows that a particular employment practice causes a disparate impact, the burden then shifts to the employer to demonstrate that the challenged practice or process is job related for the position in question and consistent with business necessity. The Act makes clear that the employer carries the burden of proving that the practice is justified by business necessity.

Mixed Motive Cases

The 1991 Civil Rights Act makes it unlawful for race, color, religion, sex, or national origin to be even a motivating factor in an employment decision. Thus, an employer may not escape liability under Title VII by proving that it was motivated by both legal and illegal factors and that it would have taken the same action even if it had not considered the illegal criteria — the so-called “mixed motive” defense. Proof of mixed motive still may be offered because the 1991 Civil Rights Act does not provide for monetary damages or reinstatement if the employer can show that the same decision would have been made without the improper motivating factor. In such circumstances, the alleged victim is entitled to only declaratory relief or an injunction prohibiting any such future conduct, plus attorneys’ fees and costs of the action.

The Supreme Court has decided that the “mixed motive” analysis does not apply to federal age discrimination claims under the ADEA. Specifically, the U.S. Supreme Court held that “a plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the ‘but-for’ cause of the challenged adverse employment action.” In addition, “[t]he burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision.” Thus, the “mixed motive” theory is not available to plaintiffs in federal age discrimination cases.

Indiana Laws Prohibiting Discrimination

Indiana Civil Rights Law

The Indiana Civil Rights law prohibits employers from discriminating against employees on the basis of race, religion, color, sex, disability, national origin, or ancestry. In 2014, the law was amended to also prohibit discrimination on the basis of an applicant or employee’s status as a U.S. military veteran or Indiana National Guard member or reservist. Employers with six or more employees are covered. The legal analysis for state law discrimination claims is similar to that under the comparable laws mentioned earlier in this chapter.

Pregnancy and Childbirth Accommodation

Effective July 1, 2021, a new Indiana law (Ind. Code § 22-9-12 et seq.) protects employees from discipline, termination, or other retaliatory conduct because the employee requested or used an accommodation related to pregnancy, childbirth, or related medical conditions. Employers also must respond to an employee’s request for accommodation “within a reasonable time,” but are not required to provide accommodations beyond what existing federal or state laws require. The law does not replace nor

limit employee protections afforded by state and federal laws that prohibit discrimination based on sex, pregnancy, childbirth, or disability, or that provide family medical leave. The new Indiana law applies to employers with 15 or more employees.

Age Discrimination

Indiana's age bias law prohibits an employer from discriminating against employees between the ages of 40 and 75 on the basis of age. The age discrimination provisions apply to employers who have one or more employees and who are not covered by the ADEA.

Smokers' Rights Law

Indiana has a smokers' rights law, which makes it unlawful for an employer to require, as a condition of employment, that an employee or prospective employee refrain from the off-duty use of tobacco products.

Remedies Available for Violations of Discrimination Laws

Depending on the particular statute that an individual seeks a remedy for alleged employment discrimination, the following paragraphs outline the remedies available.

Injunctive Relief

This type of relief may require the employer to stop engaging in any unlawful acts and to comply with the statutes. A court might also order the employer to engage in other affirmative acts, such as posting anti-discrimination policies or conducting training.

Retroactive Relief/"Make-Whole" Remedies

Retroactive relief places the victim of discrimination in the position that he or she would have occupied but for the discrimination. These remedies include back pay, retroactive promotion, seniority rights, and reinstatement. Back pay includes not only salary loss, but also compensation for lost overtime, shift differentials, and fringe benefits such as sick pay, annual leave, and vacation pay. These awards may be reduced by any interim wages earned by the employee.

Front Pay

Under circumstances where the court determines that reinstatement would be inappropriate because, for example, the work environment is hostile or to return an employee to the workplace would be disruptive or would unfairly displace another employee, an employee may be awarded front pay to compensate for future losses caused by the discrimination.

Damage Remedies in Addition to “Make-Whole”

As noted previously, the Civil Rights Act of 1991 made new damage remedies available to Title VII plaintiffs. These are outlined as follows:

- **Compensatory damages:** Compensatory damages are actual damages for injuries sustained because of specific conduct. These may include damages for mental and emotional distress and damages for impaired reputation or humiliation.
- **Punitive Damages:** Punitive damages may be awarded where an employer’s conduct is shown to be motivated by ill motive or intent, or when such conduct involves reckless or careless indifference to protected rights. In the case of a public employer, punitive damages are not available.
- **Nominal Damages:** Under some circumstances, a nominal damage award may be given where, for example, there is no other remedy available. Nominal damages are minimal damages, often \$1, to show that the plaintiff was the victim of discrimination but was not monetarily damaged by the discrimination. Importantly, even an award of nominal damages can support an award of attorneys’ fees, which can far eclipse the monetary damages awarded.
- **Prejudgment Interest:** Victorious plaintiffs may be entitled to receive interest on their damage award calculated for the period of time between the unlawful act and the judgment in their favor.
- **Attorneys’ Fees/Expert Witness Fees:** Successful plaintiffs also may be entitled to attorneys’ fees and expert witness fees under the anti-discrimination laws.

This chapter was edited by Angela N. Johnson, Partner.

Chapter 5

Age Discrimination

Reduction in Force (RIF)

The Age Discrimination in Employment Act of 1967 (ADEA) prohibits discrimination against persons 40 years or older in terms or conditions of employment because of age. The Supreme Court has found that employers may be liable under the ADEA for specific actions that have a disparate impact on persons 40 years or older. An employer may be liable under the disparate impact theory if a facially neutral employment practice has an adverse impact on persons 40 years or older unless the practice is based on a reasonable factor other than age. However, the scope of disparate impact liability under the ADEA is narrower than under the ADA.

There are many reasons why employers do not take workforce reductions lightly. From a liability perspective, reductions in force (or downsizing) provide fertile ground for ADEA litigation. For example, there has been much litigation regarding the requirements for an enforceable group release. Properly executed releases or waivers can shield an employer from litigation, and the bona fide occupational qualification may shield an employer from ADEA liability.

A reduction in force (RIF) or downsizing may affect one employee or hundreds of employees, depending on the size of the business. A RIF should include planning to avoid (or to defend) litigation. There are many reasons to plan and execute a RIF properly to avoid litigation. Losing a discrimination case can mean:

- losing the cost savings obtained by the RIF;
- paying two people for one job – the employee retained and the one discharged;
- paying the discharged employee double for lost wages if a court decides the violation was willful;
- paying thousands of dollars in legal fees, expert witness fees and costs;
- paying incalculable costs in lost time of employees who must assist in the defense of the action; and
- paying in terms of distraction, frustration and reputation.

Guidelines for Preparing for a RIF

When planning a RIF, review the nature of the workforce, how it is presently organized, and how it will be organized after the RIF. This information will be needed, for example, to determine the types of skills, qualifications, and experience that will be needed after the number of employees is reduced and to demonstrate the basis for eliminating departments or positions.

How Is the Workforce Structured?

Prior to a RIF, an employer should:

- prepare organizational charts;

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- prepare an analysis for each skill level or work area that includes:
 - job title or category;
 - detailed description of the tasks performed;
 - hours worked per week/day; and
 - classification and number of employees that will not be affected by the reduction in force
- analyze the number and percentages of employees 40 and older in job classifications/departments that are to be affected by the RIF;
- analyze the number and percentages of employees in other protected classes (race, sex, religion, national origin); and
- prepare a list of areas affected the most and detail the reasons why.

How Will the Future Workforce Look?

An employer must be able to show how the changes made by a RIF will affect the business in the future. Again, an employee's age cannot be taken into consideration when making decisions about the future workforce. Some of the items an employer should identify include:

- how the new organizational chart will look;
- which positions will be needed and why; and
- how each job position will be filled.

Additionally, the employer should identify how the present structure will correspond to the future structure. Some examples include:

- which job classifications/positions will fit into the new organization;
- which skills will best fit the future organization;
- which skills will not fit the future organization's needs;
- which skills must be sought outside of the organization; and
- who will and will not fit the new organization.

Selecting Criteria for a RIF

Before the RIF, identify valid reasons for its occurrence and the reasons for selection of employees to be terminated. If later faced with an ADEA claim, an employer must show that factors other than age motivated the selection for discharge or demotion. The time to identify those factors is before employees are affected.

Courts have found the following company-related reasons, employee-related reasons, and subjective criteria to be legitimate reasons for reductions in force.

Company-related reasons include:

- closing a particular plant;
- restructuring operations;
- declining production resulting from economic decline, change in market demand or loss of a customer or contract;

- abandoning a particular line of business; and
- eliminating job categories, functions, departments, etc.

Beware! When using costs to justify the elimination of positions of more highly paid employees, the employees most affected are typically those with the greatest seniority (i.e., compensation), and older employees will usually be disproportionately affected. Liability under the ADEA may arise from a disproportionate discharge of older workers.

Employee-related reasons for the discharge of particular individuals include:

- the employee's qualifications;
- lack of educational background;
- lack of product knowledge;
- lack of versatility;
- insufficient degree of skill;
- employee's performance;
- poor working relationship with supervisor or coworkers;
- poor ratings on performance evaluations;
- record of disciplinary actions; and
- inability or failure to meet company standards.

Subjective factors for discharge of particular individuals include:

- employee's conduct and attitude (e.g., lack of cooperation with coworkers, failure to demonstrate loyalty to management, contributing minimal effort to daily work);
- employee's inflexibility; and/or
- employee's unwillingness to reach professional/ occupational potential.

Beware! Documentation is critical to the defense of an age claim. Personnel files/ records and performance evaluations should be current and accurate.

Procedural Safeguards

Here are a few actions that employers may take as procedural safeguards:

- Select a committee to evaluate employees' qualifications, performance and subjective criteria.
- Review all documentation on employee's qualifications and performance.
- Interview supervisors and others familiar with an employee's performance.
- Analyze not only an individual's current skills but his/her potential for acquiring new and different skills.
- Identify a preliminary list of individuals to be discharged.
- Test the list to ensure that the selection is free of bias by supervisors making the recommendations.

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The Final Steps: Executing a RIF

Smooth execution of a RIF requires determining:

- who makes the decisions that employees will be discharged and who communicates the decision to the employee;
- what the discharged employees will be told;
- what can be done to help the discharged employees; and
- how the process will be documented.

Exit Interviews

It is a good idea to have two individuals involved in a discharge – for example, someone from the human resources/personnel department and the employee’s supervisor.

Statements should be accurate and to the point. This is not the time to belabor the employee’s shortcomings (thus, further angering, frustrating or alienating the individual), nor to overemphasize the employee’s strengths (thus, calling into question the decision to terminate the employee).

Prepare a file memo documenting the points covered in the exit interview and record the employee’s comments.

Outplacement Assistance

Consider providing outplacement services for employees. Outplacement professionals work with individuals or groups and provide a healthy outlet for venting anger and frustration that might otherwise be directed toward supervisors and the company.

Outplacement professionals immediately direct the discharged individual’s attention to the future (job searches, resume preparation, interview skills) rather than the past (the employer causing a loss of economic security).

Letters of Recommendation

Letters of recommendation may assist the discharged employee in the job search. Such letters may:

- state the employee’s dates of service;
- set forth the positions held and job duties performed; and
- objectively state the employee’s strengths.

Beware! Do not overstate the employee’s assets. Consider using terms such as “hardworking,” “loyal,” “dedicated” and “dependable” rather than focusing on specific skills and qualifications. Above all, be accurate or your own letter may be the former employee’s Exhibit A in an ADEA action against you.

Letters of recommendation should not be provided by individual supervisors. All letters of recommendation should be reviewed and approved through the human resources/personnel department to ensure they are consistent and accurate.

Checklist for Avoiding Liability

Review and revise personnel policies and forms to ensure they are free of reference to age. Make sure advertisements or notices do not allude to age (e.g., recent college graduate).

Inform supervisors and managers to avoid any age-related comments in reference to an employee, even in a joking context. Comments such as “You must have had a senior moment,” “Hurry up, grandpa,” or referring to someone as a “dinosaur” lose any good-natured ring when reflected from the walnut-paneled walls of a federal courtroom.

Make sure that employees’ evaluations are accurate, candid and consistent. It is difficult to defend an age discrimination claim with poor performance when performance evaluations reflect 20 years of satisfactory ratings. If past performance evaluations appear inconsistent with present decisions to terminate an employee, explain the discrepancies and provide a basis for the present decision. For example:

- supervisors can rate the present employees;
- supervisors can prepare explanations for their preferences that are supported by specific examples of adequate/inadequate or exemplary/marginal performance; or
- other supervisors who have an opportunity to observe and interact with the employees can evaluate the employees’ present skills, qualifications, abilities and performance.

Finally, give employees the real reason for termination or demotion. Being humane but dishonest can hurt you later when your credibility is at stake. Consider obtaining waivers and releases to prevent employees from subsequently claiming age discrimination. Ask whether the company’s reasons and explanations for its decisions and actions will appear fair to a jury. If the answer is no, reevaluate.

Waiver of Rights and Releases: Implications of the Older Workers Benefit Protection Act

Title II of the Older Workers Benefit Protection Act (OWBPA) of 1990 ensures that employees are not coerced or manipulated by employers into waiving their rights to seek legal relief under the ADEA. Any waiver of an employee’s ADEA rights must be made knowingly and voluntarily, and the party seeking to enforce a waiver has the burden of establishing that it was made knowingly and voluntarily. By incorporating the OWBPA requirements into a waiver or release, an employer reduces the possibility of facing ADEA litigation or having an unenforceable settlement agreement.

OWBPA sets forth threshold requirements that are the minimum requirements an employer must use in preparing enforceable waivers and releases in three circumstances. These circumstances are:

1. standard terminations (the pre-charge of discrimination setting);
2. reduction in force terminations (incentive or termination programs); and
3. post-charge of age discrimination settlements.

Waivers in a Standard Termination

A written waiver that is not part of an incentive or other termination program being offered to a group of employees is considered to have been accepted knowingly and voluntarily by an employee if, at a

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minimum, the waiver:

- is written in a manner that can be clearly understood by the employee and without terms unfamiliar to the employee; and
- explicitly states that the employee is waiving rights and claims that fall under the ADEA.

The waiver must also advise the employee that:

- he or she cannot waive rights or claims arising after the date that the release is signed;
- when he or she waives his or her rights or claims, it is done in return for specific compensation in addition to anything of value to which the employee already is entitled;
- he or she should consult with an attorney prior to signing the release;
- he or she has at least 21 days to consider the settlement agreement; and
- he or she has the option of revoking the agreement within at least seven days after signing the agreement and the agreement will not be enforceable until after the seven-day period expires.

Waivers That Are Part of an Exit Incentive or Termination Program

Additional information is required when drafting waivers for employees involved in an exit incentive or employment termination program.

The guidelines stated above apply, except the 21-day period to consider the agreement is extended to a 45-day period, and at the beginning of the 45-day period it must inform the employee in writing (in a manner calculated to be understood by the average individual eligible to participate) as to:

- the class, unit or group which will be covered by the program and from which employees were or were not selected;
- any eligibility factors for the program;
- any time limits that apply to the program;
- the job titles and ages of employees who are eligible or are selected for the program; and
- the ages of all employees in the same job classification or organizational unit who are not eligible or are not selected for the program.

Waivers in Settlement of Pending Age Discrimination Claims

When drafting a waiver in settlement of a charge or lawsuit, the waiver will not be considered knowing or voluntary unless the waiver is:

- written in plain English without terms unfamiliar to the employee; and
- explicitly states that the employee is waiving rights and claims that fall under the ADEA.

The waiver must also advise the employee that:

- he or she cannot waive rights or claims arising after the date that the release is signed;
- when he or she waives his or her rights or claims, it is done in return for compensation in addition to anything of value to which the employee already is entitled;

- he or she should consult with an attorney prior to signing the release; and
- he or she has a reasonable period of time to consider whether to sign the settlement agreement (although a specific minimum consideration period is not necessary, 21 days is indisputably a reasonable period).

EEOC Regulations Regarding ADEA Waivers

The EEOC has established additional guidelines it believes employers must adhere to when asking older workers who are voluntarily or involuntarily terminated from their employment to accept payments or other benefits in exchange for waiving their ADEA rights. While the regulations are not controlling law since they are subject to interpretation by the courts, they are important because they demonstrate the EEOC's commitment to ensuring that ADEA waivers comply with the OWBPA. As a result, if an employer's ADEA waiver fails to comply with the OWBPA, that employer may face an EEOC investigation.

The EEOC regulations provide:

- an ADEA release that does not comply with each of the requirements of the OWBPA may not be ratified by the employee's failure to return, upon bringing a lawsuit, payments received in exchange for the waiver;
- an older worker cannot be required to return severance payments as a condition to filing a lawsuit under the ADEA based on an allegedly invalid waiver;
- an employer may recover money it paid for a waiver if an older worker successfully challenges the waiver and prevails on merits of the ADEA claim;
- an employer's recovery of the money it paid for the waiver is limited to the lesser of: (1) the amount it paid for the waiver to begin with; or (2) the amount the employee recovered under his or her ADEA claim;
- covenants not to challenge an ADEA waiver are the functional equivalent of waivers and are subject to the OWBPA;
- covenants not to challenge an ADEA waiver may not subject an employee to penalties for bringing a lawsuit challenging the validity of the waiver; and
- an employer may not avoid its duties under an ADEA waiver agreement even after the employee brings suit challenging the validity of the waiver.

Bona Fide Occupational Qualification: A Defense to ADEA Claims

Where age is a bona fide occupational qualification (BFOQ) — that is, when age distinctions are necessary for the particular requirements of a job — employers may use age as a factor in employment decision making.

When an employer uses the BFOQ defense, it admits to discrimination on the basis of age and has the burden of justifying the age-based discrimination.

The BFOQ defense is narrowly interpreted by the EEOC and courts and rarely can be relied upon as a defense to age discrimination.

The BFOQ Defense and Safety

The BFOQ typically applies when jobs involve public safety (e.g., public transportation, air travel and law enforcement) or safety in the workplace. When public or workplace safety is a factor, courts give employers more flexibility.

When an employer uses the BFOQ defense because of public or workplace safety concerns, the employer must show that:

- there is a reasonable basis for an age-based qualification because of the significant risk of injury or death, and disqualifying an employee from a job because of age satisfies the intended goal of maintaining public safety; and
- there is no acceptable alternative to distinguish one employee from another that has a less discriminatory impact on the hiring process.

Maintaining Public or Workplace Safety

An employer must make sure the age-based distinction is reasonably necessary to protect people from harm. For example, to justify a mandatory retirement age for older workers the employer must show that:

- it has a duty to provide the highest degree of safety to the public or its employees;
- the use of older workers compromises the safety of the public or employees; and
- certain statistical or medical evidence demonstrates the employer's concern (e.g., the employer can provide medical evidence showing that older workers are more likely to have medical conditions such as cardiovascular irregularities that significantly increase the risk of injury or death in the specific job the individual is performing, airline pilots, for example).

After the COVID-19 pandemic, the EEOC acknowledged that public health authorities have identified those age 65 and over as being at higher risk for a severe case of COVID-19. The EEOC issued guidance clarifying that employers are not required to accommodate older employees even if the employee fears contracting COVID-19 in the workplace. Employers are also not obligated to allow older employees to telework or to take leave, unless the employee has an underlying condition that could be considered a disability. Employers should refrain from placing older workers on involuntary leave, requiring them to work remotely, or requiring them to undergo testing not required of other employees. However, allowing older workers the option to voluntarily stay home or giving them priority to telework would be permitted.

No Other Acceptable Alternative

When public safety is an issue, courts are reluctant to second-guess the employer's decisions on age requirements. If the employer can prove that the elimination of age requirements for a specific position jeopardizes one more person than would otherwise have been jeopardized, the court may accept the argument that there are no less discriminatory alternatives to achieve the same goal.

A commercial tour bus company, for example, may want to use age-based restrictions for hiring its drivers. Because a driver may have to drive for lengthy periods, placing significant mental and physical strain on the driver, a younger individual might be better suited for the position to prevent the likelihood of passenger injury. However, the employer must have solid medical or scientific evidence to justify an age-based distinction.

Courts have accepted medical evidence that evaluates a variety of factors. These include:

- acuity of senses;
- quickness of reflexes;
- endurance;
- aerobic capacity; and
- probability of heart attack or other illnesses.

Remember that in relying upon medical evidence, all individuals that hold the same position in that targeted age group are disqualified even if those individuals do not have medical disabilities. For example, if an employer is using the BFOQ defense for setting a certain retirement age for drivers, there can be no drivers working for the employer who exceed the required retirement age.

Because individuals age differently, qualified employees as well as unqualified employees may be affected by age-based requirements.

The BFOQ Defense When Safety Is Not a Factor

In the absence of significant public or workplace safety concerns, the EEOC and courts provide little leeway for the employer. The employer must show that the age limit used is reasonably necessary for the performance of that employee's particular job, and either:

- all or substantially all employees excluded from the job are, in fact, disqualified from those positions;
or
- some excluded employees have a disqualifying trait that will not be discovered without a reference to age.

These hurdles are difficult ones, and employers should proceed with great caution in setting age requirements without the ability to demonstrate significant public or workplace safety issues.

This chapter was edited by Matthew Fontana, Associate.

Five Tips to Preventing Age Discrimination

1. When downsizing or reduction in force is a consideration, properly plan and execute.
2. Review your company's personnel policies and forms to ensure they are free from references of age.
3. Do not allude to age in job advertisements (e.g., "college graduate" or "retirees.")
4. Do not allow age-related jokes or comments between staff (e.g., "You turned 60 today? I guess we'll be pushing you around here in a wheelchair soon enough!")
5. Performance evaluations need to be honest. If you are going to fire someone due to poor performance, make sure that his or her past performance evaluations reflect the poor performance. If they don't, the employee could question the reason for the termination.

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Disability Discrimination

The Americans with Disabilities Act of 1990 (ADA) extends federal civil rights protection to people who are considered disabled. (42 U.S.C. § 12101 *et seq.*). Built upon a body of existing legislation, particularly the Rehabilitation Act of 1973 (which, among other things, prohibits government contractors and employers involved in programs that receive federal assistance from discriminating against disabled individuals) and the Civil Rights Act of 1964, the ADA states its purpose as providing “a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.” On September 25, 2008, the ADA Amendments Act of 2008 (ADAAA) was signed into law, expanding the scope of the ADA for cases arising as of January 1, 2009.

The ADA has five titles that cover:

1. employment;
2. public services and transportation;
3. public accommodations;
4. telecommunications; and
5. miscellaneous provisions.

Title I, the ADA’s employment section, prohibits employers with 15 or more employees from discriminating against qualified job applicants and workers who are or become disabled. The law covers all aspects of employment, including the application process and hiring, on-the-job training, advancement and wages, benefits, and employer-sponsored social activities.

A qualified individual with a disability is someone who, with or without a reasonable accommodation, can perform the essential functions of the job in question. An employer must provide reasonable accommodations for disabled workers unless doing so would impose an undue hardship on the employer.

Enforcement

The employment provisions of the ADA have procedures and remedies identical to those under Title VII of the Civil Rights Act of 1964. Complainants must file a charge with the Equal Employment Opportunity Commission (EEOC), the Indiana Civil Rights Commission (ICRC), or a local anti-discrimination agency. After 180 days, complainants may request a right to sue notice from the EEOC that gives them the right to file suit in federal court within 90 days after receipt of the notice. Alternatively, a complainant may wait for the EEOC, ICRC, or local agency to investigate the case and decide whether it will sue on behalf of the individual, and then file a suit in federal court within 90 days after receipt of the agency’s determination.

A complainant who wins an ADA case is eligible for the following remedies as appropriate:

- Hiring or reinstatement, with or without back pay
- Reasonable attorneys’ fees and costs
- Expert witness fees

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- Reasonable accommodation
- Other injunctive relief

ADA plaintiffs also may seek jury trials and compensatory and punitive damages for intentional discrimination.

Who Is Disabled?

The ADA makes it unlawful to discriminate in employment against a qualified individual with a disability. The ADA emphasizes that the definition of “disability” should be construed in favor of broad coverage of individuals to the maximum extent permitted by the ADA. The ADA also states that determining whether an individual is “disabled” or not should not require extensive analysis. The ADA, therefore, makes it easier for individuals who are seeking protection under the ADA to establish that they have a disability.

Under the ADA, an individual is disabled if he or she has a physical or mental impairment that substantially limits one or more of his or her major life activities; has a record of such an impairment; or is regarded or viewed as having such an impairment. This three-pronged definition covers a potentially wide range of individuals.

Physical or Mental Impairment

A physical or mental impairment means any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting a vital body system, or any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness and specific learning disabilities.

Examples of physical or mental impairments include the following:

- Orthopedic, visual, speech, and hearing impairments
- Cerebral palsy, epilepsy, muscular dystrophy, and multiple sclerosis
- Infection with the human immunodeficiency virus (HIV)
- Cancer, heart disease, and diabetes
- Major depression, bipolar disorder, anxiety disorders, schizophrenia, and personality disorders
- Drug addiction and alcoholism
- Disabling medical treatments (even for non-disabling diseases)
- “Long COVID” (i.e., a physiological condition affecting one or more body systems) resulting after a COVID-19 infection

An impairment is some sort of physiological or mental disorder. It does not include simple physical characteristics such as eye color. The following are not impairments:

- Height, weight, or muscle tone within normal range and not the result of a physiological disorder
- A normal pregnancy (However, in its July 2014 enforcement guidance, the EEOC took the position that the Pregnancy Discrimination Act [PDA] requires employers to provide employees with reasonable accommodations for normal pregnancy and lactation, even if the employees are not “disabled,” as defined by the ADA, by virtue of those conditions. The United States Supreme Court has declined to adopt the EEOC’s guidance but held that an employer that accommodates

a large percentage of nonpregnant workers similarly in their ability or inability to work may run afoul of the PDA if they fail to accommodate pregnant workers. Additionally, a pregnancy-related impairment that rises to the level of disability is covered under the ADAAA.)

- Personality traits, such as a quick temper, where such traits are not symptoms of mental or psychological disorder
- Advanced age (but hearing loss and arthritis associated with advanced age may be impairments)

Impairment Substantially Limits a Major Life Activity

Not all impairments rise to the level of a “disability.” Only those impairments that “substantially limit” a “major life activity” are considered disabling. Substantially limits means “significantly restricting” performance of a major life activity that the average person in the general population can perform.

Temporary, non-chronic impairments of short duration (e.g., broken limbs, sprains, appendicitis, and influenza) generally are not substantially limiting. Impairments that are episodic or in remission, however, can be substantially limiting and covered by the ADA. The ADAAA specifically states that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

Example: An individual who has epilepsy and who may have seizures unpredictably every two to four months would be covered under the ADA.

The ADAAA provides a broad, non-exhaustive list of major life activities, which includes the following:

- Caring for oneself
- Performing manual tasks
- Seeing
- Hearing
- Eating
- Sleeping
- Walking
- Standing
- Lifting
- Bending
- Speaking
- Breathing
- Learning
- Reading
- Concentrating
- Thinking
- Communicating
- Working

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Other major life activities include the operation of a major bodily function, including but not limited to:

- functions of the immune system;
- normal cell growth;
- digestive functions;
- bowel functions;
- bladder functions;
- neurological functions;
- brain functions;
- respiratory functions;
- circulatory functions;
- endocrine functions; and
- reproductive functions.

With respect to the major life activity of working, the term substantially limits means significantly restricts the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities. The inability to perform a single, particular job for one employer or to perform a specialized job or profession requiring extraordinary skill, prowess, or talent does not constitute a substantial limitation in the major life activity of work.

Example 1: Shoulder impairment suffered by a roof bolter substantially limited his ability to work, where restricted from overhead work, heavy lifting, or pulling and pushing. These combined restrictions may apply to a broad range of jobs and are more than job specific.

Example 2: Employee's ability to work not "substantially impaired" when employee merely cannot work under certain supervisor because of anxiety and stress related to performance evaluation.

The ADAAA makes clear that, in determining whether a condition substantially limits a major life activity, an individual's condition should be analyzed without regard to the ameliorative effects of mitigating measures, such as medication, medical supplies or equipment, prosthetics, assistive technology, reasonable accommodations or auxiliary aids, or behavioral or adaptive neurological modifications, among other things. However, the ADAAA provides that individuals should be evaluated with their ordinary eyeglasses or contact lenses that intend to fully correct visual acuity. The practical impact of this provision of the ADAAA is that many more individuals will be considered "disabled."

Record of Impairment

This definition protects individuals who have recovered from a physical or mental impairment that previously substantially limited them in a major life activity. The fact that an individual has a record as a disabled veteran or of disability retirement, or is classified as disabled for other purposes, does not guarantee that the individual will satisfy the ADA's definition of disability; the record of impairment must fit the ADA's definition of impairment.

Examples: History of mental illness; cancer that is in remission.

Regarded as Having an Impairment

Before the ADAAA, an individual was “regarded as” disabled if he was regarded as having a substantially limiting impairment. The ADAAA, however, redefined the concept of “regarded as.” Now an individual is “regarded as” disabled if he or she has been subjected to an action prohibited under the Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity. The ADA specifically excludes from definition of “regarded as” disabled impairments that are transitory and minor, i.e., impairments that have an actual or expected duration of six months or fewer.

Individuals Not Protected by the ADA

Current Drug Users

The term “individual with a disability” does not include individuals currently engaging in the use of illegal drugs when the employer acts on the basis of such use. “Currently engaging” is not limited to the use of drugs on the day of or within a matter of days or weeks before the employment decision. The term applies to use that has occurred recently enough to indicate the employee is actively engaged in such conduct. Also, the ADA does not prevent employers from testing applicants or employees for current illegal drug use.

Individuals who have successfully completed a drug rehabilitation program or are enrolled in such a program and are no longer engaging in illegal drug use are covered under the ADA. An individual who is erroneously regarded as engaging in such use but is, in fact, not engaging in such use, also is protected under the ADA.

Alcoholics

Employers may prohibit the use of alcohol at the workplace. The ADA provides that an employer may hold an employee who is an alcoholic to the same qualification standards for employment or job performance and behavior that the employer holds for other employees, even if any unsatisfactory performance or behavior is related to the employee’s alcoholism. Therefore, while illegal drug users may be dismissed merely on the basis of their drug use, an alcoholic cannot be dismissed unless his or her alcohol use in some way affects his or her job performance or poses a direct threat to others. Moreover, the ADA does not mention an employer’s right to test for the use of alcohol.

Example: If an individual is drunk or drinks on the job, is often late to work, or is unable to perform the responsibilities of his or her job, an employer can take disciplinary action on the basis of poor job performance and conduct. Further, an employer is not required to discriminate in favor of an alcoholic employee by not punishing him, nor must the employer provide reasonable accommodation for illegal behavior such as driving a company vehicle while intoxicated. However, an employer may not discipline an alcoholic employee more severely than it does other employees for the same performance or conduct.

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An employer may fire or refuse to hire an individual with a history of alcoholism or illegal drug use upon demonstration that the individual poses a direct threat to the health or safety of others because of the high probability that he or she would return to the illegal drug use or alcohol abuse.

Example: An employer could justify excluding an individual who is an alcoholic with a history of returning to alcohol abuse from a job with the responsibility to transport other individuals, or with the sole responsibility for supervision of a group of individuals who are dependent (e.g., children, developmentally disabled individuals, etc.).

Sexual Orientation and Other Exclusions

Homosexuality, bisexuality, transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, and gender identity or sexual behavior disorders are not considered disabilities. Other conditions specifically excluded in the ADA include compulsive gambling, kleptomania, and pyromania.

Health and Safety Issues

Employers may deny employment to an applicant or discharge an employee with a disability if the individual poses a direct threat to his or her own health or safety or to the health or safety of others.

The ADA's regulations give little guidance as to the issue of determining a direct threat and define the phrase in the following ambiguous terms:

Direct threat means a significant risk (high probability) of substantial harm to the health and safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.

However, as the regulations note, the ultimate question is whether the disabled individual has the present ability to perform safely the essential functions of the job, and this assessment must be individualized and based upon reasonable medical judgment that relies on the most current medical knowledge and/or best available objective evidence.

The following are key factors in making this determination:

- Duration of the risk
- Nature and severity of the potential harm
- Likelihood that the potential harm will occur
- Imminence of the potential harm

Two things are clear from the regulations. First, an employer cannot deny a job to a disabled individual merely because of a slightly increased risk, or speculative or remote risk. Second, the determination must be based on objective factual evidence, not on subjective good-faith perceptions, stereotypes, fears, or patronizing attitudes about the particular disability.

Direct threat cases under the Rehabilitation Act have resulted in the following teachings:

- Evidence of a medical judgment that a disabled individual's condition has a potential for future injury is insufficient. The question is the individual's current capacity to perform.

- Concern of greater risk of economic loss, such as the cost of worker's compensation or insurance, is not a defense.
- The possibility that a disabled person will present an elevated risk of injury on the job is insufficient to deny the person a job.
- These determinations cannot be based merely on medical reports but also must take into account each particular individual's work history and medical history. The employer has a duty to gather sufficient information not only from the disabled individual but from qualified experts to make this determination.
- If an employer uses an independent medical provider to evaluate the employee to determine if a direct threat exists, the provider should develop an opinion independent of information given by the employer.

It also is important to remember that, even if an employer determines that a disabled person poses a direct threat, it still must perform a reasonable accommodation analysis to determine whether an accommodation exists that would eliminate the risk or reduce it to an acceptable level. If it is determined there is none, the employer can refuse to hire the applicant or can discharge the employee who poses the direct threat.

Under this qualification standard, a person with a currently contagious disease or infection does not constitute a direct threat to the health or safety of others unless the person poses a significant risk of transmitting the infection to others in the workplace and that risk cannot be eliminated by reasonable accommodation or a reasonable modification of policies. Therefore, individuals afflicted with transmittable diseases, such as AIDS, cannot be discriminated against unless they pose a significant risk of transmitting the infection to others.

Note that the ADA, like other antidiscrimination laws, continues to apply during the time of the COVID-19 pandemic, but none of these laws interfere with or prevent employers from following the guidelines and suggestions made by the CDC or local or state public health authorities about steps employers should take regarding COVID-19. Based on guidance of the CDC and public health authorities as of October 1, 2021, the COVID-19 pandemic meets the direct threat standard because COVID-19 is highly contagious and potentially fatal. However, as the CDC and public health authorities revise their assessment of the spread and severity of COVID-19, that could affect whether a direct threat still exists. For the most recent updates involving the ADA's application in the workplace with the evolving pandemic, review the EEOC guide, "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act" found at www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act.

Food Handlers

The United States Secretary of Health and Human Services (through the Centers for Disease Control) has published a list of infectious and communicable diseases that are transmitted through the handling of food. Because there is no medical evidence demonstrating that AIDS can be transmitted through the handling of food, AIDS does not appear on the list.

An employer may refuse to assign or continue to assign an individual with one of the communicable diseases on the list to a job involving food handling if the risk of transmission of the disease cannot be eliminated by reasonable accommodation. However, in the case of a current employee, the employer must consider whether the employee can be reassigned to a vacant position not involving food handling. The regulations specify that the food-handling provisions do not preempt, modify, or amend state, county, or

local law, ordinance, or regulation that is in accordance with the list of infectious diseases and is designed to protect the public health where the risk of transmission cannot be eliminated by reasonable accommodation.

Association or Relationship with Individuals with Disabilities

It is considered a violation of the ADA to discriminate against an applicant or employee because of that individual's known family, business, social, or other relationship or association with a known disabled person.

Example: If an applicant discloses to the employer that his or her spouse has a disability (and the applicant is otherwise qualified for the job), the employer violates the ADA if it declines to hire the individual on the assumption that the applicant will have to miss work and/or leave early to care for his or her spouse. However, the employer may dismiss an employee for violating a neutral company attendance policy regardless of the reason for tardiness. (See Chapter 18, "Family and Medical Leave Act.")

The employer need not provide any accommodation to the non-disabled individual.

Employment Highlights

The general rule under the ADA is that an employer may not discriminate against a qualified disabled person with respect to any terms and conditions of employment, including fringe benefits.

The statute lists types of conduct considered to be discrimination. The following are *not* allowed as included in the statute:

- Treating an applicant in a way that adversely affects his or her employment opportunities or status
- Being party to a contract that discriminates against disabled applicants or employees
- Discriminating against an applicant or employee because of his or her known relationship or association with a disabled person
- Refusing to make a reasonable accommodation to physical and mental limitations of an otherwise qualified applicant or employee unless undue hardship on the operation of business can be established
- Using qualification standards, tests, or other selection criteria that screen out disabled individuals unless the criteria are job-related and consistent with business necessity
- Failing to use or administer tests that reflect the skills and aptitude of applicants with impaired sensory, manual, or speaking skills

Pre-Hire Considerations

Disabled individuals must be provided access to application materials and interview sites. This includes ensuring that the interview site is accessible to an individual with a mobility impairment, such as someone

who uses a wheelchair. However, accessibility and usability apply to the needs of all qualified individuals with disabilities, including those with visual, hearing, or even mental impairments.

Thus, accommodations could include the following:

- Putting up more signs with larger print and tactile markings
- Installing ramps
- Relocating the interview or testing site to an accessible location
- Providing a reader for a visually impaired applicant who wishes to complete the application in the employer's office

At a minimum, there should be accessible parking, an accessible route to the door, and a path to travel to the place of application. You also should be prepared to provide employment and application materials in alternate formats if requested.

Employment Advertisements

Recruiting and advertising practices must not discriminate against otherwise qualified applicants. These include activities conducted by the employer itself or for the employer by a contractor, such as a recruiting or placement agency.

Frequently, the first contact an employer has with potential applicants is a publicly placed employment want ad. In describing job openings, avoid using phrases that suggest certain mental or physical conditions, such as the following:

- Able-bodied
- Strong or healthy back
- Exceptional dexterity
- Agile
- Articulate

Such phrases might be considered evidence that the employer is trying to discourage people who have physical and mental conditions from applying (i.e., the employer is trying to screen out individuals with disabilities).

Telephone or Walk-in Inquiries

If contacted by a disabled applicant, either in person or by telephone, an employer cannot discriminate against a qualified individual with a disability who can perform the essential functions of the job with or without reasonable accommodation.

Accordingly, if asked about a policy regarding employees with disabilities, the response should be something like this:

[Employer's] policy is not to discriminate against individuals with disabilities. All situations are looked at individually, on a case-by-case basis. We take into account the nature and severity of the particular limitations, the essential functions of the job that the person is applying for, and whether there is a reasonable accommodation available that would not cause an undue hardship.

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An applicant with a disability should be permitted to proceed with the employment process just like any other applicant. If the applicant requests reasonable accommodation in the application or interview process, the employer must provide it unless doing so creates an undue hardship.

Employment Application

Job applications should not contain any questions or comments that might violate the ADA, such as inquiries seeking information about a person's physical or mental condition. Examples of questions to avoid include the following:

- Do you have any physical or mental impairments?
- How many days of work did you miss at your previous job due to illness or injury?
- Have you ever filed for or received worker's compensation benefits?
- Have you been hospitalized in the past five years, and, if so, for what?

Interview Process

Obviously, any questions or inquiries that may be inappropriate to ask on an application should not be asked during an interview.

Supervisors must anticipate and respond to questions from applicants who volunteer information concerning a disability and who ask how the organization deals with the disabled or whether the disability will jeopardize their chances for a job offer or advancement. If such inquiry is made, the applicant should be told something along the following lines:

[Employer's] approach to such issues depends on the circumstances. All situations are looked at individually, on a case-by-case basis. We take into account the nature and the severity of the particular limitations, the essential functions of the job that the person is applying for, and whether there is a reasonable accommodation available that would not cause an undue hardship.

Reference Checks

Reference checks are acceptable. However, it is not permissible to inquire about medical history, and any such questions should be omitted. An employer may ask whether the applicant had any attendance problems unrelated to a disability; however, with this question the employer runs the risk of discovering a disability. The applicant may then claim that the employer took a disability into account in its hiring decision. In any event, if the issue of a disability arises in reference checks, the employer should make no further inquiries about the disability.

Permissible Pre-employment Inquiries

Although an employer cannot inquire about the applicant's mental or physical condition, it is appropriate and legal to make inquiries about the following:

- The applicant's qualifications
- The applicant's ability to perform essential functions of a job or job-related functions of the position

Example: If driving is a job function, an acceptable question is: “Do you have a valid driver’s license?” You cannot ask whether the applicant has a visual disability, epilepsy, diabetes, etc., that might prevent the applicant from having a driver’s license.

- Whether the applicant possesses required licenses, certifications, or degrees
- How an applicant will be able to perform job-related functions. This may be asked of all applicants in the same job category regardless of disability or of an applicant whose known disability may interfere with performing a job-related function even if all applicants are not asked. (Be prepared to describe the essential functions of the job to the applicant.)

Avoid questions regarding the following:

- Whether the applicant has or has had a disability or a disabling condition
- The severity of the applicant’s disability (even if the disability is obvious to you)
- The applicant’s worker’s compensation history
- The health or disability of the applicant’s family member

Medical Inquiries and Examinations

The ADA specifically prohibits pre-employment (i.e., pre-hire) inquiries as to whether the applicant has a disability or to the nature or severity of such a disability. Employers are permitted, however, to inquire about the ability of an applicant to perform job related functions or may ask an applicant to demonstrate how, with or without reasonable accommodation, the applicant will be able to perform job related functions. Thus, if an applicant has an obvious walking impairment, it would be unlawful to ask what causes it or how severe it is. However, if the job the applicant is applying for requires walking on a frequent basis, it would be lawful to ask whether the applicant could perform that function, with or without an accommodation.

Notwithstanding, employers may make inquiries that are not disability-related in an effort to identify which employees are more likely be to be unavailable for work in the event of a pandemic, such as the COVID-19 pandemic. An inquiry is not disability-related if it is designed to identify potential non-medical reasons for absence during a pandemic (e.g., curtailed public transportation) on an equal footing with medical reasons (e.g., chronic illnesses that increase the risk of complications). The inquiry should be structured so that the employee gives one answer of “yes” or “no” to the whole question without specifying the factor(s) that apply to him or her. For the most recent guidance regarding pre-hire practices with the evolving pandemic, review the EEOC guide, “Pandemic Preparedness in the Workplace and the Americans with Disabilities Act” at www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act and updated technical assistance at www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws.

Pre-employment (pre-hire) physicals are also prohibited. However, after the employer has offered an applicant a position, it can make actual commencement of the job contingent upon taking a physical examination. If undertaken, this practice must be observed uniformly for all entering employees in the same job category and may not be applied selectively to disabled persons. Results of such exams that in practice screen out employees with disabilities are only permissible if the exclusivity criteria is job-related and consistent with business necessity, and where performance of the essential functions of the job cannot be accomplished with reasonable accommodation.

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Medical examinations of current employees are permissible only when job-related and consistent with business necessity. Employers may inquire into the ability of an employee to perform job related functions. Voluntary medical examinations and medical histories are permissible if offered as part of an employee health program available to employees at the worksite.

Any information obtained as a result of a permissible examination must be maintained in separate files and kept confidential. Only the following people may be informed of an individual's medical data:

- Supervisors and management may be informed regarding necessary restrictions on work duties of the employee and necessary accommodations
- First-aid or safety personnel also may be informed if the disability might require emergency treatment
- Government officials investigating compliance with ADA may be provided relevant information upon request

Post-hire Process and Job Descriptions

To be protected by the ADA, a person must be a qualified individual with a disability. This is a person who: "satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of the desired position."

There are two basic, equally important steps in determining whether an individual is qualified under the ADA:

1. Determine whether the individual meets necessary prerequisites for the job (such as education, work experience, training, skills, licenses, certificates), and other job-related requirements (such as good judgment or ability to work with other people).
2. Determine whether the individual can perform the essential functions of the job, with or without reasonable accommodation. This second part, a key aspect of nondiscrimination under the ADA, also has two parts. They are:
 - o identifying the essential functions of the job; and
 - o considering whether the person with a disability can perform these functions, unaided or with a reasonable accommodation.

Note: "Essential functions" are defined as job tasks that are fundamental and not marginal.

Under the ADA, an otherwise qualified individual with a disability cannot be discriminated against because of that disability if he or she can, with or without reasonable accommodation, perform the essential functions of the job in question. Most claims under the ADA likely will arise when an employer does not select a disabled person for a position because he or she cannot perform the job fully. In those situations, the employer's defense probably will be that the function the individual cannot perform is an essential one and a reasonable accommodation could not be made without undue hardship on the operation of the business.

The statute states that consideration will be given to the employer's judgment as to essential functions and that the first place to look when an employer rejects a disabled individual for a job is that employer's

description for the position at issue. Thus, if a job description does not list the function that the individual cannot perform, then the function will not be deemed essential. Therefore, the concept of an essential function and a job description become important issues. In short, the job description becomes the first line of defense.

Job descriptions must be kept current. If there is a question about the accuracy of job descriptions (duties may change, for example), the job descriptions should be reviewed with appropriate personnel (e.g., the human resources director) so that appropriate revisions can be made. Do not give an applicant or an employee a copy of a job description that does not accurately reflect the position as it applies to that individual. A copy of the job description should be placed in the employee's personnel file.

Determining what functions are essential will be critical in determining whether a disabled individual is qualified. The final regulations state that an essential function is a fundamental duty of the job in question that the employee must be able to perform and that tasks that are marginal to the position are not essential.

The regulations recognize that among the reasons a job task or function may be considered essential are:

- the position exists to perform the particular function;
- there are a limited number of employees available to perform that job function. This may be a factor either because the number of available employees is low or because of the fluctuating demands of the business; and
- the function is so specialized that individuals are hired for the position because of their expertise or ability to perform the function.

In addition to the employer's judgment and written job descriptions, the types of evidence cited as relevant in deciding whether a function is essential include the amount of time typically spent on performing it; the terms of an applicable labor contract; the consequence of not requiring an individual to perform that function; the work experience of persons who have held that job in the past; and the work experience of persons currently performing the job.

In identifying an essential function to determine whether an individual with a disability is qualified, the employer should focus on the purpose of the function and the result to be accomplished, rather than the manner in which the function presently is performed. An individual with a disability may be qualified to perform the function if a reasonable accommodation would enable this person to perform the job in a different way and the accommodation does not impose an undue hardship.

The EEOC's inquiry into essential functions is not intended to second-guess an employer's business judgment with respect to qualitative or quantitative standards or to require employers to lower their standards.

Example: If an employer requires its employees to type 75 words a minute, the employer need not explain why a lesser speed is inadequate. However, the employer must show that it actually imposes the requirement on its employees.

In addition to listing tasks or functions an employee is expected to perform in a particular position, job descriptions frequently contain a list of qualifications an individual must have for the position. The ADA prohibits the use of qualification standards or other selection criteria that screen out individuals with disabilities unless those qualifications or criteria are job-related and consistent with business necessity. Qualifications are such things as personal or professional attributes, skills, experiences, education, physical

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requirements, and so forth established by the employer. It is important to note that the regulations allow qualifications to include a requirement that a person not pose a direct threat to the safety or health of himself or herself or of others. Therefore, for many jobs, it may be appropriate to list this as a qualification.

Example: The first step in determining whether a person who has cerebral palsy is qualified for a counselor position is to determine whether the person has the appropriate education and experience qualifications. If not, he or she is not qualified. If the policy is that all counselors must have a bachelor's degree and two years of experience working with the developmentally disabled, an individual with a disability who has worked with the developmentally disabled for one year would not be qualified as a counselor.

Documentation of the process used in preparing job descriptions should be maintained, including the following:

- Names of those who participated
- Dates
- List of duties
- Functions
- Qualifications
- A list showing for what reason a function is considered essential
- Any notes of evidence supporting that conclusion

This documentation should be kept in a separate file. Thus, if an employer does not choose a disabled individual for a particular job because of a belief that he or she cannot perform one or more functions satisfactorily, the employer can respond to any charge or inquiry as to why the function is essential.

A systematic approach to reassessing job descriptions should be selected. Thereafter, it will be critical to recognize changes that are more than temporary and to revise job descriptions accordingly.

Developing a Process for Determining Reasonable Accommodation

The ADA requires employers to make a reasonable accommodation that would allow an otherwise qualified, disabled applicant or employee to perform the essential functions of the job for which he or she is being considered. Thus, before an employer must face the issue of reasonable accommodation, the individual must be disabled (i.e., have a mental or physical impairment that substantially limits a major life function) and otherwise be able to perform the essential functions of the job.

Reasonable accommodations fall into three general categories:

1. Changing a job application process to allow qualified disabled persons to be considered
2. Changing the work environment or the circumstances under which a job is customarily performed to allow a qualified, disabled individual to perform the essential functions of that job
3. Changing the work environment to allow a qualified, disabled employee to enjoy benefits and privileges of employment on the same basis as other similarly situated, non-disabled employees

By way of example, the statute and the comments to the final regulations list the following reasonable accommodations:

- Changing existing facilities so that they are readily accessible to and usable by the disabled
- Job restructuring, such as a part-time or modified work schedule
- Altering when and/or how an essential function of a job is to be performed
- Reassignment to a vacant position
- Allowing a disabled individual the chance to provide and use equipment, aids, or services on his or her own (e.g., use of a service dog)
- Modifying examinations, training materials, or policies
- Permitting the use of accrued paid leave or providing additional unpaid leave
- Making transportation provided by the employer accessible or providing reserved parking spaces for the disabled
- Providing qualified readers or interpreters
- Providing a personal assistant to a disabled employee (e.g., a page turner for an employee with no hands or a travel attendant for a blind employee on an occasional business trip)

Courts have found the following were “reasonable accommodations” under the ADA, under the circumstances in the particular cases:

- An emotionally disabled typist who had an extreme stress reaction when she took and failed a typing test was given numerous attempts either to pass the test or to obtain alternative employment
- An alcoholic was given counseling, granted leave, given the opportunity to obtain several different levels of treatment, and provided a last-chance agreement
- A computer analyst with multiple sclerosis was offered workstation relocation, a flexible work schedule, and frequent rest periods
- A diabetic with a hyperactive thyroid was transferred to a less hazardous job, was given a modified warehouse position that did not require him to operate a forklift, and was given accommodations for his special eating requirements
- An individual who was extremely sensitive to tobacco smoke was separated from workers who smoked, given the voluntary agreement from employees not to smoke in that area, provided ventilation improvements in that area, and given the opportunity to move his desk or to accept an outside maintenance job
- An employee with arthritis was offered disability retirement or a lower position that did not require the fieldwork that aggravated his condition
- An individual addicted to illegal drugs was referred to an in-patient rehabilitation and drug counselor but declined assistance

Unfortunately, there are no easy-to-follow rules for what a reasonable accommodation will be. Rather, each individual’s situation will need to be reviewed on a case-by-case basis, taking into account all relevant surrounding circumstances.

Although the preference of the disabled individual is to be given primary consideration in selecting the accommodation, the regulations make it clear that the ultimate decision is that of the employer. An employer is free to choose the accommodation that is the least expensive or easiest to implement as long as it provides

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a meaningful equal employment opportunity. While a disabled individual is not required to accept the accommodation offered, if his or her refusal results in the inability to perform the essential functions of the job, the person will not be considered to be a qualified individual with a disability.

Example: A hearing-impaired nurse was unable to hear dialysis alarms and had other performance problems unrelated to her disability. The nurse requested a transfer, and the employer rejected the request, offering the option to stay in the position and receive additional training, resign and reapply for a position in another area, or be discharged. The nurse refused the first two options, so her employment was terminated. The court held that an employer is not required to find another job for an employee who is not qualified for his or her present job, and an employee is not entitled to reject satisfactory accommodations that the employee finds undesirable.

Responses to Failure to Make a Reasonable Accommodation

If faced with a claim by an individual that the employer did not make a reasonable accommodation, the employer's response may include one or more of the following seven positions:

1. The individual is not disabled as defined by the law: that is, he or she does not have a mental or physical impairment that substantially limits a major life activity, or the employer did not have knowledge of the employee's disability.
2. The person, regardless of his or her disability, is not qualified for the job in question.
3. The person's disability will cause him or her to be a direct threat to the safety or health of himself or herself or others, and there is no reasonable accommodation to eliminate or minimize that threat to an acceptable level.
4. Providing the reasonable accommodation would result in an undue hardship on the operation of the business.
5. The cost is disproportionate to the benefit to the disabled employee, regardless of the employer's resources (cost considerations are not limited to undue hardship).
6. Despite the employer's numerous attempts to determine necessary accommodations, the employee withheld necessary information that would allow the employer to determine what, if any, reasonable accommodation exists.
7. Providing the reasonable accommodation would violate an existing and consistently enforced collective-bargaining agreement (any exceptions in other circumstances may weaken this defense).

The burden to establish the first two issues should be upon the individual or the agency making the claim, while the burden to establish the remaining five will be on the employer.

Determining Undue Hardship

Failing to provide a reasonable accommodation violates the ADA unless the employer can prove that the accommodation(s) would impose an undue hardship on the operation of its business. An undue hardship includes things that are unduly costly, extensive, substantial, or disruptive, as well as things that will fundamentally alter the nature of the business or the services offered.

Factors that will be considered in making the determination of undue hardship include the following:

- Nature and cost of the proposed accommodation
- Overall financial resources of the facility providing the accommodation
- Number of employees at the location providing the accommodation
- Effect of providing the accommodation on the expenses and resources of the location providing it
- Impact of the accommodation on the ability of other employees to perform their duties at the location and on the location's ability to conduct business
- Overall financial resources of the employer
- Overall number of employees in the employer's business
- Number, type, and location of the employer's facilities
- Employer's type of operation and the composition, structure, and functions of its workforce
- Administrative and fiscal relationship of the facility providing the accommodation to the employer's entire operation
- Availability of outside funding to pay for an accommodation

It is clear that an employer will not simply be able to point to undue hardship as a defense to a failure to accommodate. Rather, the employer must present evidence and prove that the accommodation will be an undue hardship.

Example 1: The size of the facility and available finances have an effect on the determination of whether a particular action would cause an undue hardship. Compare a facility that serves 20 individuals with a budget of \$200,000 annually to a facility that serves 200 individuals with a staff of 125 and an annual budget of \$4,500,000. If the requested accommodation requires buying new equipment costing \$10,000, it may be an undue hardship for the smaller facility but not an undue hardship for the larger facility. However, there are no easy-to-follow rules. The reasonable accommodation/undue hardship analysis must be performed by each facility on a case-by-case basis.

Example 2: An employer was not required to provide a helper to do overhead work for a roof bolter in a coal mine when overhead work was an essential function of job and the employee could not perform overhead work.

Reasonable Accommodation Analysis

An employer is likely to face the reasonable accommodation question in making employment decisions concerning disabled and potentially disabled employees. The statute and regulations make it unlawful to prefer a qualified, non-disabled person over a qualified, disabled person if the decision is based on the fact that the employer must make an accommodation for the disabled person. The reasonable accommodation analysis also may arise with respect to decisions about transfers and promotions, and about employees who have been released to return to work with restrictions after being on medical leave.

Consultations

The reasonable accommodation analysis may involve obtaining relevant information from many persons, including the following:

- **Supervisors.** Review the written job description with the supervisor of the job in question to confirm whether the functions that the disabled person will have difficulty performing are essential or marginal, and get the supervisor's view as to any accommodations that could allow the disabled person to perform that function.
- **Human Resources Department.** Review the entire situation based on the evidence that has been gathered and ask the department to provide input as to whether there have been similar situations in the past and how the organization has dealt with them.
- **Physicians.** Seek a medical opinion from either a company physician or the disabled person's physician. It may be necessary to ask the physician additional questions or to provide the physician with additional information. For example, an employer might provide the physician with the written job description and a detailed description of the essential functions of the job and request the physician's opinion concerning the disabled person's current ability to perform those essential functions and/or whether the person's condition could result in substantial probability of harm to himself or herself or others because of the condition.
- **The Disabled Person.** Ask the disabled person whether he or she has performed similar jobs in the past at other locations or for other employers. If so, ask if the individual had any difficulty and what accommodations were made at that time. An employer also should solicit the disabled person's opinion as to whether the individual believes he or she can perform the essential functions of the job and, if not, what accommodations, if any, the individual would suggest might allow him or her to perform the job.
- **Rehabilitation Specialist.** Consult with a rehabilitation counselor or specialist and provide the counselor with all the relevant information at your disposal, including physicians' statements, job descriptions, and concerns of the supervisor and the disabled person. Also, the rehabilitation specialist may view performance of the job during an on-site visit. The specialist then can give an opinion or suggest potential accommodations that could be considered.

State and local rehabilitation agencies can provide assistance. There also is the Job Accommodation Network (JAN), which is a service provided by the United States Department of Labor's Office of Disability Employment Policy (ODEP). JAN provides services to businesses needing information about accommodation. To contact JAN, call them at (800) 526-7234 or (877) 781-9403 (TTY), or visit their web site at www.askjan.org.

ADA Committee

In difficult cases or where time allows, committee action could prove to be a valuable tool for resolving reasonable accommodation issues. A standing ADA committee should consist of some or all of the following: human resources director, health and safety director, operations manager, company physician or nurse, a rehabilitation counselor with whom the employer has established a relationship; and a disabled employee. Then, as questions arise, the committee can meet to discuss the issue of reasonable accommodation.

Supervisory Training

Supervisors and other management personnel, as well as the company physician, must be educated about the requirements of the ADA. They must understand the concepts of essential functions, reasonable accommodation, direct threat, undue hardship, and other related terms. For example, some supervisors may resist having a disabled individual placed in their area because they fear that the work will be affected or that clients' and/or customers' needs will not be met. Supervisors need to understand that their actions can result in liability to the employer.

An employer should emphasize to its physician(s) that the issue is whether the person's condition currently affects his or her ability to perform any of the essential functions of the job. This requires knowledge of essential functions by the physician. Statements such as "the individual could or may" or "there is a possibility of" will not qualify as grounds to rely on to deny a disabled individual a job or the right to return to work. Furthermore, in instances where the physician believes the person's condition will cause the person to be a direct threat to the individual's safety or the safety of others, the physician needs to specify the risk that raises the concern, how long that risk may exist, the likelihood of harm occurring, and the imminence of that harm occurring.

There are many issues to become familiar with and consider when confronted with a need to provide reasonable accommodation. Supervisors must become comfortable with and conversant in this as well as other ADA concepts to ensure compliance. Failure to do so may result in substantial liability.

State and Local Laws

Indiana has essentially adopted the ADA with respect to employers having 15 or more employees. The provisions of the Indiana ADA mirror those of the federal law.

Employers with between six and 14 employees are not subject to the ADA or the Indiana ADA, but they are subject to the disability provisions of the Indiana Civil Rights Law. Employers also may be subject to local laws concerning the employment of individuals with disabilities. Although the Indiana Civil Rights Law and local laws may be less expansive than the ADA (e.g., the Indiana Civil Rights Law does not require a reasonable accommodation or protect individuals from being discriminated against because of their relationship with a disabled individual), the Indiana Civil Rights Commission and other local anti-discrimination agencies enforce these laws liberally and frequently turn to federal law to interpret the state statute or local ordinance. For these reasons, even small employers are well advised to be familiar with ADA principles.

Summary of Other ADA Provisions

Title II: Public Services

Title II prohibits discrimination against a disabled individual in the provision of services, programs, or activities by a public entity, such as a state or local government or a department, agency, special purpose district, or other instrumentality of a state or local government. Title II includes specific requirements applicable to public transportation provided by public transit authorities, commuter rail authorities, and Amtrak.

Title III: Public Accommodations and Services Provided by Private Entities

Title III prohibits discrimination against disabled individuals in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations by any person who owns, leases, or operates a place of public accommodation. The following are considered public accommodations:

- Restaurants
- Hotels
- Doctors' and lawyers' offices
- Bakeries
- Grocery stores
- Clothing stores
- Laundromats
- Museums
- Parks
- Zoos
- Convention centers
- Educational facilities
- Daycare centers
- Banks
- Golf courses
- Health spas

Title III also prohibits discrimination in public transportation services that are provided by private entities.

Existing establishments must be made accessible if the changes are readily achievable (i.e., easily accomplished without much difficulty or expense). Auxiliary aids and services must be provided unless such a provision would fundamentally alter the nature of the program, service, or goods, or cause an undue burden. New construction and major renovations must be designed and constructed to be readily accessible to disabled individuals. Elevators need not be installed if a building has fewer than three stories or fewer than 3,000 square feet per floor unless the building is a shopping center, shopping mall, or office of a health care provider, or unless the U.S. Attorney General decides that other categories of buildings require the installation of elevators.

Title IV: Telecommunications

Title IV requires providers of telephone services to the public to include interstate and intrastate telecommunication relay services. Such services provide disabled individuals who use non-voice terminal devices with opportunities for communications that are equivalent to those provided to individuals able to use voice telephone services.

Where to Obtain More Information

Additional information regarding disability discrimination can be obtained from the following:

Equal Employment Opportunity Commission

Indianapolis District Office

101 W. Ohio St., Suite 1900

Indianapolis, IN 46204-4203

(800) 669-4000 (voice)

(800) 669-6820 (TTY)

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What Do You Know About Disability Discrimination?

1. An employee who wins an ADA case:
 - a. may be required to be re-employed with the company.
 - b. is eligible for reimbursement of attorneys' fees and costs.
 - c. may be provided with a reasonable accommodation.
 - d. all of the above.

2. Which of the following is likely not considered a physical or mental impairment by the ADA?
 - a. quick temper
 - b. diabetes
 - c. major depression
 - d. HIV

3. The ADA covers which of the following:
 - a. kleptomania
 - b. pyromania
 - c. compulsive gambling
 - d. none of the above

4. Is it legal to make inquiries about a job applicant's ability to perform essential functions of a job or job-related functions of a position?
 - a. yes
 - b. no

5. Employers with six to 14 employees are subject to which discrimination laws?
 - a. ADA
 - b. Indiana ADA
 - c. Indiana Civil Rights Law
 - d. all of the above

Answers: 1: d; 2: a; 3: d; 4: a; 5: c

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Independent Contractors and Temporary/Part-Time/ Leased Employees

Whether an individual is an employee or independent contractor ranks among the most significant legal distinctions facing companies today. The number of lawsuits and administrative actions seeking to penalize companies for “misclassifying” employees as independent contractors is significant. And companies found to have misclassified their workers may face stiff financial consequences in the form of unpaid wages, punitive damages, back taxes, and a variety of other damages and penalties.

But determining whether an individual is an employee or independent contractor can be a difficult task, due in large part to the lack of a single test governing the issue. For instance, one test applies for federal tax purposes and others apply for state unemployment purposes. Because different tests may apply, a worker could be an employee for some purposes, but an independent contractor for other purposes. Further complicating things, many of the tests require courts and agencies to balance many considerations—often referred to as “factors”—against one another, making it difficult to predict how the balancing act will turn out in any given case.

Adding to this mix of legal rights and obligations, companies have also looked to temporary employees and part-time employees — rather than full-time employees or independent contractors — as a means to achieve a more flexible workforce. Employment laws treat such employees differently than regular, full-time employees in certain circumstances.

In each of these circumstances — independent contractors, regular employees, temporary employees and part-time employees — a company should look carefully at the type of relationships it creates and the legal risks, obligations, and rights that result.

Independent Contractor/Employee Status

The law treats employees differently than independent contractors in various ways. Consider the following:

- A company has an obligation to withhold taxes from wages or salaries of employees, compared to an obligation to report payments made to independent contractors.
- Federal law requires employers to make a matching contribution to Social Security and to pay an unemployment compensation tax for employees but not for independent contractors.
- Indiana state law requires employers to make unemployment compensation contributions based on employees’ wages and to provide workers’ compensation insurance to employees — but neither of these obligations applies to independent contractors.
- Federal law requires minimum wage and overtime payments for employees but not for independent contractors.

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- Federal and Indiana civil rights laws, occupational safety and health laws, collective bargaining laws and laws regulating compensation and benefits all apply to employees but not to independent contractors.

Note: There is one federal statute prohibiting race discrimination in contractual relationships, and some safety and health obligations apply generally to workplaces and not just to the characterization of the individuals working there.

As noted above, numerous tests govern whether a person is an employee or independent contractor. It is essential that employers understand these tests. Although an employer may take steps that will affect the legal analysis of the worker's status, an employer cannot simply choose whether a worker will be an employee or independent contractor.

"Misclassifying" a worker as an independent contractor can subject a company to costly state and federal penalties.

One of the greatest benefits of an employment relationship is that it gives companies more control over a person's work than an independent contractor relationship. In the independent contractor setting, a company may specify the end result it wants a worker to achieve, but generally cannot control how the worker achieves that result without jeopardizing the contractor's status. Because the parties are legally independent, the contractors can go about the job however they see fit, as long as they produce the result called for in the contract. But in an employment relationship, the employer can dictate not only the end result of an employee's work, but how an employee achieves that result. Further, if the employee is an "at-will" employee, ending the employment relationship can be easier than ending an independent contractor relationship. The termination of an independent contractor relationship may be subject to certain contractual requirements that are normally absent in "at-will" employment relationships.

An employment relationship may also have recruiting and retention advantages. Most notably, attracting and retaining qualified workers may be aided by their ability to access fringe benefits and other privileges of employment that are available to employees but not to independent contractors.

Factors Considered When Analyzing Whether Workers Are Employees or Independent Contractors

No uniform definition exists for what constitutes an employee and what constitutes an independent contractor. Different parts of federal and Indiana law define these terms in somewhat different ways.

With occasional exceptions, the definitions require an analysis of the individual facts and circumstances of the relationship being scrutinized. It is important to remember that whether a person is an independent contractor or an employee is a conclusion of fact reached by looking at, among other things, the contract between the parties, the parties' dealings with each other, and the nature of the work and how it is performed. Significantly, simply defining someone in a contract as an "independent contractor" does not mean that person is an independent contractor under the law. How the parties define the relationship is only one factor that courts and agencies consider.

Although neither Indiana nor federal law defines what an independent contractor is in a single way, both rely heavily on the company's control of how the individual performs the work being done. The underlying assumption is that in an independent contractor relationship, the company does not care how something is

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done and looks only at the end result, while in an employment relationship, the company is interested in making sure that the manner and means of doing the work are to its liking. In other words, if the company dictates only what the result of the work performed will be, but not how it is to be achieved or who is to achieve it, the relationship may be closer to that of independent contractor. On the other hand, if the company not only dictates the result of the work performed but also controls the manner, means, and details of doing the work (who and how), the relationship is one of employment.

Further distinguishing between employees and independent contractors, employees generally are compensated by the hour or on a regular salary basis, while independent contractors tend to receive variable compensation determined by project or by how much the individual produces.

Finally, when an individual has an investment in his or her own activities, and when the individual stands to gain or lose from his or her own efforts, independent contractor status is more clearly found. Alternatively, when the individual makes no investment and has no risk of profit or loss from his or her own labors, the relationship is closer to one of employment.

Common Law Test

In many circumstances, the agency or court determining whether an individual is an employee or an independent contractor will use what is called the “common law test.” The common law test applies in situations in which neither the legislature nor an administrative agency has spoken on the standard that applies when determining whether a person is an independent contractor. For example, in Indiana, the common law test applies to claims under the wage payment statutes and simple negligence claims. The common law test, or a close variant of it, also applies to most federal statutes, including the anti-discrimination statutes.

Determining whether a person is an employee or an independent contractor under the common law test is entirely dependent on the facts. The reviewing agency or court will consider all the facts in light of several factors. While no one factor is controlling, particular importance is placed on whether the company has the right to control the manner and means of the individual’s performance. However, it is significant to note that some administrative agencies, like the Internal Revenue Service, apply their own peculiar twist to the common law test. Accordingly, when dealing with an administrative agency, it is advisable to check that agency’s specific approach.

The factors usually considered under the common law test include the following:

- Does the company train the individual in the manner and means of performing the work in question, or does the individual already possess the expertise required for the work?
- Must the individual perform the work personally, or may he or she find others to perform it?
- Does the individual have an ongoing working relationship with the company that will continue as long as the work is satisfactory, or is the work performed on a short-term or job-by-job basis?
- Does the individual do business in the company’s name, with assistance and guidance from other company personnel, and ordinarily deal only with the company’s products or services, or does the individual have contracts to perform services for other companies and otherwise hold him or herself out as a separate business?
- Is the agreement that contains the terms and conditions under which the individual operates determined unilaterally by the company, or by both the company and the individual?
- Is the individual paid the same amount on a regular basis or by time spent, or by the task or quality of the results?

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- Does the company furnish equipment and materials to perform the work, or does the individual furnish them?
- Does the individual account to the company for sources and uses of the funds received in performing the work, or does the individual pay his or her own expenses?
- Is the individual generally paid the same regardless of quality, or does the individual have a proprietary interest in the work, with investment and the opportunity for profit and the risk of loss, or the opportunity to make decisions that may result in profit or loss?
- Must the individual perform services only for the company, or is the individual free to perform the services for others at the same time?
- Does the company exercise supervision over the means and manner of the individual's work (how, who, when, where, how often), or does the individual work without supervision?
- Do the company's and worker's actions and words reflect an intent to create an employment or an independent contractor relationship?
- Can the individual be terminated at will, or does the agreement provide for its termination only in certain circumstances?
- Do company employees perform the same type of work that the individual is performing, or is the work the individual is performing different?
- What differences or similarities in treatment exist between how the company treats the individual in question and how the company treats its acknowledged employees?

Remember: None of these factors is individually determinative of employee or independent contractor status. These and similar considerations will determine the overall result, with particular emphasis given to who controls the manner and means of performance and who has the economic investment and opportunity for profit and risk of loss from the performance of the work.

Areas of Importance: Indiana Employment Law

Unemployment Compensation

In most areas, Indiana uses the common law test to distinguish between employees and independent contractors. In the area of unemployment compensation, however, Indiana uses a three-part test. Unlike the common law test, the unemployment compensation test creates a presumption that an individual is an employee for whom the company must pay unemployment compensation taxes. This presumption reflects the legislature's desire to provide unemployment compensation protection to as many people as possible. To overcome this presumption and show that the individual is an independent contractor, a company must satisfy all three of the following factors:

1. The individual has been, and will continue to be, free from control and direction in connection with the performance of his or her services, both under the contract and in fact.
2. The individual's services are performed outside the usual course of the business that the service is performed for.

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3. The individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed (or is a sales agent paid solely on commission who is the master of his or her own time and effort).

Because the law aims to maximize the number of persons who qualify for unemployment compensation, Indiana courts strictly construe the independent contractor exception, which makes it difficult for companies to prove the exception applies. An Indiana statute also expressly precludes use of contract language to waive the coverage of the unemployment compensation laws.

Worker's Compensation

Employees are covered by the Indiana Worker's Compensation Act, while independent contractors are not. The particular facts and circumstances of each case will control the determination of status. Where there is uncertainty, the agencies and courts have resolved doubts in favor of finding employee status.

In analyzing a claim for workers' compensation benefits, the Indiana courts begin with the basic common law test. But some courts apply a more refined version of the common law test that looks at:

- the absence of a right to discharge;
- how the individual is paid;
- who supplies tools and equipment;
- what the parties themselves think about the relationship;
- the control over means as opposed to results; and
- the establishment of work boundaries.

As with the common law test, the concept of control is the single most important factor. The right of control by the person for whom the work is being done over the manner and means of performance (how and who, as opposed to what) is often the decisive indicator of employee status.

Under Indiana law, general contractors must obtain certificates of worker's compensation insurance from their subcontractors for work in excess of \$1,000. Failure to do so imposes the same worker's compensation obligations on the general contractor as on the subcontractor, even though the individuals are employees of the subcontractor, not the contractor.

Indiana Negligence and Tort Law

When the actions of an individual injure a third party, the individual's employer may be held liable if the individual was acting within the scope of his or her employment in taking the actions causing the injury. In contrast, companies are most often not liable for harm caused by independent contractors. In determining whether an individual is an independent contractor in negligence cases, courts apply the common law test. Nevertheless, courts will impose liability, despite an independent contractor relationship under the common law test, in several instances. These include situations when the independent contractor performs work that is inherently dangerous or the company assumes a responsibility, either through a contract or through its conduct, to provide a safe working environment.

Areas of Importance: Federal Employment Law

National Labor Relations Act

Independent contractors are not covered by the National Labor Relations Act (NLRA). The National Labor Relations Board and the courts use the common law test to distinguish employees from independent contractors, and they consider all of the incidents of the individual's relationship to the employing entity.

Employment Discrimination

Both federal and Indiana statutes prohibiting discrimination apply to employees and employers, not to independent contractors. The courts have used the common law test in this context. In addition, they have looked to another standard known as the "economic realities" test. The economic realities test is best thought of as a more pragmatic version of the common law test. While the test considers the company's right to control the worker, it looks to all of the facts to determine whether the individual is economically dependent on the company. As its name suggests, the economic realities test examines the "reality" of the working relationship to determine whether an individual is an employee or independent contractor.

Federal law also prohibits racial discrimination in the making and enforcement of contracts, and for that prohibited criterion (race), independent contractor relationships are also subject to the prohibition of discrimination.

Wage and Hour Concerns

The federal Wage and Hour Division of the Department of Labor and the courts apply the economic realities test to determine whether an individual is an employee entitled to the minimum wage and overtime benefits of the Fair Labor Standards Act (FLSA).

The application of the economic realities test in this context reflects the theory that those economically dependent on the business to whom they render service should receive the protections of the legislation, and considers the following factors:

- The nature and degree of the employer's control
- The permanency of the worker's relationship with the employer
- Whether the worker provides the means and instrumentalities of the work, such as investment in facilities, equipment, or assistants
- The amount of skill, initiative, judgment, or foresight required for the worker's services
- Whether the worker is at risk or benefit of profit or loss
- The degree of integration of the worker's services into the employer's business

Occupational Safety and Health

Federal and Indiana laws obligate employers to provide a healthful workplace free of recognized hazards. Although the federal Occupational Safety and Health Act (OSHA) applies to employees, the probability of several entities having employees at a worksite has led to a focus on which employer at a work location controls the safety aspects of workplace operations. It is thus possible for a company using both

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employees and independent contractors to have workplace obligations irrespective of the nature of the relationship with any particular individual.

In determining whether a company has safety obligations at a place of work, and where more than one company is present factors used in determining which one has the obligation, include the following:

- Which company has enough control over the workplace to direct the operation of the individuals at the job site?
- Which company has authority to abate (cease or control) a recognized hazard?
- Which company has knowledge of the hazard?
- Which company's interests are being furthered by the actions of the individual(s) affected by the hazard?
- Which company, if any, do the affected individuals believe to be their employer?
- Which company compensates the affected individuals?

In this area, both OSHA and the courts have rejected attempts to use mere contract language to shift responsibility for workplace safety away from the company that should have responsibility for it.

Employee Benefits

To determine whether an individual is an employee for purposes of benefit eligibility under a retirement or welfare benefit plan covered under the federal Employee Retirement and Income Security Act (ERISA), the agencies and courts apply the common law test. The issue must be resolved on the particular facts of each case. Even so, because the law imposes no obligation on companies to make their ERISA plans available to all employees, companies can draft their ERISA plans to exclude "independent contractors" regardless of whether the individual qualifies as an independent contractor under the common law test. Following this approach requires companies to pay careful attention to the language used in drafting the ERISA plan.

Federal Tax Law: IRS Definition

The federal Internal Revenue Service (IRS) used to follow a 20-factor test in determining whether an individual was an employee or independent contractor. While the 20 factors are still relevant, the IRS has modified its test in an effort to make it easier to understand and apply. Understanding the IRS test is important because it determines whether a company must withhold federal income taxes, and withhold and pay Social Security and Medicare taxes, on compensation paid to a worker.

The modified IRS test focuses on the degree of control the company has over the contractor and the degree of the contractor's independence. The IRS test identifies factors relevant to that inquiry and organizes them into three broad categories: behavioral control, financial control, and the type of relationship.

The factors of the modified IRS test are as follows:

Behavioral Control

- Does the company have the right to direct and control how the worker does the task for which the worker is hired, and does the business give specific instructions to the worker? The following are some examples of types of instructions about how the work should be performed:
 - When and where to do the work
 - What equipment to use

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- What workers to hire
- Where to purchase supplies and services
- What work must be performed by a specified individual
- Order or sequence of the work
- Does the company train the individual to perform work in a particular way, or does the individual rely on his or her own training to determine how to do the job?

Financial Control

- Does the company reimburse the individual for expenses incurred in performing the work, or is the individual responsible for his or her own expenses?
- Does the individual have a significant investment in the tools and other devices used in completing the work, or is the individual's investment minimal?
- Does the individual make his services available generally in the relevant market, or is the individual's work concentrated with a small number of companies?
- Does the company pay the individual a flat fee for the job, or is the individual paid an hourly or weekly wage?
- Does the individual have the opportunity to realize a profit or loss, or is there no financial risk in performing the work?

Type of Relationship

- Does the contract purport to create an independent contractor relationship, or is the contract silent on the issue?
- Does the company provide the individual with benefits, such as insurance, a pension plan, or vacation pay, or does the individual receive no benefits aside from his or her pay?
- Do the parties expect that their relationship will last only for a specific or short period, or do they expect that it will continue indefinitely?
- Does the individual perform services that are not part of the company's regular business activities, or is the work a part of the regular business of the company?

These factors capture the evidence that is most significant to the IRS in deciding whether a person is an independent contractor. However, the IRS will consider all evidence, even if not listed among the factors, that relates to a company's control over an individual and that individual's degree of independence.

If an individual believes he or she has been misclassified for federal tax purposes, he or she may request that the IRS determine his or her employment status for federal tax purposes by filling out and submitting IRS Form SS-8. After it receives a Form SS-8 from an individual, the IRS will request that the company complete a Form SS-8 as part of the IRS's investigation and determination process.

Strategic Considerations

Establishing the Relationship

Because the analysis that determines what relationship has been created looks backward at events after they have occurred, it is important to consider and agree on what sort of relationship is created at the outset of the relationship. In that regard, the employer should consider the following:

- Make certain your company considers the benefits, burdens, and other aspects of the differences between an employment relationship and an independent contractor relationship. Consider whether the governing factors could support an independent contractor arrangement at all, and if so, what makes the best business sense for your company in the particular circumstance.
- When your company retains an individual to perform work for it, begin with the assumption that he or she is an employee and will be treated as such. If that is not what you intend, consider whether the circumstances can support an independent contractor relationship and what aspects of the relationship can be changed to strengthen an independent contractor relationship, keeping in mind the risks of misclassification.
- Document the creation of the relationship, including with the individual, so he or she understands it to be one of independent contract and reflects that intention on paper and in action.
- Do not treat an independent contractor like an employee by, for example, putting him or her through all aspects of new employee orientation, disciplining him or her, or subjecting him or her to the policies and procedures that apply to employees.
- Be careful to inform your company's appropriate managers and supervisors that the individual is an independent contractor and of the arrangements you have made to create that relationship, including the differences in the way the individual will be treated as compared with your company's employees.

Maintaining the Relationship

The existence of a written document indicating independent contractor status is not by itself determinative. The relationship must be respected and maintained. In that regard, keep the following in mind:

- Be careful to ensure that the actions taken by the company reflect the independent contractor relationship. Actions contradicting the terms of an independent contractor agreement (including subjecting the individual to performance counseling or discipline) may be strong evidence of an employee relationship.
- As the need for the individual's work changes over time, be careful to consider whether the use of the individual still reflects an independent contractor relationship. Few employment relationships gravitate toward independent contractor relationships, but independent contractor relationships may over time become employment relationships, as the length of the relationship increases and the way the company and the individual interrelate about the work changes.
- A periodic review of the relationship as it continues over an extended time is advisable in order to determine whether it remains viable and whether changes should be made to reinforce its intended character.
- When the relationship ends, manage its ending in a manner consistent with its character (for example, an employee would be discharged, while a company would exercise its right to terminate the business relationship with an independent contractor).

Temporary and Part-time Employees

As employers look for greater flexibility in accomplishing their work, the use of temporary employees and part-time employees may be an attractive alternative. As a general rule, however, the benefits are gained by flexibility and reduced cost, not by reduced legal obligations. The use of such arrangements generally does not relieve the employer of its legal obligations to employees.

For example, payroll taxes, withholding, workers' compensation insurance, and unemployment compensation contributions all apply to employees irrespective of whether they are temporary or part-time. Similarly, temporary and part-time employees are protected from illegal discrimination and generally are covered by fair labor standards and workplace safety laws.

In the area of labor relations, part-time employees generally are eligible to vote in union organizational elections and to be covered by resulting union labor contracts if they work on a regular basis and if they have a substantial interest in the working conditions at the employer's place of business. Ordinarily, temporary employees with no expectation of continued employment (i.e., there is a "date certain" that the employee's employment will expire) are not eligible to vote in representation elections. However, temporary employees may be eligible to vote in representation elections if there has been no "date certain" for the termination of their employment.

In the area of employee benefits, covered in Chapter 15, part-time employees may have certain rights under employer benefit and welfare plans depending on how much they work over how long a period of time.

Leased Employees and Joint Employer Status

When a company uses employment agencies providing leased employees as the source of temporary or part-time labor, the company may be subject to claims that it is a joint employer with the staffing firm. This may be true even though the two companies are entirely independent legal entities. Suits by leased employees against the employer (not the staffing agency) are on the rise. Employers should carefully review contracts with staffing agencies to ensure that they appropriately address employment-related responsibilities, as well as the issue of liabilities and indemnification for the cost of defending lawsuits and liabilities incurred.

In the context of employment discrimination, the company may be liable along with the staffing firm for discrimination or other unlawful conduct.

Traditionally, the central consideration in a finding of joint employer status was the existence of shared significant control over the employees. When two employers exert such significant control over the same employees, where they share or co-determine matters governing essential terms and conditions of employment, they are joint employers. Such terms and conditions include hiring, promotion, demotion, compensation, working conditions, daily supervision and direction, discipline and termination.

This chapter was edited by Jeff Beck, Counsel.

Employee or Independent Contractor?

1. To cut costs, the Arnold Company decides to convert a portion of its workforce from employees to independent contractors. It signs an agreement with each affected person stating that the individual will now work for the company as an “independent contractor.” Aside from the new contract, no other part of the parties’ relationship changes. Are the workers independent contractors?

Answer: No, under any applicable test. Simply calling a worker an “independent contractor” does not, in fact, make the worker an independent contractor. Courts and other agencies will look beyond the contractual label and examine the parties’ relationship when analyzing whether a person is an employee or independent contractor. In addition, the workers’ receipt of W-2s and Form 1099s in the same year likely will be a red flag to the IRS that a misclassification issue may exist.

2. Silas, who is in the business of fixing printing presses, contracts with the Franklin Company, which is also in the business of fixing printing presses, to work at its facility. The parties sign a contract stating that Silas is an “independent contractor.” The agreement gives Franklin Company the right to tell Silas how to perform his job. After a few days pass, the company decides it likes the way Silas performs his work and chooses never to exercise its right to control and supervise the details of Silas’ work. Is Silas an independent contractor?

Answer: No, under any test. What is significant is that the Franklin Company has the right (in other words, the power) to control how Silas does his job. The fact that it does not exercise its power is irrelevant. Further, under the unemployment compensation test, the fact that Silas works at Franklin’s plant performing the same line of work that Franklin performs would make him an employee regardless of Franklin’s right to control.

3. John operates a computer repair business out of his home. The Braintree Company, which makes furniture, hires John to complete an extensive computer repair project that is expected to last six months. The parties sign a contract stating John can determine the appropriate methods to complete the work, but the contract is very specific about the required performance of the computers after the repairs are complete. Braintree Company pays John a flat rate for the work. Is John an independent contractor?

Answer: Yes, under any test. John operates his own business, which performs work distinct from the Braintree Company’s business. The contract contemplates John working for the Braintree Company for a specified project, and that he will be paid a flat rate for the job, not hourly or weekly. The fact that the contract is very specific about the result of John’s work is acceptable, so long as it does not specify the manner and means John is to use completing the work.

Chapter 8

Affirmative Action

The goal of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., is to make every covered workplace neutral with regard to race, color, religion, national origin and sex. Although affirmative action is not required under Title VII, it may be required under Executive Order 11246, Section 503 of the Rehabilitation Act of 1973, the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA), and other laws covering federal government employers and federal contractors and subcontractors.

This chapter is designed to provide a basic understanding of affirmative action and its requirements.

What Is Affirmative Action?

Affirmative action requires that an employer make special, proactive efforts commonly referred to as "good faith efforts" to attempt to increase the number of minorities, veterans and women in its workforce and in various jobs through either external recruitment or promotion. This is different from equal employment opportunity, which means that the employer does not discriminate against a person because of race, sex, veteran status, or other protected class.

To What Groups Does Affirmative Action Apply?

Affirmative action was originally designed to benefit designated minority groups, (e.g., African Americans, Hispanics, Asian/Pacific Islanders, American Indian/Alaskan Natives and women). It was later expanded to benefit disabled individuals and covered veterans (e.g., disabled veterans, recently separated veterans, campaign veterans, or armed forces service medal veterans), and now prohibits discrimination because of gender identity and sexual orientation.

Why Do Employers Have Affirmative Action Programs (AAPs)?

Employers may have AAPs for several voluntary and/or involuntary reasons. Here are some examples:

- They do enough business with federal, state or local government entities to be subject to affirmative action rules and regulations.
- They are required to engage in affirmative action as a result of a judicial finding of discrimination in a lawsuit.
- They have a significant under-representation of minorities or women in their workforce or in particular jobs.
- They believe that making special efforts to include more minorities and women will expand the pool of qualified candidates from which the employer may choose when making hiring and promotion decisions.

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- They believe they will have a better workforce if it reflects the diversity of the labor force generally, which increasingly includes more women and minorities.
- They believe that engaging in affirmative action can insulate them from liability for employment discrimination claims by individuals or government agencies.

What Is the Legal Source of Affirmative Action Obligations?

The following are the primary legal bases for affirmative action:

- **Executive Order 11246**, as amended, prohibiting employment discrimination because of race, color, religion, sex, national origin, sexual orientation, or gender identity, or because an employee or applicant has discussed, disclosed, or inquired about compensation
- **Section 503 of the Rehabilitation Act of 1973 (Rehabilitation Act)**, prohibiting employment discrimination on the basis of disability
- **The Vietnam Era Veterans Readjustment Act of 1974 (VEVRAA)**, as amended, prohibiting employment discrimination on the basis of veteran status

Who Is Required to Have AAPs?

Under Executive Order 11246, the requirement to develop, implement, and maintain written AAPs applies only to companies with 50 or more employees that have federal government contracts or subcontracts to provide goods or services totaling \$50,000 or more. Under Section 503 of the Rehabilitation Act, contractors (including those with direct federal construction contract(s)) are required to have a written AAP if the contract or subcontract is worth \$50,000 or more and the company has 50 or more employees. Under VEVRAA, contractors (including those with direct federal construction contract(s)) are required to have a written AAP if the contract or subcontract is worth \$150,000 or more and the company has 50 or more employees. The jurisdiction threshold has been raised to \$150,000 from \$100,000 to adjust for inflation, though VEVRAA itself has not been amended.

Covered contractors must have affirmative action programs at each of their establishments with 50 or more employees, and the programs must be updated annually. Multi-establishment contractors with large business or functional units that span across multiple establishments in different states or regions instead can, by agreement with the Office of Federal Contract Compliance Programs (OFCCP), have Functional Affirmative Action Plans that encompass each establishment in the business or functional unit. Additionally, under Executive Order 11246, contractors and subcontractors that work under federal or federally assisted construction contracts totaling more than \$10,000 are required to take affirmative action to ensure:

- equal employment opportunity for minorities;
- that employees are treated without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin during their employment; and
- that employees and applicants are not discharged or discriminated against because they have discussed, disclosed, or inquired about compensation.

However, construction contractors are not required to prepare written affirmative action programs for women and minorities as is required for goods and service contractors.

What Is a “Government Contract” and Who Is a “Federal Contractor?”

A “government contract” is an agreement between any federal agency and a business for the furnishing of supplies or services or for the use of real or personal property. “Contractor” means either the prime contractor or a subcontractor. A “subcontract” is an agreement between a contractor and a business to furnish supplies, services, or use of property necessary to perform the contract. If a business has a subcontract directly with a prime contractor, it is known as a first-tier subcontractor. However, subcontractors in lower tiers (second tier, third tier, etc.) are also subject to the federal requirements if the good or service they provide is relevant to the fulfillment of the prime contract. A “direct federal construction contract” is an agreement entered into directly with the federal government through one of its agencies for the purchase, sale, or use of personal property or nonpersonal services, where the term “nonpersonal services” includes construction services.

Responding to Certification Requests from Government Contractors

A covered government contractor is required to advise businesses with which it subcontracts any of the work related to the prime government contract of their obligations to also comply with the requirements discussed in this chapter. As a result, you may receive a request for certification from a contractor asking you to comply with the requirements of the applicable affirmative action regulations. If you receive such a certification request form, your response likely will be one of the following:

- You will complete the form, because you know your subcontract is related to the prime government contract, you meet the employee threshold, and the subcontract is for at least the threshold amount.
- You will write the prime contractor and indicate that, while you support the principles of affirmative action, you are not a covered subcontractor either because your subcontract does not meet the minimum dollar threshold, or you do not have the threshold number of employees.
- You will write to the prime contractor and indicate that, while you support the principles of affirmative action, to your knowledge, your subcontract with the prime contractor is not related to a government contract. You should further state that, to the extent that it is, you request the prime contractor to identify the specific government contract it has and how your subcontract is related to that contract.

Who Enforces Affirmative Action Obligations on Employers?

Enforcement of affirmative action obligations generally rests with the United States Department of Labor through the Office of Federal Contract Compliance Programs (OFCCP).

Compliance reviews are the result of either specific complaints filed by individuals or random periodic audits by the OFCCP. Complaints must be filed with the OFCCP within 300 days of the alleged violation under VEVRAA or the Rehabilitation Act and within 180 days of the alleged violation under Executive Order 11246. But these deadlines can be extended by the OFCCP for good cause. The OFCCP is also testing various targeted, non-random methods for audit selection to maximize the impact of its enforcement efforts.

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If violations are found during an audit, the agency seeks to resolve them through negotiation and entering into a conciliation agreement. However, if violations cannot be resolved, complaints may be issued, and the matter resolved through litigation before an administrative law judge.

Consequences of Failing to Meet Affirmative Action Obligations

If an employer is required to have an AAP and the OFCCP or an administrative law judge finds significant violations of the employer's affirmative action obligations, the employer may be required to draft a written program or hire or promote particular individuals or members of a protected class. An employer may be subject to awards of back pay and, in rare instances, termination of existing contracts and debarment from future federal contracts.

The Legality of Voluntary Affirmative Action Programs

The Supreme Court has issued a series of opinions spelling out the elements of acceptable AAPs for both the private and public sectors, which are described in the following paragraphs.

Title VII of the 1964 Civil Rights Act and the Equal Protection Clause of the Constitution both prohibit discrimination on account of an individual's race. Thus, an employer cannot choose a minority over a non-minority or a woman over a man because it wants a minority or woman unless it has a defense to that action, such as observing the terms of an affirmative action program. The burden is on the person claiming reverse discrimination to show that the employer's affirmative action program is invalid.

An employer can have a voluntary affirmative action program even if there is no admission or proof it discriminated against minorities because the statute (Title VII) encourages voluntary efforts. However, certain key points must be met. These are outlined as follows.

- There must be a minimum factual predicate of a statistical manifest imbalance disfavoring minorities. (The comparison must be to the relevant labor pool.)
- The AAP must be reasonable in its scope and provide for goals, not quotas.
- The impact of the AAP on non-minorities must be acceptable and diffuse. That is, it cannot unnecessarily trammel the rights of non-minorities or be an absolute bar to employment or advancement of non-minorities.
 - No specific positions may be set aside.
 - Race/sex can be one of among many factors considered.
 - The type of employment decision involved can be relevant. Hiring or promotion goals have a relatively diffuse impact. They only postpone a non-minority's or a man's opportunity for employment or advancement. However, layoff decisions directly modify an incumbent employee's position.
- The AAP must be tailored narrowly to achieve the specifically identified goal.
 - This must be in terms of duration, (i.e., the affirmative action must be temporary, not permanent, in nature).

- o It must be designed to attain, not maintain, a balanced workforce. Courts have rejected programs where the purpose of the preference was to maintain prior affirmative action gains.

The constitutional standard of equal protection for public-sector employers is more stringent. State and local government programs that use race or ethnic criteria as a basis for decision-making are held to a strict scrutiny standard. This means the program must be based on a compelling government interest and then must be narrowly tailored to serve that interest. Societal discrimination or general claims of discrimination in certain sectors or industries are inadequate to justify such programs. The U.S. Supreme Court has previously held that this same standard applies to federal affirmative action programs; however, the Court's ruling has had little effect on affirmative action programs under Executive Order 11246, the Rehabilitation Act, or VEVRAA.

Court-Ordered AAPs

Title VII does not prohibit a court from ordering — as a remedy for past bias — affirmative, race-conscious relief that benefits those that are not individually discriminated against. Similarly, court-imposed promotion goals may be upheld when they are designed to offset the continuing effects of long-term, open, and pervasive discrimination that can be eliminated in no less intrusive manner.

Consent Decrees

Title VII does not prohibit the entry of consent decrees benefiting individuals who are not actual victims of biased practices, and such decrees may contain remedies going beyond those provided by the act. Consent decrees generally will be presumed valid unless they contain provisions that are unreasonable, illegal, unconstitutional, or against public policy.

Preferential Treatment for Layoffs

Title VII protects bona fide seniority systems. While hiring goals impose a diffuse burden often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals and frequently result in serious disruption of their lives. Courts have held this burden is too intrusive and therefore generally have prohibited preferential treatment in layoffs.

Finally, even if there is underutilization, voluntary affirmative action can only be temporary. That is, once a goal is reached and there is no more underutilization, giving someone a preference because of race or sex can be reverse discrimination.

To Summarize: Voluntary affirmative action programs can be lawful, and a person's race or sex can be taken into account as a factor in making decisions if there is either evidence of past discrimination or there is evidence of a noticeable imbalance between men and women or Caucasians and minorities in particular job classifications. However, such affirmative action cannot be engaged in if there is no underutilization. Absent proof of discrimination, there cannot be guaranteed quotas or positions held only for minorities, but there can be goals that an employer strives to achieve.

The Primary Components of AAPs for Women and Minorities

The contents of government-required AAPs are dictated by the rules and regulations of the Secretary of Labor as interpreted by the OFCCP. The program requirements are numerous. In general, AAPs must consist of the following five major components:

1. A commitment to equal employment opportunity and affirmative action to achieve it
2. Designation of individual responsibility for implementation and monitoring of the AAP
3. Performing a self-analysis with respect to employment practices, recruitment, and utilization of minorities and women in the workforce compared to their availability in the market and then determining whether utilization is as would be expected based upon availability in the market
4. Setting numerical goals to reach proper utilization
5. Establishing action-oriented programs to achieve the goals

These five components are discussed in detail in the following paragraphs.

Commitment to Equal Employment Opportunity

AAPs must contain a detailed statement reaffirming the company's commitment to providing equal employment opportunity to individuals and employees in all aspects of employment.

Designation of Responsibility

An employer must assign an employee the responsibility of implementing, monitoring, and updating the AAP. Monitoring requirements for the designated individual include performing analyses of a facility's workforce, compensation system, applicant flow, terminations, promotions, and personnel procedures to ensure no discrimination exists. The designated individual must have the authority, resources, support of, and access to top management. Furthermore, the designated individual must update management regarding program effectiveness and make suggestions to improve unsatisfactory performance if it occurs.

Employer's Self-Analysis of Existing Practices and Utilization of Minorities and Women

The heart of any AAP is the employer's self-analysis of its existing employment policies and its utilization of minorities and women in the workforce compared to the availability of minorities and women who could be considered to fill positions.

Company Practices

An employer is required to review its existing employment practices such as its applicant selection process (e.g., employment applications, pre-employment questions, and procedures), its transfer and promotion practices, its termination practices, and its job descriptions to ensure they are free of racial or sexual bias. It also should review its record of hires, promotions, and terminations to determine whether minorities are being disproportionately disadvantaged.

Organizational Display or Workforce Analysis

A key ingredient of an AAP is an organizational profile. For many years, regulations required an employer to prepare a workforce analysis. This required an employer to list, within each department or other organizational unit, every job title ranked from the lowest paid to the highest paid and show the pay or salary rate, total number of employees, total number of minorities, and total number of women in each job title. The workforce analysis reveals how minorities and women are distributed in various jobs by department.

Changes to regulations now give employers the option to either continue to use the long-standing workforce analysis or submit an organizational display. The organizational display is a detailed graphical or tabular chart, text, spreadsheet or similar presentation of the employer's organizational structure. The organizational display must identify each organizational unit (any component that is part of the employer's corporate structure) in the establishment and show the relationship of each organizational unit to the other organizational units in the establishment.

For each organizational unit, the organizational display must indicate:

- the name of the unit;
- job title, gender and race and ethnicity of the unit supervisor (if the unit has a supervisor);
- the total number of male and female incumbents; and
- the total number of male and female incumbents in each of the following groups:
 - African Americans
 - Hispanics
 - Asians/Pacific Islanders
 - American Indians/Alaskan Natives
 - A combination of two or more races

Job Group Analysis

An employer must also prepare a job group analysis as part of its written affirmative action program. A job group analysis requires an employer to allocate its jobs into job groups and then to list all employees by job title within each job group, including race and gender information for each employee. The job group analysis will reveal how minorities and women are distributed by job group.

Preparation of the job group analysis involves reviewing the company's job titles and grouping together those having similar content, wage or salary rates, and opportunities for advancement. This job grouping can generally be done within the standard EEO-1 categories. An EEO-1 is a standard government form (required to be filed annually) on which employers with 100 or more employees report their number of employees, total number of minorities, and total number of women in each of 10 classifications pre-designated and defined by the government. These 10 categories are as follows:

1. Senior/executive officials and managers
2. First/mid-level officials and managers
3. Professionals
4. Technicians
5. Sales workers

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6. Administrative support workers
7. Craft workers (skilled)
8. Operatives (semi-skilled)
9. Laborers and helpers (unskilled)
10. Service workers

Covered contractors with 150 or more employees should create unique job group categories for large job groups. The following example illustrates the concept of job grouping. Larger companies may have several levels of management such as president, senior vice presidents, vice presidents, department heads, managers, supervisors, and foremen. These job titles are all within the same EEO-1 category of officials and managers. However, for purposes of the workforce analysis, the titles must be placed into job groups. Thus, for example, Group 1 might include presidents, senior vice presidents, and vice presidents (upper management); Group 2 might include department heads and managers (middle management); and Group 3 would include area supervisors and foremen (first-line management). If there is an insufficient number of employees within an EEO-1 category to break them down into groups, the category itself can serve as the job group.

Availability Analysis

Another major component of the AAP is calculating the availability percentage of minorities and women for each job group. In each instance, the calculation must consider available statistical information for two factors. They are:

1. percent of minorities and women having requisite skills in the relevant labor area; and
2. percent of minorities and women among those promotable or transferable within the organization.

The raw statistical information for the first factor is available from the U.S. Census Bureau (www.census.gov). The raw statistical information for the second factor is determined by establishing feeder job groups from which individuals can reasonably be or have been promoted in the past to fill job openings in the specific job group.

The employer assigns weights to the factors based on their relative importance in filling job openings in the particular job group. It then multiplies the factor by the assigned weight, and then adds the weighted factors together to arrive at the availability percentage. Four aspects of this analysis allow various degrees of latitude to the employer. The first two are the relevant labor area and the area in which the contractor can reasonably recruit. How these are defined for each job group by an employer will affect the percent of minorities or women used in the two-factor computation. The third aspect allowing latitude is the employer's ability to weigh the factors in determining the final availability percentage. And the fourth aspect allowing latitude is the employer's selection of the feeder job groups for those promotable or transferable within the facility. Obviously, an employer's determination of these four aspects cannot be arbitrary or careless and must be defensible on the facts surrounding its employment practices.

Utilization Analysis

Once the workforce analysis or organizational display, job group, and availability analysis are complete, the employer then compares the percentage of minorities and women in its various job groups to the percentage of their availability. If the percentage is less than the availability percentage, the employer's utilization in that job group is not as would be expected based upon availability in the market. If a contractor's

utilization analysis reveals the underutilization of minorities, women, or both – in any of the job groups – the contractor must establish placement goals designed to cure the underutilization.

Goal Setting and Establishing Action-Oriented Programs to Achieve Goals

If the utilization of minorities and women is not as would be expected in a job group, the regulations call for the employer to set goals – not quotas – that employers must make good-faith efforts to achieve. The goal is always to reach a percentage of utilization equal to the calculated availability percentage.

The final phase of an AAP is for the employer to create action-oriented programs designed to increase the representation of minorities and women in the job groups in which utilization is not as would be expected and, if it fails, to document the good-faith efforts of the employer. To be acceptable to the OFCCP, these programs must indicate what the action will be, who will accomplish it, how it will be accomplished and when it will be accomplished.

The Requirements of AAPs for Disabled Individuals and Veterans

The AAP requirements for both disabled individuals and veterans are similar in many respects to those for minorities and women.

The OFCCP implemented new regulations effective March 24, 2014, concerning veterans and disabled individuals affirmative action requirements of federal contractors. These rules are very similar and contain many shared requirements discussed in the following paragraphs. Both must be disseminated to employees through a policy manual and, if the contractor is party to a collective bargaining agreement, to the union accompanied by a request for assistance.

AAPs for disabled individuals and qualified veterans must require employers to invite all applicants and employees who believe they fall within the definition of either a disabled individual or qualified veteran and who wish to benefit from the AAP to identify themselves voluntarily, in confidence. The employer must assure the applicant or employee that refusal to provide this information will not have an adverse impact on them. Employers must make the same invitation post-offer.

Covered contractors must have an AAP at each of their establishments and may integrate it into other AAPs. Although there is no obligation to submit the AAP to the government, it must be available for inspection to any employee or applicant on request, excluding the statistical analysis required under the plan. In addition, the programs must be reviewed and updated annually.

Contractors must review personnel procedures to determine whether they result in careful and systematic consideration of the job qualifications of known disabled applicants or qualified veterans and employees for job vacancies and for all training opportunities. Contractors must also establish a process to review all of the physical or mental job qualification requirements for each job, and if one or more of the qualifications tend to screen out qualified veterans or qualified disabled individuals, they must be determined to be job-related and consistent with business necessity and the safe performance of the job.

Contractors must undertake outreach and recruitment activities designed to effectively recruit qualified veterans and disabled persons. Examples of activities the OFCCP deem reasonable include enlisting the

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support of:

- state agencies devoted to disabled persons or qualified veterans;
- Department of Veterans Affairs;
- entities funded or sponsored by the DOL; and
- local disability and veteran groups.

Contractors must annually review their recruitment efforts for effectiveness, and document the criteria used to determine effectiveness. Ineffective efforts must be addressed by implementing alternative efforts.

AAPs for disabled individuals and qualified veterans also require data collection analysis. For both classes, contractors must document the following computations or comparisons pertaining to applicants and hires on an annual basis and maintain them for a period of three years:

- The number of applicants who self-identified as protected veterans or disabled individuals, or who are otherwise known as such
- The total number of job openings and total number of jobs filled
- The total number of applicants for all jobs
- The number of protected veteran applicants or disabled applicants hired
- The total number of applicants hired

Contractors must also design and implement an audit and reporting system that will:

- measure the effectiveness of the contractor's affirmative action program;
- indicate any need for remedial action;
- determine the degree to which the contractor's objectives have been attained;
- determine whether known protected veterans or disabled individuals have had the opportunity to participate in all company-sponsored educational, training, recreational and social activities;
- measure the contractor's compliance with the affirmative action program's specific obligations; and
- document the actions taken to comply with the obligations above.

Contractors should also review personnel records to determine the availability of known disabled individuals or qualified veterans presently in its employ who are promotable and transferable and should decide whether their potential skills are being fully utilized and developed.

Individuals with Disabilities

There are no affirmative action requirements under the Americans with Disabilities Act (ADA). Under the Rehabilitation Act, goals and quotas are not required, but employers with federal government contracts exceeding \$10,000 have an obligation to take affirmative action in employing and promoting qualified individuals with disabilities. Though Section 503 itself has not been amended, the jurisdiction threshold amount has been adjusted to \$15,000 for inflation. Contracts under the \$15,000 jurisdictional amount are not totaled to meet the jurisdictional threshold. An affirmative action clause must be included in each covered contract, and a notice of the employer's affirmative action obligations must be posted in a conspicuous place.

Employers with 50 or more employees and federal contracts (including direct federal construction contracts) of \$50,000 or more are required to prepare a written AAP covering the disabled within 120 days after being granted the contract.

By statute and regulation, a disabled individual is anyone who has a physical or mental impairment that substantially limits a major life activity. The definition also includes anyone who has a record of such an impairment or is regarded as having such an impairment.

The contractor has an obligation to make a reasonable accommodation to the physical or mental limitations of an employee or applicant unless it can demonstrate that an accommodation would impose an undue hardship on the conduct of the business. In deciding the extent of an employer's accommodation obligation, the OFCCP primarily reviews reasonableness in terms of an employer's size and the financial cost. The issue of reasonable accommodation must be determined on a case-by-case basis.

To effectively measure its efforts, a contractor must compare its employment data under its AAP with the goal established by the OFCCP: 7% for employment of qualified individuals with disabilities for each job group in the contractor's workforce, or for the contractor's entire workforce. Contractors not meeting this goal must take steps to identify any impediment to equal employment opportunity and develop and execute action-oriented programs designed to correct any defect. However, quotas are expressly prohibited.

Veterans

The majority of AAP requirements for veterans mirror the requirements of AAPs for disabled individuals. However, under VEVRAA businesses with a federal contract of \$100,000 or more (including direct federal construction contracts) have an obligation to take affirmative action in employing and promoting qualified protected veterans. Though VEVRAA itself has not been amended, the jurisdiction threshold has been adjusted to \$150,000 for inflation. There are also a few additional requirements. A protected veteran is defined as one who may be classified as a disabled veteran, recently separated veteran, active-duty wartime or campaign badge veteran, or Armed Forces service medal veteran.

The contractor must list all suitable job openings at the appropriate local office of the state employment service in the state where the job opening occurs. This requirement applies to all full-time employment, temporary employment of more than three days, or part-time employment for positions other than officials and managers. These listings must be made at least concurrently with the use of any other recruitment source or effort.

Covered government contractors are required to file a VETS-4212 form annually. The employer must report the total number of employees in the workforce by job category and hiring location who are protected veterans. It also must report the total number of new employees hired during the period covered by the report and the number who are protected veterans.

To effectively measure its efforts, a contractor must annually establish hiring benchmarks using one of two methods. A benchmark can be established using the national percentage of veterans in the civilian force as published on the OFCCP's web site. Alternatively, a contractor can establish its own benchmark taking into account the following factors:

- The average percentage of veterans in the civilian labor force in the state(s) where the contractor is located over the preceding three years, as calculated by the Bureau of Labor Statistics and published on the OFCCP web site

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- The number of veterans, over the previous four quarters, who were participants in the employment service delivery system in the state where the contractor is located, as tabulated by the Veterans' Employment and Training Service and published on the OFCCP web site
- The applicant ratio and hiring ratio for the previous year based on the contractor's data collected
- The contractor's recent assessments of the effectiveness of its external outreach and recruitment efforts
- Any other factors, including but not limited to the nature of the contractor's job openings and/or its location, which would tend to affect the availability of qualified protected veterans

Pay Transparency Rule

Executive Order 11246 prohibits federal contractors and subcontractors from discriminating based on race, sex, and other protected class. The OFCCP's Pay Transparency Rule prohibits covered federal contractors and subcontractors from discriminating against employees and job applicants who choose to inquire about, discuss, or disclose their own compensation or the compensation of another employee or applicant. Covered contractors include those holding over \$10,000 in federal contracts or subcontracts in any 12-month (rolling) period that are entered into or modified on or after January 11, 2016.

"Compensation" refers to any payments made to an employee, or on behalf of an employee, or offered to an applicant, including but not limited to salary, wages, overtime pay, shift differentials, bonuses, commissions, vacation and holiday pay, allowances, insurance and other benefits, stock options and awards, profit sharing, and retirement.

Under this regulation, covered contractors are prohibited from:

- disciplining, harassing, demoting, terminating, denying employment or otherwise discriminating against an employee due to their inquiries about, discussions, or disclosures of their own compensation or the compensation of another employee or applicant; and
- having policies prohibiting or tending to restrict employees or applicants from discussing or disclosing their compensation or the compensation of others.

Disclosure of compensation information obtained by certain employees though their essential job functions are not protected, with limited exceptions. Covered contractors may raise a general defense to a discrimination claim based on consistent and uniform enforcement of workplace rules that do not prohibit discussion of compensation information.

The regulations also impose additional obligations:

- **Contract modifications:** Covered contractors must use the revised Equal Opportunity clause in new/modified contracts, which now includes a provision prohibiting contractors from discharging, or in any manner discriminating against, any employee or applicant because he or she inquired about, discussed, or disclosed his or her compensation or the compensation of another employee or applicant.
- **Handbook updates:** Covered contractors must incorporate the OFCCP's specific non-discrimination language into existing employee manuals and handbooks.
- **Postings:** Covered contractors must disseminate the same specific non-discrimination language either electronically or by distributing hard copies.

Sex Discrimination Regulations

Covered contractors also must comply with the OFCCP's sex discrimination regulations, which broadly address numerous employment issues and areas, such as sex as a bona fide occupational qualification; compensation and benefits; pregnancy, childbirth, and related medical conditions; caregiving; sex stereotyping; job steering; and harassment and hostile work environment. The OFCCP revised its regulations to align contractors' obligations with current law under Title VII as interpreted by the courts and the EEOC, which includes the following:

- Providing protections and workplace accommodations related to pregnancy, childbirth, and related medical conditions
- Promoting fair pay practices by enabling employees to recover lost wages any time a contractor pays compensation that is the result of discrimination
- Providing equal benefits to men and women employees participating in fringe benefits plans, such as medical, hospital, accident, life insurance, and retirement benefits; profit-sharing and bonus plans; leave; and other terms, conditions, and privileges of employment
- Prohibiting sexual harassment
- Prohibiting contractors to set requirements for jobs or training that are based on an applicant's or employee's sex unless the contractor can demonstrate that such requirements are a bona fide occupational qualification
- Safeguarding workers who provide caregiving to their loved ones
- Providing protections to transgender workers by requiring that contractors allow workers to use facilities consistent with the gender with which the workers identify
- Prohibiting discrimination based on sex stereotypes

The regulations apply to any company that:

1. holds a single federal contract, subcontract, or federally assisted construction contract or subcontract in excess of \$10,000;
2. holds federal contracts or subcontracts that have a combined total in excess of \$10,000 in any 12-month period; or
3. holds government bills of lading, serves as a depository of federal funds, or is an issuing and paying agency for U.S. savings bonds and notes in any amount.

Though the regulations may be consistent with current law, covered contractors should carefully analyze these compliance requirements when revising key policies (e.g., EEO, anti-harassment, leave and accommodation); training supervisors and managers; reviewing hiring and recruitment practices; and reviewing benefits plans and coverages.

Policy Directives

The OFCCP has announced policy directives that provide guidance to OFCCP staff or federal contractors regarding enforcement and compliance policy and procedures. A directive does not change the laws and regulations governing the OFCCP's programs and does not establish any legally enforceable rights or obligation.

- **Directive (DIR) 2022-2 Effective Compliance Evaluations and Enforcement:** The

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OFCCP issued DIR 2022-1 to provide transparency on the OFCCP's compliance evaluation policies and expectations for contractors. The directive revoked prior directives initially developed as a part of the OFCCP's CERT initiative towards certainty, efficiency, recognition and transparency in compliance.

- **DIR 2022-1 Revision 1 Advancing Pay Equity Through Compensation Analysis:** The OFCCP issued DIR 2022-1 to clarify its earlier guidance addressing federal government contractors' regulatory requirement to evaluate compensation as part of their affirmative action programming.
- **DIR 2021-01 Veterans Affairs Health Benefits Program (VAHBP) Enforcement Activities:** The OFCCP amended DIR 2018-02 to establish a two-year moratorium on enforcement of the affirmative action obligations required of VAHBP providers. This directive extends the moratorium by another two years, until May 7, 2023.
- **DIR 2019-02 Early Resolution Procedures (ERP):** For certain compliance evaluations, the OFCCP may seek to resolve violations through the ERP and work with the contractor to develop corporate-wide corrective actions. The OFCCP strongly encourages contractors with multiple establishments to resolve issues that the OFCCP finds during compliance evaluations proactively with the OFCCP through the ERP.
- **DIR 2018-01 Use of Predetermination Notices (PDNs):** The OFCCP will issue PDNs for preliminary individual and systemic discrimination findings identified during the course of compliance evaluations.
- **DIR 2018-02 TRICARE Subcontractor Enforcement Activities:** On May 7, 2014, the OFCCP issued Directive 2014-01, establishing a five-year moratorium on enforcement of the affirmative obligations required of all TRICARE subcontractors. DIR 2018-02 extends the moratorium by two years, until May 7, 2021, and was amended to include VAHBP providers. On July 2, 2020, the OFCCP published the Final Rule, "Affirmative Action and Nondiscrimination Obligations of Federal Contractors and Subcontractors: TRICARE Providers" in the Federal Register. The final rule, which went into effect August 31, 2020, removes TRICARE providers from the OFCCP's authority. Accordingly, TRICARE providers are not required to comply with Executive Order 11246, Section 503, and VEVRAA.
- **DIR 2018-03 Executive Order 11126 § 204(c), Religious Exemption:** This Directive incorporates recent developments in the law regarding religious-exercising organizations and individuals. OFCCP staff are instructed, in all their activities, to take into account recent U.S. Supreme Court decisions and White House Executive Orders that have addressed the broad freedoms and anti-discrimination protections that must be afforded religion-exercising organizations and individuals under the United States Constitution and federal law.
- **DIR 2018-04 Focused Reviews of Contractor Compliance:** The OFCCP is implementing a comprehensive compliance initiative that seeks to ensure compliance with equal employment opportunity and anti-discrimination regulations in all of its protected groups. As part of this initiative, OFCCP will add focused reviews to its compliance activities, with comprehensive on-site reviews focused on each of the three enforcement authorities OFCCP enforces: Executive Order 11246; Rehabilitation Act, and VEVRAA.
- **DIR 2018-05 Analysis of Contractor Compensation Practices During a Compliance Evaluation:** This directive further clarifies and provides additional transparency to contractors about OFCCP's approach to conducting compensation evaluations; supports compliance and compensation self-analyses by contractors under applicable law, and OFCCP regulations and

practices; and improves compensation analysis consistency and efficiency during compliance evaluations.

- **DIR 2018-07 Affirmative Action Program Verification Initiative:** The directive establishes a program for verifying compliance by all contractors with AAP obligations.

Documentation

To comply with the requirements of AAPs and to document the company's efforts, if challenged, a variety of records must be maintained on an ongoing basis.

Personnel Actions

Documented personnel actions should include the following:

- **Applicant log.** This log should reflect the name, race/sex/disability, veteran status, or sexual orientation (if known), date of application, job group and position applied for and disposition. The contractor must be able to identify when an individual was removed from the selection process and why.
- **Hires.** This should be a list of all employees hired by name, race/sex/disability, veteran status, or sexual orientation (if known), date of hire and job group and position hired into.
- **Promotions.** This is a list of employees promoted by name, race/sex/disability, veteran status, or sexual orientation (if known), position and job group promoted from, position and job group promoted to and the date of promotion.
- **Terminations.** This list should include employee terminations by name, race/sex/disability, veteran status, or sexual orientation (if known), date of termination, position and job group held prior to termination, and reason for termination (quit, retired or involuntary — if involuntary, state the reason for the discharge).

When making hiring or promotion decisions, not only should a record be kept of why the successful candidate was selected, but there should be a record as to why the unsuccessful candidate was not selected.

Maintaining these types of running logs will permit an employer to perform the necessary analysis each year for the previous 12 months. Additionally, each letter sent to outside recruiting sources or minority or women's organizations should be retained in a separate file to document the company's good-faith efforts to publicize its policy and to expand the pool of minority and women applicants. Examples of advertisements placed in the classifieds should be maintained, as well as copies of any articles and employee newsletters concerning EEO or affirmative action.

The employer also must keep records of all disabled individuals and veterans who have voluntarily identified themselves and wish to benefit from affirmative action.

Notice of Impending OFCCP Audit

Employers should be on the lookout for Corporate Scheduling Announcement Letters (CSALs) published by the OFCCP on its web site, which provide a courtesy warning to establishments that have been neutrally selected for an impending OFCCP audit. Upon the publication of the CSAL, the OFCCP may begin issuing

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the Office of Management and Budget-approved Compliance Check Scheduling Letter, which commences the compliance evaluation process. Once a contractor receives the Scheduling Letter, the contractor usually has only 30 days to submit their Affirmative Action Programs (AAPs) and contractor records to the OFCCP. Accordingly, contractors identified on the CSAL immediately should ensure their AAPs are legally compliant and evaluate any additional compliance efforts required by federal regulations. The OFCCP review is likely to occur within the agency's fiscal year (October 1 through September 31).

What to Expect in an OFCCP Audit

An audit typically occurs either as the result of an individual complaint, through a random audit, or through the OFCCP's targeted auditing. The first portion of an audit is a desk audit. The company is asked to send its written AAP to the OFCCP, where the AAP will be reviewed for compliance with the regulations. If no violations, adverse impact, compensation inequities, or significant utilization problems are found, an audit may be concluded at this stage by the OFCCP.

However, should violations or other concerns arise during the desk audit stage, the OFCCP will typically request an on-site visit. An on-site visit by the OFCCP may last several days. Typically, the auditor will ask for a meeting with some of the higher management officials. During this meeting ground rules will be set for the audit and the auditor will attempt to find out how much top management knows about the AAP. The auditor also will want to interview the human resource manager and perhaps other personnel employees involved in hiring and other employment processes. These interviews will be for the purpose of discussing the type of records that are maintained, the efforts that have been made to achieve affirmative action, how the various analyses were performed, etc. Additionally, the auditor may want to speak with lower-level managers to ascertain whether they are aware of the affirmative action obligations. Finally, the auditor will likely wish to speak with selected minority and women employees to ascertain their knowledge of the AAP and to get their views as to the employer's equal employment opportunity practices.

The representative will want to review certain personnel records, as well as back-up data for the personnel activity reported in the AAP (e.g., promotions, transfers, terminations). He or she also may want to look at selected personnel files of minority or women employees.

The OFCCP is empowered by the regulations to conduct interviews and review personnel records, but the company should attempt to limit the review to a reasonable one. One approach is to contact the OFCCP investigator prior to the on-site audit and explain that it is the company's desire to cooperate and enable him or her to conduct his audit as efficiently as possible. The company can then ask whether there are any particular types of personnel records or documents he or she will want to review and tell him or her that it can have them ready when he or she arrives. The company can also ask whether there are any individuals (either by name or title) he or she would like to interview. If the auditor provides this information, the company will know what to expect and for what to be prepared. Before an OFCCP on-site audit begins, it is desirable for the company's management and supervisory personnel to meet and review the AAP and other topics that may arise during the audit.

At the end of the audit, an exit interview will be conducted. The auditor will review observations and findings that he or she will be reporting to his or her superiors. The auditor may attempt to secure the company's agreement to make changes in the AAP. The company should be careful in agreeing to any such changes on the spot to avoid being "piecemealed." The company should ask the OFCCP to present a list of all proposed modifications to the AAP or other actions it wants the company to undertake so the company can review them with its counsel.

Corporate Management Review

Historically, the OFCCP has concentrated much of its compliance review efforts on hiring practices in entry positions. However, in the late 1980s the Department of Labor started a program called the glass-ceiling initiative. This initiative is now referred to as a corporate management review and focuses on management and upper-management positions. The reason for this focus is the growing presence of women and minorities in the workplace but a continued under representation of them in higher-ranking positions.

The agency conducted a study of how mid- and upper-level management positions were filled in nine corporate workforces to see whether minorities and women were being considered for those positions. The Department of Labor issued the results of its study in 1991 in a document titled "Report on the Glass-Ceiling Initiative." The report came to several conclusions. First, it found that there was in fact a glass ceiling that relatively few women and minorities had advanced beyond. The report also concluded that corporate America lacked a comprehensive strategy to advance equal employment opportunities for women and minorities in the upper reaches of management, that there was a lack of monitoring of compensation systems to ensure nondiscriminatory practices, that minorities and women often were placed in career tracks with fewer opportunities for advancement into top management, and that women and minorities were prejudiced by corporate recruitment policies (such as word-of-mouth recruitment) that tend to minimize referrals for qualified minorities and women.

The OFCCP closely reviews compensation data of contractors as part of its corporate management compliance evaluations. These reviews are designed to ascertain whether individuals are encountering artificial barriers to advancement into mid-level and senior corporate management. Special attention is given to those components of the employment process that affect advancement into mid- and senior-level positions.

Indiana Affirmative Action Statute

The state of Indiana enacted an affirmative action statute to address past discrimination in state agencies. This law is codified at Section 4-15-12-1 *et seq.* of the Indiana Code. Section 4-15-12-2 provides that "[t]he state is committed to an affirmative action policy that includes the establishment of employment policies and conditions that ensure the elimination of underutilization of qualified members of affected classes and the elimination of discrimination on the basis of race or color, religion, national origin or ancestry, age, sex and disability."

Each state agency must annually establish an AAP to implement the state's affirmative action policy. A state agency with a small number of employees may submit an affirmative action policy statement indicating its commitment to affirmative action, in lieu of establishing a program. A state affirmative action office was created to implement this policy.

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Where to Obtain More Information

Office of Federal Contract Compliance Programs (OFCCP) Indianapolis District Office

46 East Ohio St., Ste. 419
Indianapolis, IN 46204
(317) 226-5860
(317) 226-5878 fax

Census data:

www.census.gov

This chapter was edited by Zoey A. Y. Twyford, Associate.

Chapter 9

Employee Polygraph Protection Act

Congress passed the Employee Polygraph Protection Act (EPPA) in 1988. (29 U.S.C. § 2001 *et seq.*) Its implementing regulations were published in 1991. The EPPA prohibits most private employers from giving polygraph or lie detector tests except in very limited circumstances and, even then, only if certain safeguards are observed. In the limited circumstances in which an employer can give a lie detector test, the EPPA restricts the way tests can be administered.

The EPPA broadly defines a lie detector test as a “polygraph, deceptograph, voice stress analyzer, psychological stress evaluator, or any other similar device (whether mechanical or electrical) that is used, or the results of which are used, for the purpose of rendering a diagnostic opinion regarding the honesty or dishonesty of an individual.” The EPPA does not govern the use of medical tests used to determine the presence of drugs or alcohol, written or oral tests (commonly referred to as honesty or paper-and-pencil tests), or handwriting tests.

Employers who violate the EPPA are subject to civil penalties and may be sued by an individual affected by the employer’s actions.

Prohibitions

With limited exceptions described in the next section, the EPPA prohibits employers from doing the following with regard to current or prospective employees:

- Requiring, requesting, suggesting or causing (directly or indirectly) them to take or submit to a lie detector test
- Using, accepting, referring to, or inquiring about the results of a lie detector test
- Discharging, disciplining, discriminating against, denying employment or promotion, or threatening to take any of these actions against them for refusing, declining, or failing to take a lie detector test, or on the basis of the results of a lie detector test

The EPPA also has an anti-retaliation provision that prohibits an employer from taking adverse action against a current or prospective employee because he or she filed a complaint, exercised rights under the EPPA, or testified (or will testify) in a proceeding under the EPPA.

Additionally, the EPPA prohibits disclosure of test results to anyone other than the employer who ordered the test, the examinee, and a court, government agency, arbitrator, or mediator pursuant to court order requiring the production of such information. An employer can disclose test results to a government agency only if the information disclosed is an admission of criminal conduct.

Exemptions

There are a handful of limited exceptions to the EPPA. They are described in the following paragraphs.

Economic Loss Exemption

Subject to certain restrictions, an employer can request an employee to submit to a polygraph test in connection with an ongoing investigation involving economic loss or injury to the employer's business (such as theft, misappropriation, embezzlement, sabotage, or industrial espionage) if:

- the employee had access to the property that is the subject of the investigation;
- the employer has a reasonable suspicion that the employee was involved in the incident or activity under investigation (however, an employee having access to the missing items, without more, does not constitute reasonable suspicion); and
- the employer provides a signed statement to the employee before the test that explains the specific incident or activity being investigated and the basis for testing particular employees. The employer must give the statement to the person at least 48 hours before the test (excluding weekends and holidays) and retain a copy of the statement for at least three years. The statement must:
 - be signed by someone legally authorized to bind the employer;
 - identify the specific economic loss or injury;
 - state that the employee had access to the property that is the subject of the investigation; and
 - describe the basis for the reasonable suspicion that the employee was involved.

Controlled Substance Exemption

Subject to certain restrictions, the EPPA allows use of a polygraph test by employers authorized to manufacture, distribute, or dispense a controlled substance listed in Schedule I, II, III, or IV of the Federal Controlled Substances Act (e.g., a pharmaceutical firm).

This exemption permits the administration of a polygraph test to:

- a prospective employee who would have direct access to the manufacture, storage, distribution, or sale of any controlled substance; or
- a current employee, if the test is given in connection with an ongoing investigation of criminal or other misconduct involving, or potentially involving, loss or injury to the manufacture, distribution, or dispensing of any such controlled substance by the employer, and the employee had access to the person or property that is the subject of the investigation.

This exemption does not require reasonable suspicion to administer the polygraph.

Government Employee and Contractor Exemption

The EPPA does not prohibit lie detector testing of federal, state, and local government employees. The federal government also may administer tests to certain government contractors, employees, experts or consultants engaged in national defense or security-related activities. Depending on the relationship between the federal government and the employer, the federal government in the performance of any counterintelligence function may test employees, experts or consultants under contract with the Department of Defense, certain areas of the Department of Energy, the FBI, the CIA, and the NSA.

Security Firm Exemption

Subject to certain restrictions, the EPPA allows the use of a polygraph test for prospective employees of security firms, such as armored car personnel, security alarm personnel, or security guards, who would be employed to protect certain facilities, materials, operations or assets having a significant impact on the health or safety of any state or political subdivision or the national security of the United States. This exemption does not require that the employer have reasonable suspicion of the employee's involvement.

Employee Rights

The exemptions just discussed are not available unless the employer meets certain requirements regarding the rights of the person to be examined. These rights are described in the following paragraphs and the EPPA prohibits waiver of these rights.

Rights Before the Test

Individuals must be provided with reasonable written notice of:

- the date, time, and location of the test;
- their right to consult with an attorney or employee representative before each phase of the test;
- the nature and characteristics of the test and the instrument(s) that will be used;
- whether the testing area will contain a two-way mirror, a camera, or any other device that allows the test to be observed;
- whether any other device will be used to make a recording of the test; and
- that the company or the individual may, with mutual knowledge, make a recording of the test.

Individuals must read and sign a written notice:

- informing them that they cannot be required to take the test as a condition of employment;
- informing them that any statement made during the test may constitute additional supporting evidence for the purposes of taking adverse employment action;
- identifying the limitations imposed under the EPPA;
- identifying the legal rights and remedies available if the test is not conducted in accordance with the EPPA; and
- identifying the employer's legal rights.

Individuals must be provided an opportunity to review all questions that will be asked during the test and be informed of the right to terminate the test at any time.

Rights During the Testing

The polygraph examiner cannot ask the person any question that was not presented in writing for review before the test.

Post-test Rights

After the test is given and before any adverse employment action can be taken, the employer must:

- interview the person further on the basis of the results of the test;
- provide him or her with a written copy of any opinion or conclusion rendered as a result of the test; and
- provide the person with a copy of the questions asked during the test along with the corresponding charted responses.

Rights During All Phases

At any point during the test, individuals have the following rights:

- They must be permitted to terminate the test at any time.
- They cannot be asked questions in a manner designed to degrade or needlessly intrude.
- They cannot be asked any questions concerning their religious beliefs or affiliations, beliefs or opinions on racial matters, political beliefs or affiliations, any matter relating to sexual preferences or behavior, or beliefs, affiliations, opinions, or lawful activities regarding unions or labor organizations.
- The test cannot be conducted if there is sufficient written evidence from a physician that the individual is suffering from a medical or psychological condition or undergoing treatment that might cause abnormal responses.

Adverse Employment Action

Even if an employer follows all the procedural safeguards and limitations, polygraph test results or an employee's refusal to submit to a polygraph cannot form the sole basis for discharge, discipline, denial of employment or promotion, or other adverse employment action. The employer must provide additional supporting evidence before taking adverse action against the employee.

The EPPA defines additional supporting evidence to include:

- evidence that the employee had access to the missing or damaged property subject of an ongoing investigation;
- evidence leading to a reasonable suspicion the employee was involved in the incident or activity under investigation; or
- admissions or statements made by the employee before, during or following the polygraph examination.

Penalties

Employers who violate the EPPA can be required to hire, reinstate, or promote the individual and pay lost wages, benefits, and reasonable costs, including attorneys' fees. An individual must bring an action within three years of the date of the claimed violation and can bring suit in either federal or state court.

The Secretary of Labor also may bring an action in federal court to enjoin violations and to obtain compliance. A civil money penalty can be assessed up to \$23,011. The EPPA also applies to former employees with respect to its prohibitions against retaliation and against threatening to provide a bad reference for a refusal to take a lie detector test.

Posting Requirements

Employers must post a notice that explains the EPPA in a prominent and conspicuous place on their premises where notices for employment customarily are posted. The Indiana Chamber has all-in-one state and federal postings available at www.indianachamber.com/events-products/employment-posters.

Effect of State Laws

State and local laws may impose additional restrictions on administration of polygraphs, but none have been enacted in Indiana to date.

This chapter was edited by Raphael Coburn, Associate.

Chapter 10

Employment Testing

Pre-employment testing is a technique used by many employers to screen applicants for such things as intellectual ability, physical ability, aptitude in specific skill areas, personality and honesty. Such tests are allowed under federal law as long as they are not designed, intended or used to discriminate based on a protected status or characteristic such as race, religion, sex, color, national origin, age (40 or older) or disability or have a disparate impact based on any such protected status or characteristic. Tests that have a disparate impact are still allowed if they are demonstrably job related for the position in question and consistent with business necessity, and if there is no alternative approach that would serve the employer's legitimate business interests equally well with less disparate impact. In order to avoid liability based on tests that have a disparate impact, employers should use only professionally developed tests that have been validated for the particular role being filled using recognized and accepted validation methodology.

The Americans with Disabilities Act (ADA) also imposes restrictions on testing of both job applicants and employees. The ADA's implications on employment testing are discussed in Chapter 6, "Disability Discrimination," and are briefly summarized below.

Disparate Impact

A disparate impact case involves a claim that an employer's screening or selection practice, although facially neutral, has an adverse effect on the employment opportunities of a protected group. In other words, all employees or applicants are given identical tests, so there is no discrimination in test administration, but individuals in a protected group score significantly lower overall than individuals outside that protected group. Thus, an employment practice that appears neutral has the effect of excluding individuals from opportunities such as hiring or promotion based on a protected status such as race. A rule of thumb is that if the pass rate for a protected group is less than 80% of the pass rate for the group with the highest pass rate, the test is considered to have a disparate impact on that protected group. This "four-fifths" rule is merely a guide, however, and courts may look to more sophisticated statistical approaches such as standard deviation analysis.

Tests that have this sort of disparate impact are prohibited unless the employer can prove that the practice is job-related and justified by business necessity. An employer that is unable to prove both job relatedness and business necessity will be found liable for damages, although there may have been no intent to discriminate.

Types of Employment Tests

Employers often use cognitive ability tests to evaluate mental ability or intelligence as part of the process of narrowing the field of applicants for job openings. Such tests may measure general intelligence or focus more narrowly on abilities such as mechanical aptitude or programming aptitude.

Another common type of test is the personality test, which measures traits, temperaments or dispositions. Such tests may focus on the presence and strength of a particular trait that is relevant to the job, such as

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extroversion for a sales position applicant. Personality tests may also be designed to screen out individuals whose test results indicate mental instability or psychopathology. Tests of this type are considered medical tests under the ADA and are subject to the ADA's restrictions as described in Chapter 6.

A third type of test is the honesty or integrity test. This type of test is sometimes used in industries such as retail and financial services to identify individuals who are prone to theft, in order to avoid putting such applicants in positions where they have unsupervised access to money or goods.

Title VII Requirements

Employers often favor scored tests as an employee selection device, both for hiring and promotion purposes, because such tests provide objective measures for comparison between candidates and can measure attributes that are difficult to assess in the general interview process. Title VII expressly authorizes employers to administer "any professionally developed test provided that such test, its administration, or action upon the results is not designed, intended or used to discriminate" against a protected group. Therefore, use of any selection procedure that has an adverse impact on hiring, promotion, or other employment conditions based on race, sex, ethnicity, or other protected status is discriminatory unless the procedure has been properly validated. Employers wishing to administer tests that may have an adverse impact on any such group should first complete a validation study.

Test Validation

Validation studies can establish that employment tests are legally permissible despite an adverse impact on a protected group. Validation involves establishing that the test provides a reasonably accurate prediction of success in the job. Not only must the business purpose of the challenged practice be sufficiently compelling to override any adverse impact on a protected group, there also must be no acceptable alternative test or practice that would accomplish the same business purpose equally well with lesser adverse impact. Therefore, as part of conducting a validation study, the employer should consider available alternatives that will achieve its legitimate business purpose with less adverse impact. The EEOC's Uniform Guidelines on Employee Selection (Guidelines) provide three approaches that can be used to validate a selection procedure: content validity, construct validity and criterion-related validity.

Content Validity

Content validity is the most commonly used validation approach when the test is one that simulates the job, as is often the case with skills or aptitude testing. A selection procedure may be validated by data showing that the content of that selection procedure is representative of an important aspect of performance of the particular job. For example, a test that evaluates keyboarding skill and accuracy may measure an important aspect of job performance for a clerical worker. An examination need not test for attributes in strict proportion to their importance and frequency of use in performance of the job to be adequately job related under a content validity analysis so long as the qualities measured are important aspects of the job.

Construct Validity

Construct validity establishes a relationship between some aspect of successful performance in the particular job and a specific character or personality trait. This concept uses data to show that the selection procedure measures the degree to which candidates have identifiable characteristics that have been

determined to be important for successful job performance, such as a test to measure leadership qualities for a manager.

Criterion-Related Validity

Criterion-related validity compares test success with success at important job duties using correlational analysis that shows a statistically significant relationship between test score and actual job performance. For example, such a validation study might demonstrate that sales supervisors who scored highest on a test also achieved the highest performance ratings on the job and the highest level of territory sales. This is the preferred method of validation under the EEOC's uniform guidelines, although it is not always feasible.

Standards for Validation Studies

Any validity study should be based on a review of information about the job for which the selection procedure is used. The review generally should include a job analysis showing what task or work behavior (depending on the validation concept being used) is required for successful performance on the job.

Employers may support the use of selection procedures by validity studies conducted by other users or by test publishers or distributors. However, the general reputation of a selection procedure, its author, or its publisher may not be used in lieu of evidence of validity. Likewise, while professional supervision of selection procedures is encouraged by the EEOC Guidelines, it is not a substitute for documented evidence of validity. In other words, hiring an expert will not necessarily be sufficient to prove the job relatedness required by Title VII. The focus will be on the statistical data generated by the validation study.

Race or Gender Norming

Race or gender norming is the adjusting of test scores of minorities or women to compensate for racial or gender bias. The 1991 Civil Rights Act, which amended Title VII, makes it unlawful to adjust the scores of, use different cutoffs for, or otherwise alter the results of employment-related tests on the basis of protected status. Therefore, employers may not avoid liability for tests that have a disparate impact on a protected group simply by adjusting test scores of protected group members to compensate for the disparate impact.

ADA Compliance in Testing

The ADA imposes certain restrictions on testing of both job applicants and employees, including the requirement that individuals with disabilities as defined under the ADA be provided reasonable accommodation in the testing process upon request and subject to verification of medical need (unless the disability and need for accommodation are obvious).

An employer may not require a job applicant to take a medical examination, to respond to medical inquiries, or to provide information about worker's compensation claims before the employer makes a job offer that is not subject to any other contingencies. Prior to extending a job offer, an employer may only question an applicant about his or her ability to perform the required functions of the job, with or without accommodation.

An employer may condition a job offer on the satisfactory result of a post-offer medical examination or medical inquiry if such testing is required of all entering employees in the same job category. A post-offer, pre-employment examination or inquiry does not have to be job related and consistent with business

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necessity, but if it reveals a disability and the employer rescinds the offer, the reason for not hiring the individual must be job related and necessary for the business. Generally, rescission of the offer is based on the employee's medical inability to perform all essential job functions even with reasonable accommodation. Medical examinations or inquiries of an existing employee must be job related and necessary for business.

Additional information is provided in Chapter 6, "Disability Discrimination."

This chapter was edited by Susan Kline, Partner.

Chapter 11

Immigration Reform and Control Act

The Immigration Reform and Control Act of 1986 (IRCA) is a federal law that affects all employers. It requires employers to complete prescribed forms to verify that every employee hired after November 6, 1986, is authorized to be employed in the United States. It establishes a system of civil and criminal penalties for failing to complete the verification procedure and for knowingly hiring, referring, recruiting, or retaining in employment unauthorized aliens when they are identified. IRCA also prohibits discrimination in hiring or firing based on national origin or citizenship status. Additional anti-discrimination and document fraud provisions were added by the Immigration Act of 1990.

IRCA was intended to diminish illegal immigration to the United States by penalizing employers for knowingly hiring or continuing to employ illegal aliens. To prevent employers from using the threat of employer sanctions as an excuse to discriminate against foreign-appearing workers, IRCA also contains an anti-discrimination section that bars “unfair immigration-related employment practices.”

Previously, the INS enforced the Form I-9 requirements. Under the Homeland Security Act of 2002, effective March 1, 2003, all INS functions were assumed by the Department of Homeland Security (DHS). U.S. Immigration and Customs Enforcement (ICE), DHS’s largest investigations bureau, is responsible for interior enforcement, including employer sanctions enforcement.

The current version of Form I-9, as of the date this book went to press, has a revision date of October 21, 2019. Form I-9 is available on the U.S. Citizenship and Immigration Services (USCIS) web site at www.uscis.gov/i-9. Employers should not continue using previous versions of Form I-9; employers who continue to do so are subject to fines and penalties. Employers only need to complete a new Form I-9 for new employees. Employers do not need to complete a new Form I-9 for existing employees but must use the current version of Form I-9 when reverifying employment eligibility.

Verification and Recordkeeping

The employer verification and recordkeeping section of the IRCA requires the following:

- Every employer in the United States must examine documents presented by every employee at the time of hiring.
- The documents presented must establish the employee’s identity and his or her eligibility to work in the United States and must be among the acceptable documents listed on the Form I-9.
- If an employee cannot present the documents within the required three business-day period after hiring (or within 90 days if the employee can show within three business days that he or she has applied for replacement of one of the documents; or within one year or by the stated expiration date if the employee presents within three business days a temporary I-551 stamp on a Form I-94), the employer must terminate the employment relationship.
- After inspecting the documents and determining that they appear to be genuine on their face, the employer must indicate on Form I-9 that, to the best of its knowledge, the employee is authorized to work in the United States. The employee attests on the same form that he or she has provided true and correct information and documents.

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- The employer must maintain the record created on Form I-9 for the full period of employment, plus one year. At a minimum, each I-9 form must be kept for three years.
- When an employee indicates a limited period of employment authorization (e.g., a non-immigrant alien who is entitled to work in the United States only for the period of time permitted by ICE), the employer must re-verify the employment authorization of that employee on or before the indicated expiration date.
- If the employer discovers that an employee is unauthorized to work in the United States or has work authorization that has expired, the employer must terminate the employment relationship.

When Form I-9 Must Be Completed

An employer must complete Form I-9 any time it hires anyone to perform labor or services in return for wages or other remuneration. This requirement applies to everyone hired after November 6, 1986.

Form I-9 should only be completed at the time of hire. In general, an applicant's work authorization is not relevant under the IRCA until he or she accepts an offer of employment, which may be conditioned on the applicant's work eligibility. A practice of reviewing documents prior to an acceptance of employment could be used as evidence that the employer is engaging in national origin or citizenship status discrimination, particularly when this practice is not applied consistently to all applicants.

The employer must ensure that the employee fully completes Section 1 of Form I-9 no later than the first day of employment. The employer must review the employee's documents and fully complete Section 2 of the form within three business days of the employee's first day of employment.

If a person is hired for less than three business days, Sections 1 and 2 of Form I-9 must be fully completed no later than the first day of employment.

The employer does not need to complete Form I-9 for:

- employees hired before November 7, 1986, who are continuing in their employment and have a reasonable expectation of employment at all times;
- persons employed for casual domestic work in a private home on a sporadic, irregular or intermittent basis;
- persons who are independent contractors; or
- persons who provide labor who are employed by a contractor providing contract services (e.g., employee leasing).

How to Complete Form I-9

Form I-9 is divided into three parts. Section 1 must be completed by the employee; Sections 2 and 3 must be completed by the employer.

Section 1: Employee Information and Verification

In Section 1, no later than the employee's first day of employment, the employee must indicate his or her name (including other last names used) and U.S. citizenship or alien status by placing a checkmark next

to one of the four descriptive alternatives (aliens must provide certain additional, specified information). In addition, the employee must provide his or her address, telephone number (optional), e-mail address (optional), birth date, and social security number (mandatory if the employer participates in E-Verify, but optional if the employer does not participate in E-Verify), and then sign and date the form. The date is of critical importance because it will establish that the employee filled out the form at the time of hire. The employee may request the assistance of a translator. Section 1 of the form contains a block for execution by a translator to attest that the form was translated to the employee before the employee completed Section 1.

The employer is responsible for reviewing and ensuring that the employee fully and properly completed Section 1. However, the employer may not request to see documents to confirm the correctness of Section 1 information. The employer may only verify the accuracy of this information if the employee produces documents for verification purposes in Section 2.

The instructions and lists of available documents must be available to all employees completing the form.

Section 2: Employer Review and Verification

In Section 2, the employer must verify the identity and employment eligibility of the employee as well as the date employment began. The employee must present documents of identity and employment eligibility. The employer must physically examine the documents and ensure that they appear to be genuine and relate to the individual presenting them and completing the I-9 form.

Two types of documents may be presented:

1. a single document that establishes both employment authorization and identity (List A); or
2. a separate document that establishes identity (List B), as well as a separate document that establishes employment authorization (List C).

The original documents – not copies – must be examined. Lists of acceptable documents are listed on the I-9 form. Metal, plastic or laminated social security cards or social security cards marked “not valid for work authorization” are not acceptable.

The employer may not specify which acceptable documents an individual must present, nor may it require an individual to present more documents than required. An employer who requires a specific document or excess documentation commits an unfair immigration-related employment practice if the act is done for the purpose of, or with the intent to, unlawfully discriminate against the employee based upon citizenship status or national origin. The employer must write on the I-9 form the document title from the List of Acceptable Documents included on the I-9 form, the issuing authority, the document number, and the expiration date (if any).

The employer’s authorized representative must sign the form and provide his or her name, title, employer’s name, business address, and date. Failure to complete any of these items is a violation of the I-9 form recordkeeping requirements and may subject the employer to a fine. The date is of critical importance because it will establish that the employer reviewed the employee’s work authorization within the required three business days of the employee’s first day of employment.

The employer may, but is not required to, copy and attach the documentation presented to the I-9 form. Copying documents is not, however, an excuse for failure to complete the form. Photocopies may only be

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used for the verification process and must be retained with the I-9. Retention of copies, coupled with meticulous preparation and maintenance of the I-9 forms, may demonstrate an employer's good faith efforts to comply with IRCA. However, if copies are made, the employer must be careful and diligent to make complete, accurate, and legible copies, and to avoid discrimination charges by copying documents of all employees rather than copying documents on a selective basis. Copying documents may be helpful as evidence of the employer's attempt at verification, but harmful if the documents prove to be false or if documents are not copied for every employee.

Legislation enacted in 1996 provides that if an employer makes a good faith attempt to comply with the employment verification requirements of IRCA, but in doing so makes a technical or procedural error, the employer will, nevertheless, be deemed to have complied with the rules so long as:

- once notified of the error, the employer corrects it within a specified time period (must be at least 10 business days); and
- the employer is not guilty of engaging in a pattern or practice of violating the verification requirements.

This section applies to violations occurring on or after September 30, 1996. Until ICE issues a final rule, ICE will follow the interim guidelines the INS issued on March 6, 1997, regarding implementation of the good-faith exception. ICE describes the administrative inspection process on its web site at www.ice.gov/factsheets/i9-inspection.

Section 3: Updating and Reverification

Numerous situations exist where an I-9 form must be reverified or updated. These situations are covered in the following paragraphs.

Current Employees

An employee must be reverified if he or she lists an expiration date for employment eligibility in Section 1. When an employee's work authorization expires, the employer must reverify his or her employment eligibility. Employment eligibility must be reverified on Form I-9 no later than the date that the employee's work authorization expires. The employee must present a document that shows either an extension of the employee's initial employment authorization or a new work authorization. If the employee cannot provide proof of current work authorization, the employer cannot continue to employ that person. If the employee's Form I-9 is the current version of Form I-9, the employer may reverify using either Section 3 of the employee's Form I-9 or a new Form I-9. If the employee's Form I-9 is not the current version of Form I-9, the employer must reverify using a new Form I-9. If a new form is used, the employer must write the employee's name at the top of Section 2, complete Section 3, and retain that page of the new form with the original.

Rehired Employees

When an employee is rehired, the employer must ensure that he or she is still authorized to work. If an employer rehires an employee more than three years after the date of the initial execution of the employee's previous Form I-9, the employer must complete a new Form I-9.

On the other hand, if an employer rehires an employee within three years of the date of the initial execution of the employee's previous Form I-9, the employer may either complete a new Form I-9 or may, in certain circumstances, be able to update the previous Form I-9, as follows:

- If the employee's previous Form I-9 indicates the employee is still eligible to work, the employer must either:
 - complete a new Form I-9; or
 - complete Block B (and, if applicable, Block A) and sign and date Section 3 of the previous Form I-9. If, however, the employee's previous Form I-9 is not the current version of Form I-9, the employer must use Section 3 of a new Form I-9. In that situation, the employer must also write the employee's name at the top of Section 2 and retain that page of the new Form I-9 with the previous Form I-9.
- If the employee's employment authorization has expired, the employer must either:
 - complete a new Form I-9; or
 - complete Block C (and, if applicable, Block A) and sign and date Section 3 of the previous Form I-9. If, however, the employee's previous Form I-9 is not the current version of Form I-9, the employer must use Section 3 of a new Form I-9. In that situation, the employer must also write the employee's name at the top of Section 2 and retain that page of the new Form I-9 with the previous Form I-9.

Retention of Records

The employer must retain Form I-9 for three years after the date employment begins, or one year after the person's employment is terminated, whichever is later. For example, when an employee has only worked for the employer for six months before leaving, the I-9 form must be kept for three full years. The I-9 form must be kept for three-and-a-half years when the employee leaves after two-and-a-half years. If the employee leaves after 10 years, the I-9 form must be kept for 11 years.

The employer should keep all I-9 forms separate from the company's general personnel records, since the I-9 form contains information about the employee's age, birthplace and national origin. If employers do not avoid even the appearance of being influenced by these factors, federal discrimination laws may be violated.

The employer must make all I-9 forms available for inspection to an ICE officer, the Department of Labor (DOL), or the U.S. Department of Justice Civil Rights Division Immigrant and Employee Rights Section (IER) upon request. The employer will be given at least three days advance notice. This does not, however, preclude the ICE, the DOL, or the IER from obtaining warrants based on probable cause for entry onto the premises of suspected violators without advance notice. Delay or failure to produce the I-9 forms is a violation of retention requirements. The I-9s may be produced in original form, on microfilm or on microfiche. Employers may retain I-9 forms electronically if certain requirements are met. The forms may be stored at another location but must be available for inspection.

Anti-discrimination Provisions

IRCA creates a federal right of action for individuals who suffer from and can prove discrimination because of citizenship status. In addition, this law supplements the protection already provided by Title VII of the Civil Rights Act of 1964, as amended, for discrimination based on national origin.

Who Is Affected

Employers of between four and 14 employees are subject to IRCA's national origin discrimination provisions. Employers of more than 14 employees are covered by the national origin discrimination provisions of Title VII. All employers of four or more employees are subject to IRCA's citizenship discrimination provisions.

All individuals are protected from discrimination because of national origin. Only protected individuals benefit from IRCA's prohibition against discrimination because of citizenship status. The following are protected individuals:

- Citizens and nationals of the United States
- Lawful permanent residents
- Temporary residents (legalized aliens)
- Refugees
- Asylees

In the case of the last four categories, there are two additional requirements:

1. The individual must file for naturalization within six months of the date he or she first becomes eligible to do so; and
2. The individual must be naturalized within two years after filing the application (unless the time lag is due to application processing delays and the individual is currently pursuing citizenship).

What Is Prohibited

IRCA specifically prohibits discrimination on the basis of national origin or citizenship status in hiring, recruiting, referring for a fee or discharging.

Discrimination in compensation, terms, conditions, and privileges of employment is not covered by IRCA. Employees may still file Title VII and/or Section 1981 actions for discrimination in the terms, conditions and privileges of employment.

IRCA specifically:

- prohibits intimidation or retaliation against a person who files a charge or complaint or who assists or participates in any manner with the investigation or proceedings; and
- makes it discrimination for an employer to request more or different documents than are required under IRCA, or for refusing to honor documents that appear reasonably genuine if the act is done for the purpose of, or with the intent to, unlawfully discriminate against the employee based upon citizenship status or national origin.

Generally, employers who have four or more employees cannot limit jobs to United States citizens to the exclusion of authorized aliens. Such a limitation may only be applied to a specific position when required by law, regulation, or executive order; when required by a federal, state or local government contract; or when the attorney general determines that United States citizenship is essential for doing business with an agency or department of the federal, state or local government.

On an individual basis, an employer may legally prefer a United States citizen or national over an equally qualified alien to fill a specific position. However, an employer may not adopt a blanket policy of always preferring a qualified citizen over a qualified alien.

Common Mistakes Leading to Potential Liability

Some common errors related to immigration and employment include the following:

- The employer looks at the employment eligibility document of a job applicant prior to making an offer of employment
- The employer asks a job applicant questions relating to employment eligibility prior to making an offer of employment
- The employer is inconsistent with regard to the timing of employment verification and commencement of employment
- The employer is inconsistent with regard to the amount of time that a job offer remains open while an employee seeks documentation
- An employer maintains a hiring policy that requires job applicants to be U.S. citizens or to possess a green card
- An employer requires more or different documents than are required by the I-9 form
- An employer with a government contract establishes a citizens-only policy although the contract does not require such a policy
- An employer refuses to hire a protected alien because his or her work authorization has an expiration date
- An employer conducts reverification for a Permanent Resident who submits a green card with an expiration date

If an employer received information that a prospective employee or an employee with a completed I-9 form is not employment authorized, it should consult legal counsel before exercising its duty to investigate.

Penalties for Prohibited Practices

If an investigation by an ICE or DOL investigator reveals that an employer has knowingly hired or knowingly continued to employ an unauthorized alien, or has failed to comply with the employment eligibility verification requirements with respect to employees hired after November 6, 1986, ICE and/or DOL may take action. When ICE or DOL intends to impose penalties, a Notice of Intent to Fine (NIF) is issued. Employers who receive an NIF may request a hearing before an administrative law judge. If a request for a hearing is not received within 30 days, the penalty will be imposed and a final order will be issued. When a final order is issued, the penalty is final and unappealable.

Employers determined to have knowingly hired unauthorized aliens (or to be continuing to employ aliens knowing that they are or have become unauthorized to work in the United States) may be ordered to cease and desist from such activity and pay a civil monetary penalty as follows:

- **First offense** – Not less than \$627 and not more than \$5,016 for each unauthorized alien
- **Second offense** – Not less than \$5,016 and not more than \$12,537 for each unauthorized alien

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- **Subsequent offenses** – Not less than \$7,523 and not more than \$25,076 for each unauthorized alien

The term “knowing” as used in the context of knowingly hiring or employing an unauthorized alien includes not only actual knowledge but also knowledge that may fairly be inferred through notice of certain facts and circumstances that would lead a person, through the exercise of reasonable care, to know about a certain condition. Such constructive knowledge may include, but is not limited to, situations where an employer fails to complete or improperly completes Form I-9.

Employers who fail to properly complete, retain and/or make available for inspection Forms I-9, as required by law, may be fined not less than \$252 and not more than \$2,507 for each paperwork violation, regardless of the number of prior offenses for which the employer has been cited. Each Form I-9 error is considered a separate violation. However, employers who have not engaged in a pattern of Form I-9 violations and have not been issued a prior warning notice, NIF, or notice of technical or procedural failure and have committed only technical or procedural errors have a 10-day period to cure identified violations, and fines are only issued after the employer has failed to correct the error within the 10-day period.

Employers found to have required a bond or indemnity from an employee against liability under the employer sanctions laws may be ordered to pay a civil monetary penalty of \$2,507 for each violation and to make restitution, either to the person who is required to pay the indemnity or, if that person cannot be located, to the United States Treasury.

If an employer can show that it has complied with the Form I-9 requirements, then the employer has established a good-faith defense with respect to a charge of knowingly hiring an unauthorized alien, unless the government can show that the employer had actual knowledge of the unauthorized status of the employee.

Persons or entities who are convicted of having engaged in a pattern or practice of knowingly hiring unauthorized aliens (or continuing to employ aliens knowing that they are or have become unauthorized to work in the United States) after November 6, 1986, may face fines of up to \$3,000 per employee and/or six months imprisonment.

Under Executive Order 12989, issued in 1996, federal agencies can bar employers who violate IRCA's hiring provisions from procuring government contracts for one year.

Unlawful Discrimination

If an investigation reveals that an employer has engaged in unfair immigration-related employment practices under the IRCA, including national origin discrimination, document abuse, or citizenship status abuse, the IER or the EEOC may take action. An employer will be ordered to stop the prohibited practice and may be ordered to take one or more of the following steps:

- Hire or reinstate, with or without back pay, individuals directly injured by the discrimination
- Lift any restrictions on an employee's assignments, work shifts or movements
- Post notices to employees about their rights and about the employer's obligations
- Educate all personnel involved in hiring and in complying with the employer sanctions and anti-discrimination laws about the requirements of these laws
- Remove a false performance review or false warning from an employee's personnel file

Employers also may be ordered to pay a civil monetary penalty as follows:

- **First offense** – Not less than \$517 and not more than \$4,144 for each individual discriminated against.
- **Second offense** – Not less than \$4,144 and not more than \$10,360 for each individual discriminated against.
- **Subsequent offenses** – Not less than \$6,215 and not more than \$20,719 for each individual discriminated against.
- **Unlawful request for more or different documents or rejecting facially genuine documents** – Not less than \$207 and not more than \$2,072 for each individual discriminated against.

Employers also may be ordered to keep certain records regarding the hiring of applicants and employees. If a court decides that the losing party's claim has no reasonable basis in fact or law, the court may award attorneys' fees to prevailing parties other than the United States.

Civil Document Fraud

An employer who falsely makes or knowingly accepts any forged, altered, or counterfeit document or a document lawfully issued to a person other than the possessor for purposes of satisfying the employment eligibility verification requirements may be fined.

Individuals may be ordered to pay a civil monetary penalty as follows:

- **First offense** – Not less than \$517 and not more than \$4,144 for each fraudulent document used, accepted or created, and each instance of use, acceptance or creation.
- **Subsequent offenses** – Not less than \$4,144 and not more than \$10,360 for each fraudulent document used, accepted or created, and each instance of use, acceptance or creation.

COVID-19

On March 20, 2020, DHS announced it would temporarily relax the requirement for employers to review an employee's identity and work authorization documents in person and complete Section 2 of the Form I-9. Under the temporary guidance, employers may inspect Section 2 documents remotely (e.g., via webcam, fax, or email) and obtain, inspect and retain copies of the documents within three business days. Employers wishing to take advantage of this approach must follow these rules:

1. On the Form I-9, the employer must write "COVID-19" in the "Additional Information" field in Section 2.
2. Once normal business operations resume, the employer must review the employee's original documents within three business days and write "documents physically examined" with the date of inspection in the "Additional Information" field.
3. Documentation of the remote onboarding/telework policies must be maintained for each employee.

The temporary guidance initially applied only to employers and workplaces operating remotely. If there were employees physically present at a worksite, there was no exception to the in-person requirement for reviewing original documents for Form I-9. Effective April 1, 2021, DHS modified the temporary guidance

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as follows: If employees hired on or after April 1, 2021, work exclusively in a remote setting due to COVID-19 related precautions, the temporary guidance applies to them (i.e., the employer may inspect Section 2 documents remotely) until they undertake non-remote employment on a regular, consistent, or predictable basis, or the temporary guidance expires, whichever is earlier.

The temporary guidance applies only to employers and workplaces operating remotely. If there are employees physically present at a worksite, there is no exception to the in-person requirement for reviewing original documents for Form I-9. The temporary guidance is set to expire on July 31, 2023. It is possible USCIS may issue additional extensions of the expiration date depending on the circumstances of the COVID-19 pandemic.¹

Where to Obtain More Information

Detailed instructions for completing Form I-9 are contained in a handbook for employers (Publication M-274, last reviewed/updated November 24, 2020). This handbook can be found online at www.uscis.gov/i-9-central/form-i-9-resources/handbook-for-employers-m-274. Copies of the handbook can be obtained by contacting U.S. Citizenship and Immigration Services (USCIS) forms request line by calling (800) 870-3676.

This chapter was edited by Tareen Zafrullah, Counsel.

¹ To obtain updates as they occur, you can subscribe to Faegre Drinker's Client Alerts. To do so, visit www.faegredrinker.com/subscribe. After you enter your information and check the box for each area you are interested in, click "SAVE MY PREFERENCES" at the bottom of the page. You'll receive an email with a link to confirm your subscription.

Chapter 12

Employing Foreign Nationals

Any foreign national employed in the U.S. must have employment authorization granted by U.S. Citizenship and Immigration Services (USCIS) before being placed on the employer's payroll. Generally, to obtain this authorization, a foreign national must qualify for one of the visa categories that permit employment.

Permanent vs. Temporary Visas

A visa is a document in the form of a passport stamp that allows a foreign national to physically enter the U.S. through a U.S. Customs and Border Protection Port of Entry (airport or land border). Visas are obtained from a U.S. embassy or consulate outside the United States. Once admitted to the U.S., the foreign national is considered to have that specific visa status.

Visas are classified into two principal categories: permanent (immigrant) visas and temporary (nonimmigrant) visas. An immigrant visa allows a foreign national to enter the U.S. and remain permanently. Lawful Permanent Resident status is commonly referred to as green card status. A nonimmigrant visa allows a foreign national to enter the U.S. for a limited period of time to participate in a particular activity (such as attending school or working for a particular employer). With the exception of applicants in many of the employment-based nonimmigrant categories, visa applicants are presumed to be intending immigrants. Each such applicant for a nonimmigrant visa must convince the U.S. consular official that he or she will return to his or her home country at the completion of his or her U.S. stay, as indicated on Form I-94, Arrival/Departure Record, and will not remain in the U.S. permanently.

Temporary Visa Holders

People who hold temporary visas:

- enter the U.S. for a defined temporary period; and
- are restricted to the activity consistent with their visa category.

Only certain nonimmigrant visas permit employment in the U.S., and generally those visas are employer-specific (i.e., the employment authorization relates only to the specific petitioning employer). If the foreign national desires to work for a different employer, a new petition from the new employer is required.

Permanent Visa Holders

People who hold permanent visas:

- may permanently reside in the U.S. as an immigrant; and
- may work for any employer without any additional authorization.

A Permanent Resident can apply for naturalization after five years if certain requirements are met. (This is reduced to three years if the person is married to a U.S. citizen and has been physically living together with his/her U.S. citizen spouse for the entire three-year period.) In addition, Permanent Resident status can be deemed abandoned if the foreign national no longer shows an intent to retain his or her U.S. primary residence.

Employment-based Temporary Visas

The two most common visa statuses used for temporary employment of foreign nationals are H-1B Specialty Occupation Worker and L-1 Intracompany Transferee. As these are the two situations employers will be faced with most frequently, they are discussed in some detail in the following paragraphs. Other temporary visa statuses are also discussed, although this list is not exhaustive.

H-1B Visa: Specialty Occupation Workers

General Information

There are two key requirements for H-1B visa status:

1. The proposed U.S. employment must be in a specialty occupation (i.e., one that requires the theoretical and practical application of highly specialized knowledge and for which a bachelor's or higher degree [or its equivalent] in a particular specialty field is a minimum requirement); and
2. The foreign national is qualified to work in the occupation because he or she has attained the required bachelor's or higher degree (or its equivalent) in the specialty field.

The H-1B visa is employer-specific, position-specific and city-specific. An H-1B approval authorizes the worker to work only for the petitioning employer, only in the approved position, and only in the location identified in the petition. A petition may be approved for an initial period of up to three years. Extensions may be obtained, generally up to a maximum stay of six years, and any time spent physically outside the U.S. exceeding 24 hours may be recaptured for purposes of calculating the foreign national's total period of authorized H-1B time. Additional years of H-1B status beyond six years may be approved if a permanent residency case has reached certain benchmarks. The spouse and minor children of the H-1B visa holder may accompany the H-1B worker in H-4 visa status as dependents. H-4 spouses may apply for authorization to work in the U.S. if the H-1B worker's permanent residency case has reached certain benchmarks. H-4 children may not apply for authorization to work but may attend school.

There is an annual limit on the number of new H-1B visa spots available each federal fiscal year (starting each October 1). USCIS conducts a lottery in March each year to determine which H-1B petitions will be processed for the following October.

The H-1B process involves two steps if the foreign national is in the U.S., and three steps if he or she is outside the U.S.

Labor Condition Application

The employer is first required to submit a Labor Condition Application (LCA) to the U.S. Department of Labor (USDOL). In the LCA, the company agrees that it will pay the H-1B worker the higher of:

- the actual wage the employer pays to all other individuals with similar experience and qualifications; or
- the prevailing wage paid by other employers for that occupation in the Metropolitan Statistical Area.

H-1B employers must provide an H-1B worker the same benefits as other workers.

In the LCA, the company must state that:

- employment of the foreign national will not adversely affect the working conditions of workers similarly employed at the place of employment;
- as of the date the employer signed and submitted the LCA, there was no strike, lockout or other work stoppage at the place of employment; and
- on or before the LCA's filing date, a notice of the LCA was posted in two conspicuous locations at the worksite(s), including any home worksite. These notices must be posted for 10 days. The notices must include salary information for the position.

Within one day of filing the LCA, the company must have available for inspection the completed LCA, information concerning the actual wage and prevailing wage levels for the job classification, and evidence of the posting of the LCA. A public access file containing these materials must be made available for review by any person.

By filing the LCA, the company agrees to develop and maintain documentation supporting each labor condition statement, which will include payroll records for all other individuals with experience and qualifications similar to the prospective H-1B foreign national. Documentation of all changes in salary must be noted in the public access file.

The H-1B Petition

After the LCA has been certified by the USDOL, the next step is to complete and file the I-129 H-1B petition and accompanying documents and filing fees with the appropriate USCIS Regional Service Center. Once the petition is filed, it typically takes a few months for USCIS to either approve the petition or request additional information. An employer may pay an extra Premium Processing fee for expedited 15-day petition review.

Petition approval takes the form of an I-797 Notice of Action. If the foreign national is present in the U.S., the Notice of Action will include a new Form I-94 Arrival/Departure Record attached to the bottom showing the foreign worker's new or extended temporary status.

If the employer dismisses the H-1B employee before the end of the period of authorized employment, the employer is responsible for the reasonable costs of return transportation to the H-1B employee's residence abroad. The employer must notify USCIS and withdraw the I-129 H-1B petition.

If the H-1B employee resigned or is terminated during the H-1B approval period, he or she (and dependents) may remain in the U.S. in lawful status for 60 days (without employment authorization) or until the end of his or her authorized validity period, whichever is shorter. Also, if the H-1B employee is moving from one H-1B employer to another, under certain circumstances the employee may be able to start working for the second employer as soon as the petition is filed by the second employer, rather than having to wait for the petition to be approved.

Issuance of Visa

If the foreign national is outside the U.S., the Notice of Action approval will not include a new Form I-94 Arrival/Departure Record. The foreign national must apply for an H-1B visa at a U.S. embassy or consulate abroad. The consulate will stamp an H-1B visa in the foreign national's passport. Once the passport is stamped with the visa, the foreign national may travel to the U.S. to commence working in H-1B status.

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Upon admission to the U.S., the foreign national will be given an entry stamp and I-94 record by U.S. Customs and Border Protection showing how long he or she may remain in the U.S. on that entry.

L-1 Visa: Intracompany Transferees

General Information

The L-1 visa is for intracompany transferees. The L-1 permits a foreign national to work temporarily in the U.S. for a company that is affiliated with the foreign national's foreign employer. The visa is employer-specific in that it allows the foreign national to work only for the petitioning employer. The visa is generally approved for an initial period of three years. Two-year extensions may be obtained up to a maximum of seven years for L-1A executives and managers and five years for L-1B specialized knowledge workers. The spouse and minor children of the L-1 visa holder are entitled to L-2 status as dependents. L-2 spouses may work in the U.S. L-2 children may not work but may attend school.

L-1 Petition

Procedurally, the U.S. employer files an L-1 petition with the appropriate USCIS Regional Service Center.

Following are the basic requirements for obtaining an L-1 visa:

- The foreign national must have worked abroad for the foreign affiliate company for a continuous period of one year during the three years immediately preceding application for the visa.
- The foreign company for which the foreign national has worked must be related to the U.S. company in a specific manner as a parent, branch, affiliate, or subsidiary.
- The company must be a qualifying organization – one that is doing business in the United States and one other country for the duration of the foreign national's stay in the United States as an intracompany transferee. ("Doing business" means the regular, systematic and continuous provision of goods and/or services. It does not include the mere presence of an agent or office abroad.)
- The foreign national must have been employed abroad in a capacity that was executive or managerial or that involved specialized knowledge, and the position with the U.S. company must fill one of those three capacities.
- The foreign national must be qualified for the position by virtue of his or her prior education and experience.

Every petition must be supported by a letter from the U.S. company that includes certain information. If all documentation is complete, an L-1 petition usually is processed in a few months. Expedited 15-day Premium Processing is available for an additional fee.

Issuance of Visa

If the foreign national is outside the U.S., he or she must apply for an L-1 visa at a U.S. embassy or consulate abroad. The consulate will stamp an L-1 visa in the foreign national's passport. Once the passport is stamped with the visa, the foreign national may travel to the U.S. to commence working in L-1 status. Upon admission to the U.S., the foreign national will be given an entry stamp and I-94 record by U.S. Customs and Border Protection showing how long he or she may remain in the U.S. on that entry.

TN Visa: Canadian and Mexican Professionals

The United States-Mexico-Canada Agreement (USMCA) contains immigration provisions that provide for expedited admission of Canadian and Mexican professionals into the United States in TN temporary visa status.

Only persons in certain enumerated occupations are authorized to work in the U.S. in TN status. The list of acceptable TN occupations includes professional-level positions. Examples of allowed occupations include the following:

- Accountant
- Architect
- Computer systems analyst
- Engineer
- Lawyer
- Management consultant
- College and university teachers
- Numerous medical occupations

Most of the TN occupations require the foreign national to have a bachelor's degree in the field. TN status is granted in increments of up to three years. Canadian citizens may apply for TN status directly at the U.S. Customs and Border Protection Port of Entry (airport or land border) with a letter from their prospective U.S. employer. Mexican citizens must apply for a TN visa at a U.S. embassy or consulate abroad. No advance USCIS petition is required.

E-1 Treaty Trader and E-2 Treaty Investor Visa

E-1 Treaty Trader and E-2 Treaty Investor temporary visas are for citizens of countries with which the U.S. maintains treaties of commerce and navigation.

E-1 Treaty Trader foreign nationals must be coming to the U.S. to engage in substantial trade, including trade in services or technology, primarily between the U.S. and the treaty country. E-2 Treaty Investor foreign nationals must be coming to the U.S. to develop and direct the operations of an enterprise in which they have invested a substantial amount of capital. The E-1 or E-2 principal foreign national employer must own at least 50% of the enterprise. Also, key foreign national employees from the same treaty country as the principal employer may procure an E-1 or E-2 visa if the employee is an executive, supervisor, or a person whose services are "essential to the efficient operation of the enterprise."

E-1 Treaty Trader and E-2 Treaty Investor visa holders may be initially admitted to the U.S. for a period of two years and may extend their status in the U.S. indefinitely. E-1 and E-2 visa applicants may apply for their temporary visa directly with the U.S. embassy or consulate as no advance USCIS petition is required. The spouse and children of the principal E-1 or E-2 visa holder are entitled to the same temporary E-1 or E-2 visa status. E-1 and E-2 spouses may work in the U.S. E-1 and E-2 children may not work but may matriculate and attend school (K-12).

B-1 Visa and the Visa Waiver Program

Many foreign businesspersons come to the U.S. to engage in business under a B-1 business visitor visa or the Visa Waiver Program. Foreign nationals entering in one of these categories may stay in the U.S. for a short period of time to engage in activities related to their foreign employment. They may not be employed in the U.S. or paid in the U.S. Examples of acceptable business visitor activities include negotiating contracts, engaging in litigation and consulting with clients or business associates.

If a businessperson is a citizen of a country that is not a part of the Visa Waiver Program, he or she must apply for a B-1 visa at a U.S. embassy or consulate abroad. The B-1 visa applicant will be required to document ties to the home country sufficient to convince a U.S. consular officer that the applicant will return to the home country after completion of his or her U.S. visit.

Under the Visa Waiver Program, business visitors and tourists from certain developed countries can come to the U.S. without obtaining a visa. Visa Waiver visitors must register online with the ESTA program prior to travel. Their period of stay cannot exceed 90 days and they can only engage in limited specified activities. No extensions beyond the 90 days are possible and the individual may not change to a different visa status while in the U.S.

E-3 Visa: Australian Professionals

There is a nonimmigrant employment visa category specifically for citizens of Australia. The requirements are similar to those for an H-1B visa. An LCA is required, but no prior I-129 petition is required if the Australian is applying for an E-3 visa at a U.S. embassy or consulate abroad.

F-1 Visa: Practical Training

The F-1 temporary visa is for full-time students enrolled in a degree program. Generally, F-1 students who have completed their degree program are eligible for a period of employment authorization called Optional Practical Training (OPT). The F-1 period of practical training is generally limited to 12 months after graduation, though an additional 24 months of OPT may be available if the student is in a STEM field and the employer uses the E-Verify system. A person cannot commence post-graduation practical training employment until he or she has an Employment Authorization Document in hand.

It is common for foreign students to begin working for an employer under their OPT authorization after graduation and then ask the employer to sponsor them for a change of nonimmigrant status to H-1B before the practical training expires. A “cap gap” provision may automatically extend the F-1 status during the processing of the I-129 H-1B petition if such petition was filed pursuant to the H-1B lottery, while the student’s authorized F-1 duration of status (D/S) admission was still in effect.

Employment-based Permanent Residency

Preference Categories

Frequently, companies that employ foreign nationals pursuant to a temporary visa decide that they would like to employ those individuals on a long-term basis. Because of the time limitations on most

temporary visas, it becomes necessary to obtain Lawful Permanent Resident status (green card) for that employee.

With a few narrow exceptions, immigrant or Permanent Resident status can be obtained in only one of the following three ways:

1. By virtue of a family relationship with a U.S. citizen or Permanent Resident (family-based)
2. In connection with a job offer from a United States employer (employment-based)
3. As a refugee or asylee

There are several categories or preferences for employment-based permanent immigration. Employers are most likely to employ workers in the first three preferences, which are described in the following sections.

Priority Workers (EB-1)

The first employment-based preference category is for priority workers. No PERM labor certification is required for persons in this category. (PERM labor certifications are discussed later in this section). Three types of foreign nationals qualify for this category:

1. Individuals who have extraordinary ability in the sciences, arts, education, business or athletics, as demonstrated by sustained national or international acclaim, whose achievements have been recognized in the field;
2. Outstanding professors or researchers, with at least three years of experience in teaching or research in the academic area, who are recognized internationally as outstanding; and
3. Certain multinational executives and managers who have been employed at least one of the three preceding years by an overseas affiliate, parent, subsidiary, or branch of the petitioning U.S. employer in a managerial or executive capacity and are coming to the U.S. to work in such a capacity.

Foreign Nationals with Advanced Degrees or Exceptional Ability (EB-2)

The second employment-based preference category is for foreign nationals having advanced degrees or their equivalent in professional fields or exceptional ability in the sciences, arts, or business and whose position requires an advanced degree. Unlike the priority worker category, a job offer and labor certification are required unless the individual can qualify for a national interest waiver of the job offer and PERM labor certification requirement. For purposes of this category, an advanced degree or its equivalent means a master's degree or higher, or a bachelor's degree plus at least five years of progressively responsible experience in the profession.

Professionals, Skilled Workers and Others (EB-3)

The third employment-based preference category relates to most other foreign nationals with offers of employment. This category includes professionals with bachelor's degrees, skilled workers and other workers. The third preference requires a job offer and PERM labor certification.

Permanent Residency Process

There are three basic steps to obtaining lawful permanent residence if a labor certification is required. They are:

1. PERM labor certification application;
2. I-140 immigrant petition; and
3. I-485 adjustment of status or consular processing.

Due to processing backlogs, the permanent residency process can take several years. Employers often start the permanent residency process during the early years of an employee's temporary visa status. For example, an employer may start the permanent residency process during the first year or two of an H-1B worker's six years of H-1B eligibility. As noted, EB-1 priority workers do not have to go through PERM labor certification, so they may start the process with the I-140 petition.

PERM Labor Certification

A PERM labor certification is a certification by the USDOL that there are no minimally qualified U.S. workers available to fill a specific job. The USDOL also determines that the job offer is at or above the prevailing wage for that occupation in that Metropolitan Statistical Area.

To obtain a PERM labor certification, the employer must first make a good-faith effort to recruit minimally qualified U.S. workers for the position in accordance with USDOL guidelines. USDOL regulations prescribe the advertising and recruiting steps that the employer must undertake.

A U.S. worker-applicant who appears on the basis of a resume to meet the advertised minimum qualifications must be offered an interview. If a U.S. worker applies and meets the minimum requirements, barring any lawful reasons to reject, then the PERM labor certification process cannot go forward. The employer has failed to show that there are no minimally qualified U.S. workers available.

After completion of the recruitment campaign, if no U.S. worker has applied who meets the minimum requirements, the employer files the PERM labor certification application with USDOL. USDOL will review and approve many labor certification applications with no further inquiry. The rest will be set for audit, either at random or based on certain criteria of interest to USDOL.

I-140 Immigrant Petition

If the PERM labor certification is approved, the employer files an I-140 immigrant petition with USCIS. This petition documents that the job has been certified by the USDOL, the foreign national meets all of the job requirements, and the employer is financially able to pay the foreign national's compensation.

Adjustment of Status or Consular Processing

A person may not move to the third step of the permanent residency process until his or her priority date is current. The priority date is the date the person's permanent residency case was commenced, either with the filing of a PERM labor certification or an I-140 petition. There are limits on the number of people from a particular country in each preference category who can commence the third step of the permanent residency process in a given year. The State Department monitors these numbers. If there will be too many people from a particular country in a particular preference category applying, the State Department will

make applicants wait in line based on their priority date. These waits can add several years to the permanent residency process.

Once a worker has an approved I-140 petition and his or her priority date is current, he or she may apply for the third step of the permanent residency process. If the foreign national is in the United States, he or she and his or her immediate family may file I-485 Applications for Adjustment of Status. The foreign national also has the option of obtaining the Permanent Resident visa through a U.S. consulate in his or her home country. This is called “consular processing.”

Successful completion of Adjustment of Status or consular processing makes a person a Lawful Permanent Resident of the United States. He or she may remain in the U.S. indefinitely and may work for any employer. Five years after securing permanent residency based on employment, the foreign national may apply for naturalization to become a U.S. citizen.

This chapter was edited by Tom Jensen, Senior Counsel.

Chapter 13

Post-Hire and Post-Termination Employment Policies

A new hire's orientation is a good time to reinforce the fact that the company is an equal opportunity employer. Employees also should be advised how to register complaints of discrimination and harassment pursuant to the company's equal employment opportunity policy. If the company is a government contractor and has affirmative action programs, new employees should be advised of that fact as well.

One way to communicate a company's employment policies and expectations is through the use of a comprehensive employee handbook. This handbook should include all pertinent information concerning employment policies and procedures (e.g., discrimination complaints, harassment complaints, expectations related to COVID-19, sick days, holidays, jury duty, leaves of absence, pay periods, etc.).

A handbook not only provides valuable information to each employee but also can help the employer defend against certain employee lawsuits, if prepared correctly and enforced uniformly. In particular, handbooks must not include provisions that the employer may not be able to or may not want to comply with at a later date, or provisions that may violate the law.

Employee Handbook Provisions

General Provisions

All employers should include a detailed statement of the company's equal employment opportunity policy, generally at the beginning of the handbook. An anti-harassment policy that specifically details the company's sexual harassment and other harassment policies (including the company's procedure for accepting and investigating complaints) should also be contained in the handbook, either in an equal employment opportunity policy or adjacent to it. Courts have uniformly recognized that companies will be better able to defend themselves against harassment claims with well-defined and well-publicized policies that outline complaint procedures, including sexual harassment. (See Chapter 24, "Workplace Harassment.") A handbook should include an anti-retaliation policy that explains how the company will protect those who report suspected discrimination or harassment from retaliation. A handbook should also include a disability accommodation policy that explains the company will comply with the Americans with Disabilities Act (ADA) and how an employee should bring an accommodation request, as well as an anti-retaliation policy related to such requests.

Acknowledgement of Receipt

To avoid a claim by an employee who is terminated that he or she was unaware of a particular policy or procedure, every employee should be given a handbook and asked to acknowledge its receipt in writing. It is best to use a standardized form for this purpose.

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At a minimum, such a form should contain three parts:

1. The first part should clearly state the employer's and the employee's understanding that the employee handbook does not amount to any contract of employment altering the at-will employment relationship. Some plaintiffs in employment cases have brought breach of contract claims alleging that an employer breached its contractual duty to an employee by failing to comply with a given provision of the employee handbook. Unless an employer specifically intends for its employee handbook to be a legally binding agreement between the employer and the employee, this provision should be included.
2. The second part should be a simple acknowledgement that on a certain date, the employee: received the handbook; has had the opportunity to read it; understands that it is their responsibility to read and become familiar with the information contained in the employee handbook; and was offered the opportunity to meet later to discuss any questions. The employee should make an appointment to come back to the human resources department (e.g., within one week) after reading through the handbook to ask any questions of the human resource representative.
3. The third part should state that the employee handbook may be modified, deleted, altered, added to, or amended at any time as the employer deems appropriate.

When appropriate, the form should also make clear that nothing in the employee handbook alerts the employee's "at-will" employment. For example:

I understand that my employment is at will, which means that neither I nor COMPANY is bound to continue the employment relationship, and that either I or COMPANY may end the relationship at any time for any reason without notice. I further understand that nothing in the Handbook or Supplements modify the at-will employment relationship between me and COMPANY.

Additionally, because handbooks by necessity will be modified from time to time, a similar procedure should be used to the extent that any handbook provisions are modified, deleted or added. Alternatively, an annual handbook attestation provides greater defense of an employee's continued knowledge of the employee handbook contents (whether updated or not).

Leave of Absence Provisions

Employee handbooks usually discuss various leaves of absences, including the ones described below. Given COVID-19 concerns and the evolving landscape of federal, state and local leave of absence laws, companies should consider reviewing existing policies on time off and sick leave to provide options for employees to stay home instead of coming into the workplace while sick.

Family and Medical Leave

Employers with 50 or more employees are subject to the Family and Medical Leave Act (FMLA), which provides eligible employees with up to 12 weeks of unpaid leave in a 12-month period for reasons related to certain serious illnesses or injuries, to care for an employee's new child, or for qualifying exigencies related to military service. The FMLA also provides for eligible employees to take up to 26 workweeks of FMLA leave in a single 12-month period to care for covered military servicemembers who have certain serious illnesses or injuries. (See Chapter 18 for extensive discussion of the FMLA.)

Military Family Leave

In Indiana, employers with 50 or more employees are also subject to the Military Family Leave Act (MFLA), which provides eligible employees who are family members of active duty armed forces personnel up to 10 days of unpaid leave as family military leave.

Other Leaves of Absence

If the company is not subject to the FMLA or if it offers other leaves of absence and limits the period for a leave of absence, the employer should include this statement to comply with the Americans with Disabilities Act (ADA):

At the conclusion of ___ months, your employment relationship with the company will be terminated unless an evaluation of your circumstances indicates an extended leave would be a reasonable accommodation that can be provided without causing an undue hardship on the operation of the business.

A leave policy should *not* be labeled as pregnancy leave or maternity leave. Using such phrases will raise a red flag because, under the Pregnancy Discrimination Act, pregnancy, childbirth, or related medical conditions must be treated the same for all employment purposes as any other medical disability. Thus, the employer should use phrases such as: “A leave of absence for injury, illness, or disability — including pregnancy or pregnancy-related conditions — may be granted.”

All Indiana employers must provide employees leave for additional protected engagements, including:

- military training leave;
- jury duty or witness duty obligations;
- emergency response leave for volunteer firefighters or volunteer members; and
- civil air patrol leave.

Your company should consider a defined protocol in the event an employee is diagnosed with COVID-19, including a process for notifying staff of their potential exposure and notifying public health authorities, if required.

Performance Evaluations

Employee handbooks generally make some comment about performance evaluations and the frequency of such evaluations. Again, it is important to remember to allow some flexibility. If the handbook states, for example, that performance evaluations will be given at least annually, it will provide a basis for a subsequently terminated employee to argue that because the employer did not give the performance evaluations, the employee was not sufficiently on notice that his or her performance was unacceptable. To avoid such claims, a description of evaluations as periodic will communicate the policy and allow maximum flexibility.

Additionally, avoid having a policy (either in the handbook or in practice) that states that disciplinary actions that are more than a certain number of years old will not be used or considered as part of future disciplinary decisions. A record should be kept of an employee’s entire disciplinary history, regardless of time frame. Such information may become important later to show a pattern of conduct, to suggest the employee should not be given another chance or lesser penalty, or to show the employee was treated differently than other employees who engaged in similar conduct.

Performance Evaluation Forms

Performance evaluations can become very important evidence in a discrimination or other employment case because they can establish whether the employer had reason to terminate the employee. Accurate, regular performance evaluations are critical in most employment cases to show the employer had a legitimate, nondiscriminatory reason for taking the disciplinary action at issue.

Many times, a supervisor will give an employee a higher rating than he or she really deserves. This may be because the supervisor feels uncomfortable criticizing employees or giving them a poor rating or because the supervisor realizes that if a certain rating is not given, employees will not get a pay increase. It is imperative that supervisors evaluate employees honestly and avoid making comments that would mislead or give employees inaccurate expectations as to how they are performing. Evaluators should avoid phrases that may seem to be defamatory or stereotypical, such as *lazy*, *a slow learner*, *a troublemaker*, etc. Instead of making these conclusory statements, raters should report the specific, underlying facts (conduct and comments) that led to these conclusions.

It also is important that the evaluation form include a place where the employee has an opportunity to write comments. This allows the employee to do one of three things:

1. say nothing, thereby suggesting there is no disagreement with the evaluation;
2. agree and confirm the evaluation as being accurate and fair; or
3. comment on his or her disagreement with the evaluation, thereby tipping the employer off to potential problems and giving the employer an opportunity to correct them.

Employees should sign the evaluation form and receive a copy of it. If the employee refuses to sign, simply note that fact on the form and initial that notation.

Disciplinary Action

If an employee is to be counseled or disciplined, maintaining a thorough and accurate record of each such instance is important. It is a good idea to have a standard form for these purposes and require the employee's supervisor to fill in all necessary and important information. Before disciplining, consider and document internally the "who, what, where, when, and why" for the occurrence. Document the discipline with information about past discipline, details about present discipline, and future expectations.

As a result of the COVID-19 pandemic, employers should consider adding work-from-home policies and modifying their attendance and work schedule policies, if applicable. These policies should explain:

- when employees are expected to report to work, or when they should work from home;
- the process to seek approval to work from home; and
- employee obligations to ensure their productivity.

Employers should also consider amending attendance policies to include screening procedures to maintain procedures for a safe work environment and reporting procedures to maintain a record of who is in the workplace for contact tracing purposes.

Attendance Policies

Some employers have no-fault attendance policies. Under these policies, regardless of the reason for the absence, the employee is charged “points” for each occurrence. Once the employee’s points reach or exceed a certain level, the employee is terminated. Under the ADA or FMLA, it may be unlawful to apply a no-fault policy and terminate an employee if the absences were due to a disability or FMLA leave. Reasonable accommodation could include allowing additional absences or flexibility with start times.

Many employers maintain attendance policies that establish rules concerning tardiness and absences. Some policies utilize progressive discipline. Others are more general, only stating that employees who are excessively tardy or absent will be disciplined or discharged.

Whether an employer uses progressive discipline or bases discipline decisions on the facts and circumstances surrounding each employee’s absence, it should make sure the discipline is applied in a fair, consistent, and even-handed manner to avoid discrimination complaints. Similarly, for employers whose employees are covered by a collective-bargaining agreement, such policies should not be implemented without first bargaining with the union representative.

Personnel Files

A personnel file should contain exactly what its name implies: documents that are related to the employee and events surrounding his or her employment with the company. The following may be included:

- Employment applications
- Resumes
- Employment authorization forms
- Attendance records
- Pay records
- Payroll tax forms
- Disciplinary notices
- Performance evaluations
- Commendations from supervisors or customers on performance
- Certificates of in-house or related training outside the company

Certain documents should not be included in a personnel file, including Form I-9s, IRS Form W-4s, documents identifying the employee’s protected status, drug test results, background and credit check reports, documents that reveal or may reveal an employee’s genetic information, benefits information, or documents that contain the employee’s social security number. Information with respect to physicals, medical records, or worker’s compensation matters also must be retained in files separate from other personnel records.

Occasionally, employees will offer documents that they would like placed in their personnel files. Unless directly related to their employment, it is generally not appropriate to include these documents. Doing so suggests that the employer somehow considers them to be relevant to the employment and uses such information to make decisions about that person’s employment.

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Employees who have been disciplined or given evaluations with which they did not agree may ask to submit an opposing view. There is no legal obligation for an employer to include such documents in personnel records, and it is up to the employer to determine what policy it wishes to follow in this regard. If an employer accepts an employee's statement and then does nothing to address the concerns raised by the statement, a discriminatory inference could later be argued against the employer.

Access to Personnel Files

Although public employers must make personnel files available to public employees or their representatives, there is no federal or Indiana law that requires a private-sector employer to give employees or former employees access to the personnel file maintained on them. Remember, personnel files are records prepared and maintained by the employer and, therefore, are the employer's property, not the employee's property.

There should be very few reasons why the employer would ever give a discharged employee access to his or her personnel file. As to current employees, should the employer decide to allow access, it must consider some basic restrictions:

- Do not provide access to the entire file. Rather, ask the employee to specify the document or type of documents they would like to review.
- Arrange a time for the employee to review his or her file when someone from human resources can be present to ensure that nothing is removed from or inserted in the file.
- As long as the request is not too voluminous, there is generally no problem with providing the employee with a photocopy of the document(s) he or she has reviewed.
- Make a record that the employee reviewed documents from his or her file, when that occurred, and what was provided to the employee.

Note that if employees are covered by a collective-bargaining agreement, and the union requests information relevant to the bargaining unit of employees (such as employee disciplinary records contained in an employee's personnel file), the employer has a bargaining obligation to provide that information to the union. However, the employer may need to exercise caution and seek an accommodation with the union if there are any privacy concerns regarding the release of information from an employee's personnel file.

Confidential Information

Some businesses deal with and rely on confidential or trade secret information for market advantages. To protect their operations from the unauthorized public disclosure by employees of such information, companies include a confidentiality policy in an employee handbook to define what the company considers to be confidential information, when employees can or cannot share that information outside of the company, and possible disciplinary repercussions from violations of such a policy.

Compensation

Employee handbooks generally include policies related to workweeks and pay periods, employee classification, timekeeping for non-exempt employees, and break/meal periods. Employee handbooks often also contain time-off benefit summaries, such as paid time off or vacation policies, holiday pay, or sick leave benefits.

Health and Safety

Employee handbooks generally include policies related to workplace safety. These policies may include a drug- and alcohol-free workplace policy (including drug and alcohol testing), company-specific safety policies, a no-smoking policy, or a violence-free workplace policy.

Post-termination Issues and Policies

Recovery of Company Property

Many employers have policies providing that employees who quit or are terminated may not receive their final paychecks before they return company property such as uniforms, keys, etc. Such provisions or practices violate the law. Although such provisions or practices may work as a practical matter, the Indiana employer must remember that it is unlawful to refuse to pay the employee his or her final paycheck even if he or she has not returned property that belongs to the employer. If the employer fails to make the payment within the required timeframe and the court finds that the employer was “not acting in good faith,” the employer may be required to pay liquidated damages of twice the unpaid amount to the employee. For more information on what monies can be deducted from employee paychecks and how that can be accomplished, see Chapter 14 under “Method and Timing of Wage Payments.”

Responding to Reference Checks

After an employee is terminated, he or she may be required to list former employers on an application for a prospective employer. This likely will result in a contact from that prospective employer asking for an employment verification or reference check on the individual. Until recently, Indiana employers called upon to provide information about a former employee have been faced with a practical, legal and, some might say, ethical dilemma. On one hand, employers are legitimately concerned about the legal consequences of disclosures that might later subject them to defamation, discrimination, or tort claims or be unlawful under Indiana’s blacklisting statute (which prohibits Indiana employers from preventing a discharged employee from obtaining employment with others). On the other hand, this concern conflicts with most companies’ desire to do right by sharing honest information about ex-employees that could help other employers avoid hiring calamities.

To remedy what has been a no-win situation, the General Assembly enacted legislation that seeks to rescue Indiana employers that have been teetering precariously on the horns of this disclosure dilemma. An amendment to Indiana’s blacklisting statute provides employers with civil immunity for disclosing information about a current or former employee (I.C. 22-5-3-1). This law should provide some measure of protection for employers that choose to disclose the reasons an employee was terminated and make them more comfortable discussing former employees’ qualifications and misconduct. Under the statute, unless the employee can prove that the former employer disclosed information that was known to be false at the time the disclosure was made, the employer is immune from legal liability for claims brought by the employee.

The statute offers protection to the reference-giving employer. At the same time, it imposes obligations on the prospective employer to whom such information is disclosed. It permits the employee to obtain copies of any written communications that the prospective employer receives from current or former employers if the employee requests them in writing within 30 days after applying. The category of communications that may be requested — those that “may affect the employee’s possibility of employment with the prospective

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employer” — is arguably broad and would likely encompass even the most innocuous of references. Because a former employee now has the legal right to obtain a copy of what has been reported about him or her, and because the law does not protect employers that knowingly transmit false information, an employee can, by proving such falsity, dissolve or diminish the employer’s immunity.

In addition to the immunity offered by statute, an employer can further insulate itself by getting an authorization/release signed by the former employee authorizing the former employer to provide the reference. The former employer should be careful that the authorization/release releases all parties from any and all liability for damages in furnishing and receiving the information. Indiana courts have held that such an authorization or release, if sufficiently explicit, can constitute a consent by the employee to the publication of the reference even if it is alleged to be defamatory.

Service Letter Requests

Indiana’s service letter statute requires an employer, upon the request of a discharged employee or one who voluntarily quits, to issue a letter stating “whether the employee quit or was involuntarily discharged.” Employers need not state the nature, character, or duration of service or state the reason for separation. The law is silent as to any penalties for violating this statute. Such service letters must only be given if the employer receives a written request from the former employee. Additionally, there is an exclusion in the statute for any employer that does not require written recommendations or written applications showing qualifications or experience for employment (I.C. 22-6-3-1). At least one court in Indiana has held that former employees do not have a private cause of action allowing them to bring a lawsuit against employers who fail to respond to a service letter request.

Record Retention

Various retention periods apply to records contained in employees’ personnel files. On the following pages is a general list of records and the length of time they must be retained under Indiana law and federal law. Employers with operations in other states should determine whether other retention periods apply. Numerous federal statutes contain record retention requirements in the employment context. It is highly recommended that companies adopt a record retention policy that is reviewed by legal counsel prior to implementation to ensure it addresses statutory provisions that may not be set forth in the list found on the following pages. The list is designed as guidance only.

This chapter was edited by Erik Mosvick, Associate.

Overview of Common Record Retention Requirements Under Indiana and Federal Law

Period of Retention

Records to be Retained

1 year

- Personnel records relating to (1) job applications, resumes, or other replies to job advertisements, including records pertaining to failure to hire; (2) promotion, demotion, transfer, selection for training, layoff, recall, or discharge; (3) job orders submitted to an employment agency or union; (4) results of any physical examination if the employer considered it in connection with any personnel action; (5) records of employer-administered aptitude or other test; and (6) job advertisements or notices to employees regarding openings, promotions, training programs, or opportunities for overtime work. In the event of employment termination, employee personnel records must be retained for one year from the date of termination. (ADEA, ADA, Title VII, Rehabilitation Act)
- Personnel and employment records required by Executive Order 11246 if the employer/federal contractor has fewer than 150 employees or does not have a contract with the federal government of at least \$150,000. An employer/federal contractor with more than 150 employees or a contract of more than \$150,000 must retain relevant records for two years. (OFCCP Regs)
- Reasonable accommodation requests. (ADA)

2 years

- From date of last entry, basic employment and earnings records, wage rate tables, records of additions to or deductions from wages paid, work time schedules, orders, shipping and billing records, job evaluations, merit or seniority systems, or other matters that describe or explain the basis for payment of any wage differentials to employees of the opposite sex in the same establishment, records of deductions from or additions to pay. (FLSA, Title VII, Walsh-Healey, Davis-Bacon)
- Records relating to sex and occupation of members of workforce and basis of wage differentials. (EPA)
- Apprenticeship application forms or lists. If an annual report is required by the EEOC, such forms should be retained for two years or a period of successful applicant's apprenticeship, whichever is longer. (Title VII, Executive Order)
- Federal contractors must maintain their Affirmative Action Plans and documentation of good faith efforts for both the current immediately preceding Affirmative Action Plan year. (OFCCP Regs)

Overview of Common Record Retention Requirements Under Indiana and Federal Law (continued)

<i>Period of Retention</i>	<i>Records to be Retained</i>
3 years	<ul style="list-style-type: none"> • From last date of entry, payroll records containing each employee’s name, address, date of birth, occupation, rate of pay, and compensation earned per week. (ADEA) • Basic payroll records, relevant union or individual employment contracts, collective-bargaining agreements, applicable certificates and notices of Wage-Hour Administrator, and sales and purchase records. Also, injury frequency rates, gender and identifying contract number for Walsh-Healey. Substantiation records must be kept for at least two years. (FLSA, Walsh-Healey, Davis-Bacon, ADEA) • Records relating to discrimination charges. (Title VII, ADA, ADEA, Rehabilitation Act) • Employment eligibility verification (Form I-9) (IRCA) (Statute requires I-9s be retained until the later of (1) three years from employee’s date of hire; or (2) one year after the employee’s termination.) • Dates FMLA taken, copies of employee notice, documents describing employee benefits, employer policies regarding paid and unpaid leaves. (FMLA) • Polygraph tests and results. (EPPA) • Bloodborne pathogen safety training. (OSHA) • Certain protected veterans’ affirmative action and Section 503 of the Rehabilitation Act outreach and recruitment records and data. (OFCCP Regs)
5 years	<ul style="list-style-type: none"> • Records pertaining to payments to union representatives and employees, payments for interfering with employee rights and arrangements with labor consultants. (Landrum-Griffin Act) • Form 101: Supplemental record for each occupational injury or illness; Form 200: Log and Summary of Occupational Injuries and Illnesses. (OSHA) • Form 300: Logs of work-related injuries and illnesses; Form 300A: Annual Summaries; Form 301: Injury and Illness Incident Reports. (OSHA) • Records related to criminal background checks, including adverse action notices, and communications regarding failing to hire employee due to results of background check. (FCRA)

Overview of Common Record Retention Requirements Under Indiana and Federal Law (continued)

Period of Retention	Records to be Retained
6 years	<ul style="list-style-type: none"> • ERISA plan disclosures, annual reports, and summaries.
30 years	<ul style="list-style-type: none"> • Medical records for employees with occupational exposure to bloodborne pathogens or hazardous chemicals. (OSHA) (Length of employment is plus 30 years.) • All employee medical surveillance records and analysis of such records (must be preserved and maintained for at least the duration of employment plus 30 years).
Pending Litigation	<ul style="list-style-type: none"> • From the time that a company has notice of a Charge of Discrimination or other employment-related litigation, particular effort must be made to preserve documentation that could be relevant to the defense or prosecution of the claim. This includes the personnel file of not only the charging party but also of other potential comparators. Special care should be taken to preserve electronic data in its native format that could be relevant. • Upon receipt of a Charge of Discrimination or other litigation, a company's IT department should be notified to immediately preserve electronic data that could be relevant. Such documentation should not be destroyed until final disposition of the matter and even then, only if the documentation does not pertain to other potential claims. (Title VII, ADA, GINA, Executive Order)
1 Period	<ul style="list-style-type: none"> • Employee benefit plans, written seniority or merit rating plan, period plan or system is in effect plus one year after termination. (ADEA) • A copy of the most recent EEO-1 report (required for employers with 100 or more employees) and have it available upon request.

Chapter 14

Wage and Hour Requirements

Unlike employers in many states, Indiana employers do not have a significant amount of state wage and hour legislation with which they must contend. For example, there are no Indiana state laws regulating the number of consecutive hours an employee (other than a minor) may work without a break. There is also no Indiana law governing meal periods. But Indiana employers do have to contend with federal wage and hour laws, most importantly the Fair Labor Standards Act (FLSA), which includes both the Equal Pay Act and federal child labor laws. In addition, Indiana employers must comply with the Indiana Wage Payment Statute, the Indiana Wage Assignment Statute, and state child labor laws.

The Fair Labor Standards Act

The Fair Labor Standards Act (FLSA) establishes minimum wage, overtime, and recordkeeping standards for employees who are not exempt from its provisions.

The Equal Pay Act

The Equal Pay Act is part of the FLSA and prohibits discrimination in pay on the basis of sex for work that is performed under similar working conditions and that requires equal skill, effort and responsibility.

Child Labor Laws

Federal child labor laws are included in the FLSA. In addition, Indiana has state child labor laws that in most respects mirror the federal law. Generally, child labor laws regulate the occupations in which minors may be employed and the hours minors may work. In addition, state law requires minors under 18 years of age to obtain a work permit.

FLSA Coverage

Most, but not all, workers are subject to the FLSA. Importantly, whether an employee is subject to the FLSA is a question decidedly different from whether he or she is exempt from certain FLSA provisions. Only employees are subject to the FLSA. Bona fide volunteers and independent contractors are not employees and, therefore, are not subject to the FLSA's provisions. In October 2022, the U.S. Department of Labor proposed a new rule to determine whether a worker is an employee or an independent contractor. The new rule would review the totality of the circumstances surrounding the worker's employment and would place an increased emphasis on whether the worker's work is integral to the employer's business. The period for public comments on the proposed rule closed on December 13, 2022, and the Department of Labor is currently reviewing the comments. Employers should continue to monitor the progress of this proposed rule and can check the status of the proposed rule at www.dol.gov/agencies/whd/flsa/misclassification/rulemaking.

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While the FLSA's equal protection and recordkeeping provisions apply to all employees, the most apparent FLSA provisions – those governing overtime and minimum wage payments – apply only to employees who are covered by those provisions. However, certain covered employees are not entitled to overtime or minimum wage because they are deemed exempt.

Individual Coverage

Any employee who is engaged in an industry directly involved with the movement of goods or things in interstate commerce, such as transportation and shipping, telephone and telegraph, and radio and television, as well as businesses that regularly use channels of commerce in the course of their operations, such as newspaper publishing and warehousing of goods that travel across state lines, is covered by the minimum wage and overtime provisions of the FLSA. In addition, any employee who is involved in the production of goods for interstate commerce or who uses “means of commerce” (such as telephones, fax machines and mail) as a primary part of his or her job is covered by these provisions.

Enterprise Coverage

Regardless of an individual employee's duties or their impact on interstate commerce, an employee may be covered by the minimum wage and overtime provisions of the FLSA if the employee is employed by an enterprise engaged in commerce. Generally, an enterprise engaged in commerce is an entity, or group of related entities, that has annual gross sales of \$500,000 or more. For certain entities such as hospitals and schools, no minimum dollar volume must be reached before the minimum wage and overtime provisions apply. Because of the sweeping impact of enterprise coverage, there are very few employers not affected by the FLSA.

Minimum Wage Under the FLSA

Non-exempt employees must receive a federally mandated minimum wage regardless of whether they are paid hourly, by piecework or by salary. Since July 24, 2009, the federal minimum wage has been \$7.25 per hour. Efforts in Congress further to increase the minimum wage have thus far not passed, but President Obama issued an executive order in February 2014 that raised the minimum wage for federal contractors to \$10.10 per hour beginning in January 2015, with indexed increases made annually thereafter. On April 27, 2021, President Biden, via executive order, raised the federal contractor minimum wage to \$15.00 per hour effective January 30, 2022. Also, employers should keep in mind that certain states and localities have adopted higher minimum wage rates than the federal FLSA.

Sub-minimum Wages

Certain employees – such as apprentices, learners, messengers and disabled or aged workers – may be employed at less than minimum wage under special circumstances with Department of Labor (DOL) approval.

Indiana Minimum Wage

For employees not covered by the FLSA, Indiana law provides a minimum wage (for example, a minimum wage that would cover a clerk at a “mom-and-pop” general store with nominal annual sales volume). Like the federal minimum wage, the current Indiana minimum wage is \$7.25 per hour.

Overtime Under the FLSA and State Law

Neither the FLSA nor state law limits the number of hours a non-minor may work daily or weekly, nor does the FLSA or state law require any daily overtime. The FLSA and state law simply require that overtime be paid to non-exempt employees at a rate of one and one-half times the employee's regular rate of pay for each hour worked in each workweek in excess of 40 hours. The law does not permit averaging of hours over more than one week, regardless of the length of a payroll period.

Note: Employees employed by an employer not subject to the FLSA's overtime provisions may be entitled to overtime under Indiana state law.

Regular Rate of Pay

"Regular rate" is a legal term that does not necessarily equal the employee's base hourly wage. Regular rate also may vary from week to week. Employers often fail to pay overtime correctly based on regular rate, using instead the base rate. Regular rate is arrived at by dividing the total amount owed to the employee for the workweek, including such things as on-call pay, certain bonuses, and shift differentials, by the total hours worked in the workweek that the total compensation is paid.

What should be included when calculating regular rate? All payments to an employee must go into the regular rate calculation except for items specifically excluded by the FLSA. Common **inclusions** into regular rate include:

- on-call pay;
- pre-announced bonuses tied to productivity, attendance or quality of work; and
- shift differentials.

Common **exclusions** from regular rate include:

- discretionary bonuses;
- pay for unworked time such as vacation pay, sick pay or jury-leave pay;
- holiday pay; and
- premium pay.

Overtime Alternatives

Under the FLSA an employer may use certain alternative methods for paying overtime. Some of the more common alternatives are described below.

Compensatory Time and Time-off Plans

Private sector employers must pay overtime in cash; compensatory time off in lieu of cash is not permitted. A public sector employer is permitted to use compensatory time under certain circumstances. However, a private-sector employer may utilize a time-off plan. Under such a plan, the employer controls the total hours worked in a two- or three-week pay period so that, regardless of the fact an employee works overtime in one week of the pay period, the employer pays the same total amount of compensation in the pay period that it would have paid if the employee had worked no overtime.

Example: If an employee is paid a salary of \$580 biweekly for two 40-hour workweeks (\$7.25 per hour), and he or she works 44 hours in week one, the employer can require him or her to work only 34 hours in week two and still pay the employee only \$580 for the two weeks. The \$580 equals \$333.50 for week one (40 hours times \$7.25 and four overtime hours at \$10.87 per hour) and \$246.50 for week two (34 hours times \$7.25).

Half-time Plans

An employee paid on a fixed salary basis whose hours fluctuate from week to week may be paid pursuant to an understanding that he or she will receive the fixed salary as straight time for whatever hours he or she works, whether few or many, and whether above or below 40 hours per week. Additional overtime compensation at a rate of only one-half regular rate is due for hours worked over 40 per week. The base salary, however, must be large enough that when divided by the most hours an employee works in any one workweek an equivalent of at least minimum wage is satisfied.

Belo Plans

A Belo plan guarantees compensation for a predetermined amount of overtime. It can be used only for an employee whose work necessitates fluctuating hours above and below 40 per week.

Health Care Institutions

Hospitals, nursing homes and other health care institutions may calculate overtime on a 14-day period, so long as the employees are paid overtime for hours worked over eight in a day. In other words, employees must receive both a daily overtime premium and overtime for hours worked over 80 in a 14-day period.

Determining Hours Worked

Compensable working time under the FLSA is broadly defined and includes, among other things, time an employee is required to be on duty or at a prescribed place. Depending upon the circumstances, an employer may have to compensate an employee for time that one might not usually think of as "work," such as certain travel, meal and rest periods, training and on-call time.

Voluntary Work

Employees who work voluntarily through meal or rest periods, or prior to or after a shift, are engaged in compensable working time. Merely because the employer has a rule that says no overtime may be worked unless authorized is not sufficient to defeat the compensability of such voluntary working time.

Waiting Time

The FLSA distinguishes between employees who are engaged to wait and those who are waiting to be engaged. In other words, simply because an employee shows up early to work does not mean he or she is

working. On the other hand, if an employee is required to report to work at a certain time but he or she must wait to actually start his tasks, the waiting time is deemed compensable.

On-Call Time

Generally, the employee's relative freedom while on call determines whether or not the time spent on call needs to be counted as working time. If the employee can use the time effectively for his or her own purposes, the time is not compensable. Freedom is enhanced when the employee is not summoned repeatedly, the employee has a reasonable amount of time (as a rule of thumb, 30 minutes or more) to respond to a call, and the employee need not sit by the telephone waiting to be called (cell phones or pagers are a good way to address this last concern).

Note: Time spent actually responding to a call always is compensable.

Sleeping Time

When an employee is on duty less than 24 hours, sleeping time is deemed compensable. When an employee is on duty for 24 hours or more, up to eight hours of sleeping time may be excluded as non-working time if: sleeping facilities are provided; the employee is able to get at least five hours of sleep; and interruptions to perform work are counted as working time.

Example: A nursing home employee works the 7 p.m. to 7 a.m. shift. He must help the residents to bed and help them get up in the morning. Between the hours of 9 p.m. and 5 a.m., the employee is allowed to watch television, sleep, etc., but must be available to handle emergencies or help the residents when they need to get up during the night. The entire shift is compensable.

Training, Lectures and Meetings

With certain exceptions, time spent in training programs, lectures and meetings must be counted as working time, unless all of the following criteria are met:

- Attendance must be outside the employee's regular working hours
- Attendance must be voluntary
- The employee must not do work while attending
- The program should not be directly related to the employee's present job. (In other words, if the program helps the employee do his or her job better, rather than teach him or her a new job or new skill, the time is generally compensable.)

Note: If the training is compensable, travel time to and from the training may also be compensable.

Time spent in labor management meetings during regular working hours relating to grievances is compensable unless a collective-bargaining agreement provides otherwise.

Travel Time

Commuting time, whether to a fixed location or to a changing location, is not compensable. An employee is not deemed to be working until he or she reaches the first worksite. However, travel during the course of the workday after the first stop is compensable.

When an employee must travel away from home overnight, all travel time that takes place during normal working hours (regardless of whether or not it occurs on a normal working day) must be counted. Time spent outside normal working hours as a passenger is not considered work (to the extent the employee does not actually do work while in transit). However, if the employee drives himself or herself, he or she is working, regardless of the time of day, unless he or she was offered and declined the opportunity to be a passenger.

Rest/Break and Meal Periods

With one exception, neither the FLSA nor Indiana law requires that an employee (other than minors) receive a rest or meal break. However, the FLSA regulates whether a rest or meal period must be treated as compensable working time.

Meal Periods

Generally, a meal period must be 30 minutes or longer and the employee must be completely relieved of duties for it not to be compensable. Thus, if an employee is required (by order or circumstances) to eat at his or her desk or perform any work during the meal period, the time is deemed compensable working time. However, an employee can be required to remain on the employer's premises.

Rest/Break Periods

Rest periods or breaks less than 21 minutes, even where employees are relieved of their duties, are deemed compensable.

Note: While Indiana law only requires employers to allow time for expression of breast milk during regularly scheduled breaks, the Patient Protection and Affordable Care Act, enacted in March 2010, mandates that employers that are subject to the FLSA (generally, all employers with one or more employees) give lactating mothers a reasonable unpaid break time "each time" the employee has a need to express milk.

Activities Conducted Before and After Regular Work Hours

Time spent before or after regular hours in incidental activities (such as walking from the parking lot to the time clock, changing clothes, or washing up) generally is not compensable time. However, time spent in any activity that is integral and indispensable to an employee's principal duties is compensable, such as changing into and out of certain required safety gear before and after work.

A defense to these “donning and doffing” claims is that time spent on such activities is *de minimis*, or too negligible to qualify as time worked. A three-factor test is used to assess whether otherwise compensable time should be considered *de minimis*, and therefore not compensable. These factors are:

1. the practical administrative difficulty of recording the additional time;
2. the size of the claim in the aggregate; and
3. whether the work is performed on a regular basis.

Scheduled Hours vs. Hours Worked

The FLSA requires that employees be compensated only for hours worked. Thus, if an hourly employee is sent home before the end of his or her scheduled workday, he or she need not be compensated for the scheduled hours that were not worked. By the same token, if an employee works longer than his or her scheduled hours, the employee must be paid for all of his or her working time.

Part-time vs. Full-time Employees

Neither the FLSA nor Indiana state law defines full-time or part-time. The FLSA simply deals with hours worked above and below 40 hours in a workweek. Some employers define full-time under their own internal policies as working more than 30 hours; others use 40 hours. However, the FLSA only requires that a non-exempt employee who works more than 40 hours in a workweek be paid overtime compensation.

Method and Timing of Wage Payments

The FLSA allows the payment of wages by cash or similar medium; by the reasonable cost of board, lodging or other facilities such as meals; or by way of tips (in part).

Indiana law requires employers to pay employees wages due at least semi-monthly or biweekly, if the employee so requests. An employer cannot escape the wage payment statute by obtaining an employee’s agreement that wages are not payable within the statutorily prescribed times. In other words, an employee may at any time request payment on a semi-monthly or biweekly basis and regardless of any contract of employment that may exist, the employer must promptly comply. Payment must be in cash, check, money order, or by electronic transfer to the financial institution designated by the employee. In any event, employers must pay employees the wages due not more than 10 business days after the end of the pay period during which the wages were earned.

If an employee leaves employment — either permanently or temporarily — the employer is not required to pay the employee the wages due until the next regular payday. Therefore, the employer need not comply with an employee’s demand for his or her final paycheck at the time of discharge or a voluntary resignation. Rather, when an employer discharges an employee, the employer must pay the wages due at the next regular payday for the period during which the discharge occurred. Failure timely to pay wages due gives rise to a claim for the unpaid wages, attorney fees, and litigation costs. If the court determines the employer was not acting in good faith in failing timely to pay the wages owed, the statute requires the court to award an additional liquidated damages penalty of twice the amount of the wages at issue. Prior to July 1, 2015, the statute provided for a liquidated damages penalty of 10% per day of the amount of the overdue wages,

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capped after 20 days (i.e., treble damages), and there was no good faith defense available to employers. Employees may sue for the overdue wages, any liquidated damages due, plus attorney fees and litigation costs.

If the employer does not know the whereabouts or address of an employee who has left employment voluntarily, the employer is not subject to any penalty for non-payment of wages until either 10 days have elapsed since the employee has made a demand for wages or until the employee has furnished the employer with an address where the wages are to be sent. One type of employee is exempt from the above wage payment requirements: a salaried employee who is also eligible for overtime compensation under the FLSA.

Accrued but Unused Vacation Time or PTO

An issue that often arises is how to treat accrued but unused vacation time or paid time off (PTO) upon separation of employment. An employer in Indiana is not obligated to offer PTO for vacation or personal reasons. However, if it does, in the absence of an agreement or published policy to the contrary, unused paid vacation time or PTO will be accrued pro-rata throughout the year. Any unused balance will roll over from year to year without cap, and unused time must be paid out upon termination at the employee's then-current rate of pay. However, employers are free to adopt a published policy that modifies these default rules on how vacation time or PTO may be accrued, used, and paid or not paid upon termination. Thus, an employer's policy (which should be in writing, such as in an employee handbook for which employees sign an acknowledgement of receipt) may provide that unused vacation/PTO will not be paid out upon termination, or paid out only in a certain percentage, that unused time will not roll over from year to year, or other rules the employer may wish to adopt.

Paid sick time is treated differently, and under default Indiana law need not be paid out upon termination of employment (unless employees are permitted to use paid sick time for reasons other than illness, such as for additional vacation/PTO, in which case such time is treated just like vacation/PTO). However, Indiana courts have found that payment for accumulated sick leave can, like vacation, constitute wages if it is earned over the course of the employee's employment with the employer and the employer has a policy of paying out monies for unused accrued sick days. Again, as with vacation pay, the employer should have an explicit policy or provision stating whether or not it will pay any monies out for unused accrued sick days.

Disputes and Overpayments

If there is a dispute as to the amount of wages owed due to an overpayment either during the employment relationship or at termination, the employer cannot automatically withhold the entire amount. Rather, Indiana law allows a deduction for reimbursement to the employer of the overpayment as long as the employer gives the employee two weeks' notice before amounts are deducted from the employee's paycheck. In addition, an employer may not deduct any amount in dispute, and is restricted from deducting any amount greater than 25% of the employee's disposable earnings or the amount by which the employee's disposable earnings exceed 30 times the minimum wage rate (whichever is less). However, if a wage overpayment is equal to 10 times the employee's gross wages because of a misplaced decimal point, the entire overpayment may be deducted immediately.

If an employer overpaid an employee \$100, for instance, and that employee's disposable earnings are \$300 per week, assuming the current federal minimum wage of \$7.25 per hour, the most that could be

deducted each week would be \$75, the smaller of the following calculations:

- $25\% \times \$300 = \75 (25% of the employee's disposable income)
- $\$300 - (30 \times \$7.25) = \$82.50$ (amount by which disposable income exceeded 30 times the minimum wage rate)

However, if the employer accidentally paid the employee \$3,000 instead of \$300 because of an errant decimal point, the entire \$2,700 overpaid could be deducted immediately to correct the error (Indiana Code 22-2-5-1; I.C. 22-2-5-1.1; I.C. 22-2-5-2; and I.C. 22-2-6-4).

Deductions from Wages

Indiana law limits the purposes for which deductions from wages may be made and prohibits most deductions, even for permissible purposes, in the absence of a written authorization signed by the employee.

Deductions pursuant to a written and revocable authorization by an employee are permitted but only for a limited number of purposes that are established by statute. They include payments for premiums on insurance policies; contributions or pledges to a charitable or non-profit organization; the purchase price of bonds or securities issued or guaranteed by the United States; the purchase price of shares of stock in the employing company; dues to a labor organization; payments to a credit union; dues or assessments owed to certain medical or retirement benefit plans; reimbursement for certain employee education or skills training; payroll or vacation advancements; costs of certain work-related uniforms and equipment (subject to certain monetary limitations); and satisfaction of certain legal judgments owed to a third party. Deductions also are permitted pursuant to a written and revocable authorization for the purpose of paying an amount of a loan made to the employee by the employer, subject to certain limitations on interest rate and percentage of disposable income.

Importantly, except for overpayments noted previously, no assignment of wages from the employee to the employer is lawful, even if made for a permissible purpose under the statute, unless the assignment is also:

- in writing and signed by the employee personally;
- by its terms revocable at any time by the employee upon written notice to the employer;
- agreed to in writing by the employer, with an executed copy of the assignment delivered to the employer within 10 days after its execution; and
- made for the purpose of paying one of the items specifically set forth in the statute, including those mentioned above.

To the extent an employer makes payroll deductions that are not specifically authorized by law, it will be deemed to have failed to pay timely wages and could subject itself to penalty provisions in Indiana's wage payment statutes.

Fines

An employer may not assess a fine against an employee for any reason and retain the fine, or any part thereof, from the employee's wages.

Sale of Merchandise to Employees

An employer may not sell to an employee any merchandise or supplies at a higher price than the merchandise or supplies are sold to others. This includes selling merchandise or supplies to employees as wage payment when the merchandise or supplies are sold to others for cash at a lower dollar value.

Tipped Employees

An employer can credit tips earned by an employee toward the minimum wage if the employer pays the employee at least \$2.13 per hour in direct wages. Use of the tip credit can be tricky. The employee must be engaged in an occupation in which he or she customarily and regularly receives more than \$30 a month in tips. In addition, the credit is only available if the employer has explained it to the employee, and the employee retains all tips. If an employee's tips, combined with the employer's direct wages of at least \$2.13 per hour, do not equal the minimum wage, the employer must make up the difference. Note, however, that tipped employees performing work on or in connection with covered contracts generally must be paid a minimum cash wage of \$7.40 per hour.

Garnishments and Child Support Withholding Orders

All employers in Indiana are subject to two state income garnishment statutes. One is a general income garnishment law that governs income withholding for the payment of all judgments, including those arising from debts. The other applies only to income withholding for the payment of child support obligations. These laws have several common provisions. However, for ease of reference, each will be discussed separately below.

Indiana's General Income Garnishment Statute

An employer with an employee who has a judgment entered against him or her may be required to garnish that employee's wages to pay the debt owed by the employee. Upon appropriate court order, the employer becomes the garnishee-defendant and is responsible for withholding certain amounts of money from the employee's disposable earnings. Disposable earnings include wages, commissions, income, rents or profits remaining after the deduction from those earnings of amounts required by law to be withheld.

The amount to be garnished is 25% of an employee's disposable earnings or the amount by which disposable earnings exceed 30 times the federal minimum wage, whichever is less. These percentage limitations apply to the cumulative total of all withholdings or liens and not merely the withholding or lien of one creditor. Employers in Indiana are responsible to begin making deductions once they receive the Interrogatories from the court (I.C. 34-25-3-3). The employer should hold onto these deductions until a garnishment order is received and then send the amounts deducted to the clerk as indicated in the order. Waiting to begin deductions until a later, garnishment order is issued may result in the employer being held responsible for any payments that should have been made between the time the Interrogatories are received and the time of the later garnishment order.

An employer that is required to make deductions from an individual's disposable earnings pursuant to a garnishment order or series of orders arising out of the same debt may collect, as a fee to compensate the employer for making those deductions, an amount equal to the greater of \$12 or 3% of the total amount

required to be deducted by the garnishment order or series of orders. If the employer chooses to impose the fee, it shall be allocated as follows:

- One-half of the fee shall be borne by the debtor, and that amount may be deducted by the employer directly from the employee's disposable earnings.
- One-half of the fee shall be borne by the creditor and that amount may be deducted by the employer from the amount otherwise due the creditor.

This employer's fee does not increase the amount of the judgment debt for which the fee is collected. This fee may be collected by an employer only once for each garnishment order or series of orders arising out of the same judgment debt. The employer may collect the entire fee from one or more of the initial deductions from the employee's disposable earnings. Alternatively, the employer may collect the fee on a pro rata basis over the number of pay periods during which deductions from the employee's disposable earnings are required.

A child support withholding order takes priority over a garnishment order, regardless of the dates of their entry. If an employee is subject to a child support withholding order as well as a garnishment order, the garnishment order shall be honored only to the extent the disposable earnings withheld under the child support withholding order do not exceed the maximum amount subject to garnishment.

An employer cannot discharge an employee who is subject to a garnishment for the reason that employee is subject to such order (I.C. 24-4.5-5-105).

Indiana's Child Support Income Withholding Law

An employer's obligation to withhold child support obligations is triggered when an employer receives written notice from a court or a child support agency. In addition to other pertinent information, the notice must state the name of the affected employee and the fact that he or she is delinquent in the payment of child support. Also, the notice must state the total amount to be withheld each pay period from the employee's income and the court or agency to which the amount withheld must be sent. It is important to note that if an employer hires or rehires a person who has outstanding child support income withholding orders against him or her, the employer need not withhold until a new notice to withhold is received.

Upon receipt of appropriate notice, the employer must start withholding from the affected employee's pay no later than the first pay period that occurs after 14 days following the date the notice was mailed. The permissible limit on withholding depends upon the affected employee's present dependents and prior support obligations. As much as 60% of the employee's disposable earnings may be withheld unless the employee is presently supporting a spouse or dependent child other than those for whom the support is being ordered. In that case, 50% of the employee's disposable earnings may be withheld. In either case, the amounts increase to 65% and 55% if the withholding is to enforce a support order for a period of more than 12 weeks prior to withholding.

Note: "Disposable earnings" include wages, commissions, income, rents or profits remaining after the deduction from those earnings of amounts required by law to be withheld.

Just as for garnishments, an employer that is required to make deductions from an individual's disposable earnings pursuant to a support order may collect a fee to compensate the employer for making those

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deductions. In the case of support orders, the fee is \$2 from the employee's pay each time income is withheld and forwarded to the clerk of the court or agency.

A child support withholding order takes priority over a garnishment order, regardless of the dates of their entry. If an employee is subject to a child support withholding order and a garnishment order, the garnishment order shall be honored only to the extent that disposable earnings withheld under the child support withholding order do not exceed the maximum amount subject to garnishment.

If an employee subject to such order is terminated, the employer must notify either the court or the child support agency of the termination of employment within 10 days of its occurrence. At the same time, the employer also must supply the terminated employee's last known address and name and the address of his or her new employer, if known. This will end the employer's obligations under the law.

An employer is liable for any amount it fails to withhold and submit pursuant to any child support withholding notice.

Where to Obtain More Information

Employers can contact the Child Support Bureau of the Indiana Department of Child Services online at www.in.gov/dcs/support.htm. The bureau also has a toll-free number, (800) 840-8757, that employers may call with questions concerning this law.

FLSA Exemptions

The FLSA exempts some employees from both the minimum wage and overtime provisions of the Act, and other employees from just the overtime provisions.

Commonly Encountered FLSA Exemptions

White-Collar Exemptions

Many employers assume incorrectly that salaried employees are automatically exempt from wage and hour laws merely because they are paid a salary rather than by the hour. Although one requirement to fall within most of the white-collar exemptions is to be paid a salary, employees are not automatically exempt because they are paid a salary.

Executive Employees

Employees are exempt executives if they receive a salary of at least \$684 per week (beginning January 1, 2020, as discussed in more detail below) and have as their primary duty (i.e., their most important duty) the management of the enterprise itself, or of a particular department. Management includes:

- directing the work of other employees;
- interviewing, selecting, training and evaluating employees;
- handling grievances and complaints and imposing discipline;
- planning the work and determining the techniques used; and
- assigning or apportioning work.

To be an exempt executive, employees must also regularly direct the work of the equivalent of at least two full-time employees and have the authority to hire or fire, or effectively recommend a change in employment status.

Administrative Employees

Administrative employees are exempt if they receive a salary of at least \$684 per week and have as their primary duty the performance of office or non-manual work directly related to management or general business operations. An exempt administrative employee must also exercise discretion and independent judgment (i.e., he or she must have the authority to make independent choices free from immediate direction or supervision with respect to matters of significance). A special rule for certain academic administrative employees in educational institutions may allow such employees to be exempt even if their salary is below \$684 per week, provided it is at least equal to the entrance salary for teachers in that educational institution.

Professionals

Employees are exempt professional employees if they receive a salary of at least \$684 per week, and have as their primary duty work requiring:

- advanced knowledge of a type acquired through specialized study;
- creative work in a field of artistic endeavors; or
- teaching, tutoring, instructing or lecturing in the activity of imparting knowledge as a teacher in a school system (and teachers are not required to receive any minimum salary in order to be exempt).

Highly Compensated Employees

Employees who do not satisfy all requirements to be exempt as an executive, administrative, or professional employee, but who are paid a salary of at least \$684 per week and whose total annual compensation is at least \$107,432 and who satisfy at least one requirement from a duties test for the executive, administrative, or professional exemption may still be considered exempt as a “highly compensated employee.”

Salary Basis Test

As previously described, one requirement for many of the white-collar exemptions is for the employee to receive a salary of at least a certain minimum amount. Since 2004, that weekly salary minimum had been \$455 per week (which equates to an annual salary of \$23,660). However, the weekly salary requirement increased on January 1, 2020, to \$684 per week (which equates to an annual salary of \$35,568). Although there was no change in the weekly salary requirement for 2021, some believe the Biden Administration may seek to raise that requirement in 2022. In 2016, the Obama Administration attempted to raise the weekly salary requirement to \$913 per week (which equates to an annual salary of \$47,476). Employers should monitor any potential changes. As noted above, the “highly compensated employee” minimum annual compensation rate also increased from \$100,000 to \$107,432 on January 1, 2020.

Many employers do not realize that their pay practices can cause otherwise salaried, exempt employees to lose their exempt status. To be considered paid on a salary basis for purposes of the FLSA, the employee must normally receive his or her full salary for any week in which work is performed, regardless of how many

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days or hours are actually worked, as long as the employee actually performs some work during the week. Deductions from salary may be made:

- for absences from work for one or more full days for personal reasons, other than sickness or disability;
- for absences of one or more full days occasioned by sickness or disability (including work-related accidents) if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by such sickness or disability;
- for penalties imposed in good faith for infractions of safety rules of major significance;
- for unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of written workplace conduct rules applicable to all employees; or
- for any workweek in which the employee performs no work.

Private sector employers may not make partial day salary deductions, except in the very limited circumstances of an employee's taking intermittent leave under the Family and Medical Leave Act.

If an unauthorized deduction is made from the salary of an otherwise exempt employee, the employer faces the potential of losing the exemption for that employee and others in the same job. Thus, any policy that provides for docking of pay by the hour may jeopardize salaried status. The FLSA allows employers to adopt a "safe harbor" policy to protect from such pitfalls.

Computer-Related Occupations

Computer systems analysts, programmers, software engineers, and other similarly skilled data processing workers who meet certain criteria and are paid a salary of at least \$684 per week, or are paid in excess of \$27.63 per hour, also are exempt from the FLSA's overtime requirements.

Interstate Transportation Exemption

Employees driving certain types of vehicles transporting others' property in interstate commerce may be exempt from the FLSA's overtime requirements.

Outside Salespeople

Employees who are customarily and regularly engaged away from the employer's place of business making sales are exempt from the FLSA's minimum wage and overtime pay requirements.

Recordkeeping and Posting Obligations

For non-exempt employees, employers must maintain records indicating all of the following:

- Full name
- Address
- Date of birth
- Sex

- Job title
- Time of day and day of week in which the employee's workweek begins
- Regular hourly rate of pay
- Hours worked each workday and total hours worked each workweek
- Total daily or weekly straight-time earnings or wages due for hours worked during the workday or workweek
- Total premium pay for overtime hours
- Additions to and deductions from wages paid each pay period
- Total wages paid each pay period
- Date of payment and the pay period covered by the payment

For exempt employees, employers must keep almost identical records with the exception of some of the requirements relating to payment and hours worked. Other special recordkeeping requirements exist for employees who are treated under special provisions of the FLSA. Generally, employers are advised to maintain FLSA-related records for three years.

Every employer whose workers are subject to the FLSA must post a notice explaining the FLSA's requirements. The notice must be posted in conspicuous places. The Indiana Chamber's all-in-one state and federal poster sets contain this notice. To order a poster set, go to www.indianachamber.com or call (800) 824-6885.

Application of the FLSA to State and Local Governments

State and local governments and their employees are subject to the FLSA. In most respects, private- and public-sector coverage do not differ. However, there are certain differences.

Partial Exemptions from Overtime

The FLSA provides a partial exemption from overtime obligations for public-sector law enforcement or fire protection employees. Essentially, employees engaged in fire protection and law enforcement activities who work recurring consecutive day work periods are entitled to one and one-half times their regular rate of pay if they work more than an established number of hours for the work period. For fire protection employees, overtime must be paid for hours worked beyond a ratio of 212 during a 28-day period. For law enforcement employees, overtime must be paid for hours worked beyond a ratio of 171 during a 28-day period. The public agency may establish a recurring period of work anywhere between seven and 28 days, and the maximum hours will vary accordingly. Thus, if a municipality chooses a work period of 14 days for its fire protection employees, the employees would be entitled to overtime after 106 hours in the 14-day period.

Salary Basis Test for White-Collar Exemptions

In the private sector, if an otherwise exempt white-collar employee's salary is docked for absences of less than a day, the exemption is lost. By contrast, public sector employers may, pursuant to a pay system

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established by statute, ordinance, regulation, policy, or practice, make certain deductions from an exempt employee's salary without destroying the salary basis.

Compensatory Time

Unlike in the private sector, the FLSA authorizes a public employer to provide compensatory time off in lieu of cash overtime compensation at a rate of not less than one and one-half hours of compensatory time for each hour of overtime worked.

Enforcement and Remedies

The FLSA provides civil and criminal penalties for violations. Lawsuits may be brought both by the employee, as an individual, and by the Secretary of Labor on the employee's behalf.

Investigations

The DOL is the federal government agency empowered to investigate potential violations of the FLSA. The DOL will initiate an investigation when a complaint is filed or, in some instances, when targeting a particular industry. When a complaint is filed, the DOL's Wage and Hour Division will assign an investigative officer. The investigator will contact the employer and identify records he or she would like to review. The investigator also will ask permission to conduct private on-site interviews with employees. After concluding his or her fact-finding, the investigator will ask to meet with the employer representative about the investigative findings. If violations are uncovered, the DOL will generally seek payment of the actual amounts due without seeking penalty damages.

Employee Remedies

An employee may sue an employer for violations of the FLSA's minimum wage and overtime provisions. The FLSA defines the term employer broadly. As such, the corporate veil may be pierced, and officers, managers or even supervisors could be subject to individual liability.

Remedies available to an employee include back pay, liquidated or penalty damages in an equal amount to the actual back pay owed, interest and reasonable attorneys' fees.

Class Actions

Perhaps the most significant development in the area of wage and hour law has been the recent barrage of class action activity across the country. The number of FLSA collective actions has risen sharply over a period of several years.

In a class action, a group of similarly situated employees, ranging anywhere from a handful to several thousand, sue their employer, sometimes in a class that encompasses the entire nation. These class and collective action wage and hour claims often stem from employers misapplying wage and hour law (e.g., misclassification of employees or other improper pay practices). In such cases, each individual's claim for unpaid overtime and/or minimum wages may be quite small — a few thousand or even a few hundred

dollars. But when similarly situated plaintiffs join together in a class action, the resulting damages can range from a few hundred thousand to tens of millions of dollars in awards or settlement.

Note: FLSA collective actions differ significantly from class actions filed under other federal or state laws. While there is a two-year statute of limitations (with limited exceptions) for FLSA overtime claims, an action for plaintiffs to “opt in” only commences when they sign a written consent to become a party and file it with the court.

Department of Labor Remedies

The DOL may seek an injunction to prevent further violations of the FLSA's minimum wage and overtime requirements. The DOL may bring suit on behalf of employees to recover unpaid minimum wages and overtime plus penalty damages.

In addition, persons who willfully violate the FLSA are subject to criminal fines and possible imprisonment.

Statute of Limitations

An employee or the DOL must bring suit within two years after a violation occurs, or within three years if the employer is deemed to have willfully violated the FLSA.

Employer Defenses

There are several defenses an employer may raise in the context of an FLSA lawsuit. The employer may raise the good-faith defense claiming that its complained-about act or omission was in conformity with, and in reliance on, a written administrative regulation, order, ruling, or interpretation of the United States DOL. There also exists a second good-faith defense to liquidated or penalty damages. Where an employer can show that it had reasonable grounds for believing that its acts were not in violation of the FLSA, a court, in its discretion, may reduce or deny penalty damages.

Settlement of FLSA Claims

In the context of a DOL investigation, it is not uncommon for the DOL to offer the employer the opportunity to settle back wage claims without paying any liquidated or penalty damages. A DOL-supervised settlement generally stops the employee from suing for the period covered by the settlement. However, employers should be aware that non-DOL-supervised settlements (i.e., private settlements between the employer and employee) are generally not enforceable. Settlements of litigated FLSA claims that are approved by a court are also valid.

Equal Pay Act and the Lilly Ledbetter Fair Pay Act

The Equal Pay Act prohibits an employer from discriminating between employees on the basis of sex by paying an employee of one sex less than an employee of the opposite sex for work performed under similar working conditions on jobs that require equal skill, effort and responsibility. Thus, the Equal Pay Act requires only that there be equal pay when there is equal work being performed by employees of both sexes. The

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Equal Pay Act is enforced by the Equal Employment Opportunity Commission and often arises in the context of a Title VII sex discrimination charge.

The Lilly Ledbetter Fair Pay Act of 2009 amended Title VII so that the 180-day statute of limitations to file an equal-pay lawsuit for alleged pay discrimination starts over with each new paycheck affected by that discriminatory action. Thus, such lawsuits may now be filed years or even decades after an initial decision that led to setting pay at an allegedly discriminatory level. The law reversed a 2007 U.S. Supreme Court decision in *Ledbetter v. Goodyear Tire & Rubber Co.* That case had held that the statute of limitations for asserting an equal-pay lawsuit begins to run on the date that the employer makes the initial discriminatory wage decision, not at the date of the most recent paycheck.

State and Federal Child Labor Laws

Hours of Work Restrictions

Both federal and state laws regulate the hours minors may work. Generally, employers should not employ anyone under 14 years of age. In Indiana, no one under 18 may work between 7:30 a.m. and 3:30 p.m. on a school day without written permission from the child's school. Additional restrictions on hours worked by minors are outlined below.

Minors Ages 14 and 15			
<i>Federal Law</i>	<i>State Law</i>	<i>Federal Law</i>	<i>State Law</i>
<u>Summer</u>		<u>School Year</u>	
Up to 8 hours/day	Up to 8 hours/day	Up to 18 hours/week	Up to 18 hours/week
Up to 40 hours/week	Up to 40 hours/week	Up to 3 hours/school day (8 hours/non-school day)	Up to 3 hours/school day (8 hours/weekend day)
Not before 7 a.m.	Not before 7 a.m.	Not before 7 a.m.	Not before 7 a.m.
No later than 9 p.m.	No later than 9 p.m.	No later than 7 p.m.	No later than 7 p.m.

Minors Ages 16 (Year-Round)

Federal Law

State Law

No restrictions

- Up to 8 hours/day
- Up to 30 hours/week
- No more than 6 days in any one week
- Not before 6:00 a.m.
- No later than 10:00 p.m. on a day followed by a school day

With written parental permission:

- Until 12:00 a.m. on nights not followed by a school day
- 9 hours/day
- 40 hours/week during a school week
- 48 hours/week during summer vacation

Minors Ages 17 (Year-Round)

Federal Law

State Law

No restrictions

- Up to 8 hours/school day
- Up to 30 hours/week
- No more than 6 days in any one week
- Not before 6:00 a.m. on school days
- Until 10:00 p.m. on days that are followed by a school day

With written parental permission:

- Until 11:30 p.m. on days followed by a school day
- Until 1 a.m. on days followed by school days, but must be nonconsecutive and not exceed 2 nights per week
- 9 hours/day, 40 hours/school week and 48 hours/week during summer vacation

Special Considerations

All minors under 18 must have one day off each workweek. In addition, all minors must receive one or two breaks totaling 30 minutes every six consecutive hours. A child who is 16 or 17 may be employed as an adult if he or she:

- is a high school graduate;
- has completed an approved vocational or special education program; or
- is not enrolled in a regular school term.

State law requires that all minors under 18 must have a properly issued employment certificate on file in the employer's office.

Exceptions: These rules do not apply if the child has graduated from high school or is working as a farm laborer, domestic employee, golf caddie or newspaper carrier during non-school hours.

Prohibited Employment

Both federal and state laws also regulate the types of employment that a minor may participate in. Generally, minors under the age of 18 are not permitted to work in hazardous occupations. The scope of hazardous work is broad and differs with the age of the individual in question. For further information and a list of prohibited occupations for minors, visit www.in.gov/dol/2741.htm. Another useful resource is www.osha.gov/youngworkers.

Penalties

Any person who violates child labor laws is subject to a civil penalty of up to \$11,000 for each employee who was the subject of a violation. In certain cases, the FLSA provides criminal penalties for child labor violations, including fines and imprisonment.

The Indiana Department of Labor's Bureau of Child Labor and the U.S. Department of Labor monitor compliance with state and federal child labor laws.

Where to Obtain More Information

For more information on wage and hour requirements, contact the following agencies:

U.S. Department of Labor

Wage and Hour Division

135 North Pennsylvania Street, Suite 700

Indianapolis, IN 46204

(317) 226-6801

Indiana Department of Labor

402 W. Washington Street, Room W195

Indianapolis, IN 46204

(317) 232-2655

This chapter was edited by Daniel Dorson, Associate.

Chapter 15

Employee Benefits

For most employees, a significant portion of their compensation package consists of non-cash employee benefits. Pension and health insurance benefits have become important parts of most compensation programs, and a complex system of specialized laws and government agencies regulates those programs heavily.

Sources of Regulation

Although the sources of employee benefits law include both federal and state law, as a general rule, federal law occupies the field and preempts state law regulation of employee benefits plans. A few types of state laws are not preempted by federal law, and some employers, such as churches and governmental units, are exempt from most federal regulation.

The federal law regulating employee benefits plans has two primary sources, federal tax law compiled in the Internal Revenue Code, 26 U.S.C. § 1 *et seq.* (“the Code”), and a portion of federal labor law that is commonly known by the name of the statute that enacted it, the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 *et seq.*

Employee Retirement Income Security Act of 1974 (ERISA)

ERISA imposes substantive requirements on retirement plans that generally mirror those imposed on tax-qualified retirement plans by the Code. ERISA does not generally impose substantive requirements on other types of employee benefit plans, such as health insurance plans; however, legislation such as the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and the Patient Protection and Affordable Care Act (PPACA) do impose some substantive requirements on health insurance plans. Many of ERISA’s provisions are procedural, imposing reporting and disclosure requirements, claims procedures requirements, and fiduciary responsibilities on the individuals and entities that maintain and operate employee benefit plans. In addition, ERISA governs the Pension Benefit Guaranty Corporation (PBGC) and its system of benefit insurance for defined benefit pension plans.

Internal Revenue Code

The Internal Revenue Code imposes substantive requirements on many types of employee benefit plans as conditions for favorable tax treatment. Although the particular requirements vary greatly from one type of plan to another, most (but not all) types of regulated plans are subject to nondiscrimination rules limiting the extent that the plan can provide more favorable benefits for owners and highly paid individuals than for rank-and-file workers. The nature and complexity of these nondiscrimination requirements vary from one type of plan to another, as does the composition of the group in whose favor discrimination is prohibited.

Among the types of employee benefit plans subject to substantive regulation under the Code are group term life insurance; self-funded medical plans; group legal services plans; cafeteria plans; educational assistance programs; dependent care assistance programs; and tax-qualified retirement plans.

State Law

ERISA contains a broad preemption provision that preempts most state laws, whether statutory or common law, that relate to employee benefit plans subject to ERISA. The United States Supreme Court has interpreted this preemption provision broadly. ERISA, however, expressly exempts or saves certain state laws from preemption, including state laws that regulate insurance, banking and securities. These provisions, and Supreme Court decisions interpreting them, have created a dichotomy between self-insured and fully insured group health plans. Self-insured health plans generally are not subject to state regulation because state laws are preempted to the extent they relate to the plans. Fully insured plans, however, can be regulated indirectly by a state through its regulation of the insurance companies and insurance contracts that fund the plans. Because ERISA generally does not apply to most plans maintained by churches or governmental entities, church plans and governmental plans will generally be subject to state law regulation.

When not preempted by ERISA, other state laws occasionally affect certain types of employee benefit plans. If an employer contracts in writing to make payments to any employee pension or welfare plan, including through a collective bargaining agreement, but fails to make those payments, the employer must give written notice not later than seven days after failing to make payment to the following parties:

- Employee on whose behalf the payment should have been made
- Authorized representative of such employee
- Authorized representative of a union that represents such employee
- Authorized representative of the benefit plan to which the payment should have been made
- Trustee of the employee to whom the payment should have been made

An employer that violates this requirement is liable under Indiana law for double damages plus costs and attorneys' fees. The employer is not liable, however, if it shows good cause for the failure to make the required payments or to give the required notice. Good cause does not include the employer's financial inability to make the payments required.

Indiana's wage payment statutes (See Chapter 14, "Wage and Hour Requirements") have been held to cover vacation benefits but not severance benefits. Applying common law contract principles, Indiana courts have held that certain benefit rights, such as vacation pay, accrue as work is performed. Furthermore, the employment discrimination provisions of Indiana's Civil Rights Act can apply to certain benefit programs. For ERISA benefit claims brought as civil actions, the most analogous state limitations period applies, but court choices have ranged from Indiana's two-year statute of limitations for unwritten employment contracts to Indiana's 10-year limitations period for contracts in writing. ERISA fiduciary breach actions must be brought in federal court, and ERISA, itself, establishes the limitations period. As a general rule, federal law dominates the regulation of employee benefit plans.

Requirements of ERISA

ERISA imposes a number of requirements on many common types of employee benefit plans. A number of its provisions impose substantive requirements on retirement plans and health plans. It also imposes many procedural requirements, including certain reporting, disclosure and fiduciary duty requirements, on nearly all types of covered plans.

Scope of Coverage

Whether or not a plan is subject to ERISA generally depends upon the type of benefit and the nature of the sponsoring employer.

ERISA generally applies to plans maintained by all types of employers except governmental entities or a church, convention or association of churches exempt from tax under § 501 of the Code. A plan maintained by church-related entities may make a one-time irrevocable election to be subject to ERISA. Because coverage under ERISA carries with it some benefits as well as burdens, some church plans do elect ERISA coverage. A governmental entity, however, cannot elect to subject its plans to ERISA.

Generally, there are two types of plans subject to ERISA: pension plans and welfare plans. Certain plans, which would otherwise be covered but are funded solely from the employer's general assets, are exempt from ERISA.

Pension Plans

Under ERISA, the term pension plan generally means any program maintained by an employer, an employee organization, or both, to the extent that it provides retirement income to employees or results in a deferral of income by employees for periods extending to the termination of covered employment or beyond. ERISA-covered pension plans include defined benefit pension plans; money purchase pension plans; profit-sharing plans; stock bonus plans; and employee stock ownership plans. Executive deferred compensation plans may also be pension plans subject to ERISA but may be exempt from many of ERISA's requirements if they are unfunded and limited to a select group of management or highly compensated employees.

Welfare Plans

Under ERISA, the term "welfare plan" generally means any program maintained by an employer, employee organization, or both, to the extent that it provides:

- medical-surgical or hospital care benefits;
- benefits in the event of sickness, accident, disability, death or unemployment;
- vacation benefits;
- apprenticeship or other training programs;
- daycare centers;
- scholarship funds;
- prepaid legal services; and
- any other benefit described in § 302(c) of the Labor Management Relations Act.

Severance pay plans are generally subject to ERISA as welfare plans, although in certain rare circumstances they may instead be subject to ERISA as pension plans.

Exempt Plans

ERISA does not apply to salary, wages, and similar cash compensation, including overtime pay, shift premiums, holiday premiums or weekend premiums. ERISA also does not apply to certain payroll practices that the employer pays, out of its general assets; some or all of the employee's normal compensation on

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account of periods of time during which the employee is physically or mentally unable to perform his or her duties, or is otherwise absent for medical reasons; or on account of periods of time during which the employee, although physically and mentally able to perform his or her duties and not absent for medical reasons, still performs no duties (for example, vacation, holidays, military leave, jury duty pay, leave for training, sabbatical leave or leave to pursue further education).

Written Plan Document Requirement

For every employee benefit plan subject to ERISA, the employer must adopt and follow a written document. In addition to describing the terms of the benefit program, the plan document must, at a minimum, provide for named fiduciaries to manage the plan, a policy to fund the plan, and procedures to allocate responsibilities for the plan's operations.

Summary Plan Descriptions and Summaries of Material Modifications

Plan administrators of most ERISA plans are required to distribute copies of summary plan descriptions to participants. Plan administrators are not required to file copies of the summary plan descriptions with the Department of Labor (as they were prior to August 1, 1997). A summary plan description summarizes the contents of a plan and, as discussed below, must contain certain information prescribed by ERISA and Department of Labor regulations. As a general rule, if plan amendments during a plan year change information set out in the summary plan description, either a new summary plan description or a summary of material modifications must be distributed to participants.

The summary plan description must include 20 or more different items of specified information, ranging from the plan sponsor's IRS-assigned employer identification number to descriptions of the plan's eligibility requirements and benefits.

A summary plan description of a new plan must be distributed to participants within 120 days of the plan's effective date. New participants must be furnished with the summary plan description within 90 days after their participation in the plan begins. Generally, summaries of material modifications must be distributed within 210 days after the end of the plan year in which the modification or change is adopted or occurs, as the case may be. If a material modification results in a material reduction in group health plan benefits, however, a summary of material modifications must be distributed within 60 days after the modification is adopted.

Annual Reports and Summary Annual Reports

As a general rule, ERISA plans must file annual reports with the Internal Revenue Service, on the IRS Form 5500 series, within seven months after the close of each plan year. Subject to limited exceptions, the plan must also distribute a summary of the report, written in a format prescribed by the Department of Labor, to each plan participant and each beneficiary who is receiving benefits under the plan within nine months after the close of the plan year. The Department of Labor may impose a penalty of up to \$1,100 per day for failure to file a timely and complete annual report for an ERISA plan.

Exemptions

Certain plans are exempt from the annual reporting requirement. Most notably, welfare plans that have fewer than 100 participants and that pay benefits solely from the employer's general assets, insurance contracts, or both do not have to file annual reports. Certain fringe benefit plans (e.g., cafeteria plans that provide solely for the pre-tax payment of employee premiums) are also exempt.

Registration of Top Hat Plans

Top hat retirement plans, which are unfunded deferred compensation plans for a select group of management or highly compensated employees, are exempt from many of ERISA's more troublesome requirements, including nondiscrimination requirements, funding requirements, and most reporting and disclosure requirements. To be entitled to these exemptions, a top hat plan must register with the Department of Labor by filing a brief notice in a form prescribed by the Department.

Trust Requirements

With some exceptions, assets of an employee benefit plan must be held in trust or by an insurance company. Plan assets must be used for the exclusive purpose of providing benefits to participants and beneficiaries and defraying reasonable expenses of plan administration. Employers may fund welfare plans, such as health plans, from their general assets without the use of a trust. If, however, the plan requires employee contributions, those contributions are plan assets that must be placed in a trust or forwarded to an insurance company as soon as they reasonably can be segregated from the employee's pay. Similarly, COBRA contributions are plan assets that either must be held in a trust or forwarded to an insurance company. This generally means that employers with self-insured group health plans must establish a trust to hold employee contributions and COBRA contributions until those contributions can be applied toward the payment of benefits. The Department of Labor, however, does not enforce the trust requirement for employee and COBRA contributions collected under a cafeteria plan.

Fiduciary Duties

A person is a fiduciary with respect to a plan to the extent that the person exercises authority or control over plan assets; renders or has the authority to render investment advice to the plan for compensation; or has any discretionary authority in plan administration. A plan fiduciary must discharge his or her duties solely in the interest of plan participants and beneficiaries, and with the care, skill, prudence, and diligence that a prudent person acting in a like capacity and familiar with such matters would use under similar circumstances. A plan fiduciary must ordinarily diversify plan investments to minimize the risk of large losses. Fiduciaries are personally liable to a plan for losses to the plan or gains to the fiduciaries resulting from a breach of fiduciary duties.

Prohibited Transactions

A fiduciary may not cause a plan to engage in certain prohibited transactions involving parties in interest. The definition of party in interest is complex, but it generally includes plan fiduciaries; persons providing services to the plan; employers whose employees are covered by the plan; unions whose members are

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covered by the plan; owners, direct or indirect, of 50% or more of any employer whose employees are covered by the plan; and entities that are 50% or more owned by any of the above.

ERISA also prohibits the use of plan assets by or for the benefit of a party in interest and, under certain circumstances, the acquisition of employer securities or employer real property by a plan. ERISA's prohibited transaction rules are very complex. They are extremely broad in scope but subject to many specific statutory and administrative exemptions. A party in interest that engages in a prohibited transaction may be liable for substantial civil penalties to the Department of Labor.

Bonding Requirements

With limited exceptions, every fiduciary of an ERISA plan and every person who handles property of the plan must be bonded. Certain banks and insurance companies are exempted from this requirement. The amount of the bond may not be less than 10% of the amount of the funds handled, with a minimum required amount of \$1,000 and a maximum required amount of \$500,000 for plans that do not hold employer securities and \$1,000,000 for plans that do hold employer securities. The bond must protect the plan against loss caused by fraud and dishonesty on the part of the fiduciary or the person handling the funds. ERISA limits the class of entities from which bonds can be obtained.

Claims Procedures

ERISA plans must establish and maintain a claims review procedure that satisfies requirements set out in Department of Labor regulations. The claims and review procedure must also permit the participant, in connection with the review of a denied claim, to request and obtain information and documents in the plan administrator's possession relating to the claim and to submit, in writing, evidence and arguments relating to the claim. The Department of Labor has adopted stricter claim procedure requirements for health plans (including urgent care procedures and shorter time frames for health plans to review claims) and long-term disability claims, and the Patient Protection and Affordable Care Act has mandated new claims appeal protections, including external review and rights to present testimony.

Defined Benefit Plan Termination Requirements

Because certain benefits under defined benefit plans are guaranteed by the Pension Benefit Guaranty Corporation (PBGC), ERISA sets forth detailed requirements regarding the termination of defined benefit plans. These rules require, among other things:

- that detailed information regarding the termination be provided to the PBGC;
- that certain notices be given to employees; and
- that plan assets be used to satisfy benefit liabilities under the plan determined as of the termination date.

As a general rule, a defined benefit pension plan may not be terminated unless it contains assets sufficient to satisfy all benefit liabilities under the plan. To satisfy this requirement, the sponsoring employer may be required to make additional contributions to the plan before it can terminate. Generally, the plan can satisfy its benefit liabilities by the purchase of guaranteed annuity contracts from an insurance company or by distributing lump-sum cash equivalents to participants. Except where the present value of a participant's benefits does not exceed \$5,000, the benefits must be distributed in the form of annuities unless the participant – with his or her spouse's consent – elects cash.

If the plan's assets exceed its benefit liabilities, and the plan provides for the return of excess assets to the employer upon termination, the excess assets may be returned to the employer after the plan has provided for the satisfaction of all benefit liabilities. The employer will be subject to ordinary income taxes plus a 20% to 50% excise tax on the amount of reversion.

Multiemployer Plan Withdrawal Liability

If an employer withdraws from a multiemployer pension plan (a plan to which two or more unrelated employers contribute pursuant to collective-bargaining agreements), it may incur substantial liabilities if vested accrued benefits under the plan have not been fully funded. This may be true even though the employer has made, on a timely basis, all contributions required by its collective bargaining agreement for its own employees. Withdrawal liability may occur either on a complete withdrawal (where the employer permanently ceases to have an obligation to contribute under the plan) or a partial withdrawal (where an employer has a 70% contribution decline or a partial cessation of its contribution obligation).

A change in corporate form, such as a merger, will not constitute a withdrawal if it does not cause an interruption in employer contributions or obligations to contribute under the plan. As a general rule, if the sale of assets by a corporation obligated to contribute to a multiemployer plan results in a cessation of contributions to the plan, withdrawal liability will occur. An asset sale can be structured to avoid immediate withdrawal liability, however, if the purchaser is willing to assume certain obligations with respect to the plan and other procedures are followed.

Other Requirements

Record Retention

Employers and plan administrators must retain certain records relating to the administration of an ERISA plan for a required period, generally six years.

Responses to Participant Requests for Information

If ERISA requires a plan administrator to provide certain documents or information to a participant, the plan administrator must provide that information or materials within 30 days of receipt of the participant's written request. If the plan administrator fails or refuses to comply with the request within 30 days after receipt of the request, the plan administrator may be assessed a penalty of up to \$110 per day from the date of its failure or refusal to the date the information is furnished properly.

Availability of Plan Documents

ERISA requires an employer maintaining a plan to keep copies of the governing plan documents (including the official plan document, insurance contracts, trust documents and summary plan description) at its main offices and at job sites, so that the document may be reviewed and copied by participants upon request. The employer may assess a reasonable charge for copying.

Prohibition Against Discrimination and Retaliation

ERISA makes it unlawful for any person to discharge, fine, suspend, expel, discipline or otherwise discriminate against a participant or beneficiary for exercising his or her rights under an employee benefit plan or ERISA, or for the purpose of interfering with the attainment of any right to which the participant or beneficiary may become entitled under the plan or ERISA. ERISA also makes it unlawful for any person to discharge, fine, suspend, expel or otherwise discriminate against any person because he or she has given information (or has testified, or is about to testify) in any inquiry or proceeding relating to ERISA. An individual unlawfully discriminated against in violation of ERISA may bring a civil action in federal court under ERISA's general enforcement provisions.

Tax-Qualified Retirement Plans

Retirement plans that satisfy the tax qualification requirements of Code § 401(a) are eligible for substantial tax benefits, both for the employers that sponsor the plans and the employees who participate in them. Contributions and earnings accumulate tax-free in the plan until they are distributed to participants or beneficiaries. Also, an employer will ordinarily receive a current income tax deduction for the amount of its contribution to a qualified plan.

There are two basic types of qualified retirement plans: defined contribution plans and defined benefit plans.

Defined Contribution Plans

A “defined contribution plan” is a retirement plan that provides for an individual account for each participant and bases its benefits solely upon the amount contributed to the participants’ account (plus or minus any investment or operational gains or losses). Defined contribution plan types include profit-sharing, money purchase pension, 401(k), SIMPLE, stock bonus, and employee stock ownership plans.

Profit-Sharing Plans

Under this type of plan, an employer agrees to make substantial and recurring, though generally discretionary, contributions. Contrary to its name, profit-sharing plans are not required to base contributions on profits.

Money Purchase Pension Plans

Under this plan, the employer’s contributions are mandatory and are usually based on a formula tied to each employee’s compensation.

401(k) Plans

These are plans that offer employees an election to make contributions, on a pre-tax basis, to a profit-sharing or stock bonus plan. They may also allow employees to establish Roth accounts, which receive after-tax contributions but produce tax-free earnings when distributed to the employee.

403(b) Plans

Similar in many respects to 401(k) plans, these plans are limited to certain educational and tax-exempt employers and government employers.

SIMPLE Plans

SIMPLE (Savings Incentive Match Plans for Employees of Small Employers) plans are for employers with fewer than 100 employees and must be the only plan of the employer. Employers must contribute to the plans under specific formulas, and participants must be 100% vested in the plan at all times.

Stock Bonus Plans

These are plans similar to profit-sharing plans except that benefit payments must generally be made in stock of the company.

Employee Stock Ownership Plans (ESOPs)

An ESOP is a special type of defined contribution plan (usually a profit-sharing or stock bonus plan) whose funds must be invested primarily in employer securities.

Defined Benefit Plans

A “defined benefit plan” is a retirement plan that promises a benefit, usually based on a formula, and requires the employer to set aside enough assets over time to fund the promised benefit. In most cases, the promised benefit will vary depending upon the employee’s years of service and compensation level. Cash balance plans, which generally describe benefits in terms of annual contribution credits and earnings credits, resemble defined contribution plans in concept, but are actually defined benefit plans. Defined benefit plans are generally more complex to administer than defined contribution plans, require regular actuarial assistance to determine funding levels, and are subject to the protections and the premium-payment requirements of the Pension Benefit Guaranty Corporation.

Requirements for Tax Qualification

Code qualification requirements (some that are duplicated in ERISA) are described in the following sections.

Minimum Coverage Requirements

These requirements are designed to ensure that a plan benefits a non-discriminatory group of employees of the employer (determined on a controlled group or affiliated service group basis). Generally, a plan must benefit at least 70% of the employer’s non-highly compensated employees, and it may require no more than one (and in some cases two) years of service as a condition for participation.

Contribution and Benefit Nondiscrimination Requirements

These requirements are designed to ensure that plan contributions and benefits do not discriminate in favor of highly compensated employees.

Minimum Vesting Requirements

These requirements limit the time it takes for plan contributions to become nonforfeitable. A defined benefit plan must provide for a vesting schedule that is at least as rapid as 100% vesting as of five years of service, or graduated vesting at 20% per year over a period of three to seven years of service. In most cases, a defined contribution plan must provide a vesting schedule of 100% vesting as of three years of service, or graduated vesting at 20% per year over a period of two to six years of service. A plan must provide that employee contributions (including employee contributions to a 401(k) plan) are always 100% vested and that all employer contributions also become 100% vested at the occurrence of certain events, such as attainment of normal retirement age, termination or partial termination of the plan, or a complete cessation of employer contributions to a profit-sharing plan.

Minimum Distribution Requirements

These rules are designed so that the bulk of an employee's benefits will be distributed within his or her lifetime, or within a short period after his or her death. These rules require a participant who is a 5% owner of the employer to begin receiving distribution of his or her plan benefits no later than April 1 following the year in which the participant reaches age 70½, and they require all other participants to begin receiving distribution of plan benefits no later than April 1 following the later of the year in which the participant reaches age 70½ or the year he or she retires. Under the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act), the age at which these required minimum distributions (RMD) are triggered increases to age 72 for individuals who turn age 70 on or after July 1, 2019. These rules were further amended by SECURE 2.0, passed in December 2022, which increased the RMD age to 73 for individuals who had not turned 72 by the end of 2022 (individuals born between January 1, 1951 and December 31, 1959). The RMD age increases to age 75 for those born on or after January 1, 1960.

Survivor Annuity Requirements

Certain plans must distribute benefits attributable to married participants in the form of a pre-retirement survivor annuity or a joint and survivor annuity for the participant and his or her spouse, unless the participant has waived that form of benefit with the spouse's consent. These plans must also satisfy certain notice requirements designed to ensure that participants and spouses are adequately informed about the normal forms of distribution and the procedures for waiving them.

Annual Limitations on Contributions and Benefits

As of 2023, for defined contribution plans such as 401(k) plans, profit-sharing plans and money purchase pension plans, total contributions on behalf of any employee may not exceed the lesser of 100% of the employee's annual compensation or \$66,000 (increased for cost of living). For defined benefit plans, annual benefits on behalf of an employee may not exceed the lesser of 100% of the employee's compensation or, in 2023, \$265,000 (increased for cost of living).

Minimum Participation Requirements

Generally, a defined benefit plan must benefit at least 50 employees or 40% of all employees of the controlled group/affiliated service group, whichever is less.

Annual Limitations on Elective Deferrals

These rules limit the amounts that individuals can defer under 401(k) and 403(b) plans. The 2023 limitation is \$22,500 (increased for cost of living). In addition, individuals age 50 and above may, if permitted by their plan, make “catch-up contributions” above and beyond the normal annual limit on elective deferrals. “Catch-up contributions” limits are \$7,500 in 2023, with increases for cost of living thereafter. Effective in 2024, SECURE 2.0 requires any employee whose compensation was \$145,000 or more in the prior calendar year to make catch-up contributions as Roth contributions. Effective in 2025, SECURE 2.0 increases the catch-up contribution limit for those between ages 60-63 to \$10,000 or 150% of the regular limit.

Special Nondiscrimination Requirements

Plans that permit pre-tax employee contributions, employee after-tax contributions, or employer matching contributions must satisfy certain special nondiscrimination requirements. Generally, these requirements limit the extent to which highly compensated employees can benefit from these types of contributions to a greater degree than other employees.

Anti-Alienation Rules

A plan must prohibit assignment or alienation of benefits except under specific conditions in connection with qualified domestic relations orders, certain loans to participants and embezzlement of plan assets. These strict anti-alienation rules prohibit an employer from attaching, garnishing, or otherwise reducing or withholding from a participant’s plan benefits to satisfy an obligation owed to the employer or others by the participant.

Compensation Limitation

As of 2023, a plan must limit the amount of a participant’s compensation that is taken into account for contributions and benefit purposes to \$330,000 (increased for cost of living in \$5,000 increments).

Special Requirements for Special Types of Plans

Additional requirements apply to certain special types of plans, such as stock bonus plans, employee stock ownership plans and plans that contain cash or deferred arrangements.

Other Important Retirement Plan Issues

Determination Letters

Although neither the Code nor ERISA requires it, retirement plans designed to satisfy the qualification requirements of Code § 401(a) should seek a formal, written determination from the Internal Revenue

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Service that the form of the plan satisfies applicable qualification requirements. Applications are made using IRS Form 5300 and are made to the IRS at the location indicated in the form's instructions. The Internal Revenue Service has adopted a procedure for reviewing determination letter requests on five-year cycles, with plans assigned to particular cycles based upon their sponsor's employer identification number. In August 2015, the Internal Revenue Service announced that these five-year cycles would be eliminated; the determination letter program was discontinued (except for initial qualification of plans and qualification of plans upon termination) effective January 1, 2017. However, in 2019, the IRS expanded the program once again, making it available for statutory hybrid plans and for certain merged plans.

Participant-Directed Investments

Defined contribution plans that permit participants to direct the investment of their retirement plan accounts among several investment alternatives may qualify for an exemption from certain ERISA fiduciary duty requirements that would otherwise apply, but only if the plan's directed investment provisions meet certain requirements specified by Department of Labor regulations. This exemption is known as the 404(c) exemption. Under Department of Labor regulations, a plan must satisfy three important requirements to ensure that participants truly have the opportunity to direct their investments: participants or beneficiaries must be provided with sufficient information to make informed investment decisions, must have the opportunity to choose from a broad range of diversified investment alternatives, and must have an opportunity to transfer assets among available investment alternatives with sufficient frequency to ensure the participants' meaningful control over investments.

Plan Loans

A loan from a qualified plan to a plan participant will constitute a prohibited transaction in violation of ERISA and the Code unless the loan complies with certain requirements set forth in the statutes and interpreted by Department of Labor regulations. In addition, a plan loan will constitute a taxable distribution to the participant unless it complies with certain requirements. Among the requirements necessary to avoid these adverse consequences are express plan loan provisions, including a reasonable rate of interest for the loan; a definite term and repayment schedule; adequate security for the loan; sufficient documentation supporting the loan; and, if a plan is subject to qualified joint and survivor annuity requirements, a spouse's consent to a loan. If a plan has made 25 loans in the preceding calendar year and makes 25 loans in the current calendar year, it also is subject to the requirements of the Truth in Lending Act.

Special Rules for Employees Returning from Military Service

Under the Uniformed Services Employment and Re-employment Rights Act (USERRA), employees with military service covered by that act who subsequently are reemployed by their employer are entitled to certain service credits and benefits for their period of military service. (See Chapter 19, "Veterans' Re-employment Rights.")

Fee Disclosure

Department of Labor rules create a three-part regulatory scheme to enhance disclosure of fees charged by certain ERISA retirement plan service providers. The first part focuses on government reporting: that is, reporting by plan administrators to the Department of Labor, using Schedule C of each plan's Form 5500 annual report. The second part governs provider-level disclosure: disclosures by certain covered service

providers to retirement plan fiduciaries (governed by Department of Labor regulations under ERISA Section 408[b][2]). The third part controls plan-level disclosure: disclosure of fees and other investment-related information by plan fiduciaries to participants who have the ability to direct their retirement plan investments (governed by Department of Labor regulations under ERISA Section 404[a][5]).

Curing Plan Problems

Curing Plan Tax Qualification Problems

The Internal Revenue Service administers a correction program for retirement plans known as the Employee Plans Compliance Resolution System (EPCRS).

In an attempt to streamline certain procedures and ensure greater consistency, the EPCRS:

- combines previous programs that allow voluntary correction with the Internal Revenue Service's approval into a single voluntary correction program;
- provides a self-correction program to allow correction, without Internal Revenue Service approval, for certain recent or insignificant operational errors;
- allows certain group submissions; and
- includes procedures specifically designed for small employers that sponsor Simplified Employer Plans (SEPs).

The IRS issued an updated version of EPCRS in 2019.

Filing Delinquent Annual Reports

The Department of Labor (DOL) operates the Delinquent Filer Voluntary Compliance Program (the DFVC program) to encourage plan administrators to comply with their annual reporting obligations under ERISA. Normally, plan administrators who fail to file annual reports on a timely basis face penalties of up to \$2,259 per day from the DOL with no maximum and up to \$250 per day from the IRS with a maximum penalty of \$150,000. Under the DFVC program, plan administrators may file delinquent annual reports and pay a reduced civil penalty. If a report is late, the penalty is up to \$2,000. If a plan has more than one delinquent annual report and all delinquent reports are filed together under the amnesty program, the penalty for all reports may not exceed \$4,000. Reduced penalties apply to reports covering plans with less than 100 participants and plans of tax-exempt organizations. The amnesty program is of indefinite duration, but the DOL has reserved the right to terminate or modify the program at any time at its sole discretion.

Tax-Sheltered Annuity Plans

Nondiscrimination Rules

Tax-sheltered annuity programs — also called 403(b) plans — are retirement programs that certain educational institutions and Code § 501(c)(3) tax-exempt organizations may use to provide tax-deferred retirement benefits for their employees, funded through annuity contracts or custodial accounts. Federal tax law imposes nondiscrimination requirements for tax-sheltered annuity plans (except those plans maintained

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by churches as defined very narrowly), which subject them to many of the same constraints that apply to tax-qualified plans. Internal Revenue Service regulations cause tax-sheltered annuity programs to be much like 401(k) plans, shifting from loose collections of individual arrangements with various providers to employer-focused, centrally controlled plans. The 403(b) plans must be in writing, must clearly allocate administrative and compliance responsibilities, must limit asset transfers to investment providers who have entered into information-sharing agreements, may allow for distributions upon plan termination, and must take on other characteristics of 401(k) plans.

Determination Letters

Although there is no general determination letter procedure for tax-sheltered annuity plans as there is for qualified retirement plans, the Internal Revenue Service is expected to adopt one. The Internal Revenue Service has also issued model language to comply with some portions of the new regulatory requirements.

Nonqualified Deferred Compensation Arrangements

Nonqualified deferred compensation arrangements are arrangements that provide certain employees with deferred pay upon which they do not have to pay income tax until the amounts are distributed. Employer deductions for these types of arrangements are also deferred until distribution. Under Code § 409A, nearly all nonqualified deferred compensation plans are subject to rules that significantly modify the tax treatment of deferrals under the plans. The rules impose election, distribution and funding restrictions on nonqualified plans, and if plans fail to comply with the rules, the affected employees will be subject to current taxation on all deferrals and will suffer significant tax penalties.

Top Hat Requirement

Many nonqualified deferred compensation plans have the effect of postponing payment until the employee terminates employment and, for that reason, would be considered “pension plans” under ERISA. For such nonqualified deferred compensation plans to be exempt from the nondiscrimination, funding, and certain other requirements of ERISA, they must be offered to only a select group of management or highly compensated employees. An employer other than a church or governmental entity must be careful to ensure that the group of employees benefiting under its plan is sufficiently select and highly compensated to qualify for the top hat plan exemption.

Unfunded Status

To be exempt from ERISA, the deferred compensation plan must also be unfunded. That means that the benefits must be paid from the employer’s general assets or from other assets (such as a rabbi trust) that are subject to the claims of the employer’s general creditors. The employee has an enforceable contractual right to the promised payments, but that promise is unsecured.

457 Plans

Deferred compensation plans of governmental entities and tax-exempt entities are subject to special tax rules, including low annual accrual limitations, under Code § 457.

Group Health Plans

Patient Protection and Affordable Care Act of 2010

Federal health care reform that began with the Patient Protection and Affordable Care Act of 2010 (PPACA) has caused major changes in group health plan design and operation. Phased in over several years, health care reform also has imposed a new array of constraints on group health plan design – both minimum requirements (including essential benefits, premium sharing, cost sharing, and prohibitions on such traditional features as lifetime and annual limits, pre-existing conditions, and waiting periods) and maximum limits (including “Cadillac plan” taxation) – as well as new procedural burdens (such as auto-enrollment, free choice vouchers, additional tax and quality-of-care reporting, and new claims appeal steps). The major changes have been implemented over several years, as outlined below.

Effective before 2014:

- Small employer tax credits
- Early retiree reinsurance program
- Elimination of pre-existing condition limitations for children (under 19)
- Temporary high-risk pool for individuals
- Lifetime, annual benefit limit restrictions
- Nondiscrimination rules for insured plans (enforcement delayed pending regulatory guidance)
- Expansion of dependent coverage
- Over-the-counter medications not permitted from FSA, HSA, HRA
- Form W-2 reporting for health care costs (with transition relief for certain employers)
- Insurers reporting medical loss ratios and, if inadequate, paying rebates to policyholders
- Plan appeals procedure changes
- Certain small group insurance market reforms
- New summary of benefits and coverage
- Health flexible spending account cap of \$2,500 (indexed for inflation)
- Increased Medicare taxes (on wages and investment income) for high-income earners
- Fees (per covered life) for patient-centered outcomes research (originally through 2019, but extended in 2019 through 2029))

Effective in 2014:

- Individual “Play or Pay” mandates
- Insurance market reforms, including elimination of pre-existing condition exclusions, expansion of guaranteed issue and renewability, and prohibition against discrimination based on health status
- Annual limit and waiting period restrictions
- Increased wellness incentives
- Purchasing exchanges for individual and small group insurance
- Fees (per covered life) for transitional reinsurance program (through 2016)

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Effective in 2015:

- Employer “Play or Pay” mandates (delayed from 2014)
- Additional employer reporting obligations (coverage, costs, participation)

Effective in 2019:

- Elimination of individual “Play or Pay” mandates
- Repeal of the “Cadillac Plan” excise tax

Nondiscrimination Rules for Self-Funded Plans

Group health plans that are self-insured (that is, funded by the employer rather than insurance) are subject to nondiscrimination requirements under Code § 105(h). Those rules require that the plan not discriminate in favor of highly compensated individuals with respect to eligibility to participate or receive benefits. This generally means that the plan must provide the same benefits to highly compensated individuals as to all other plan participants. If a self-funded health insurance plan fails to comply with the nondiscrimination requirements, highly compensated participants may have to include in their taxable income all or a portion of the benefits (not the cost of coverage) paid to them under the plan. If a plan is only partly self-insured, the nondiscrimination rules apply to the self-insured part of the plan. Under health reform, similar nondiscrimination rules will also apply to fully insured group health plans (potentially with substantial employer penalties for failure to comply).

Retiree Health Benefits

Health plans that provide for retiree benefits face certain special concerns. Financial accounting standards require financial statements to reflect the employer’s liability for unfunded retiree health benefits. To preserve their right to modify or eliminate retiree benefits and to adjust the costs to retirees, employers should unambiguously reserve in their plan documents and summary plan descriptions their right to make those changes. Without clear amendment and termination language, courts often find those benefits to be vested, based on certain oral or written representations made to the retirees before their retirement.

FSA, HRAs and HSAs

As health care costs increase, employers are turning to consumer-driven health plans and funding accounts to help rein in expenses. Health flexible spending accounts (FSAs) have been around the longest. FSAs allow employees to contribute some of their own salary to spending accounts to pay for health care expenses. FSAs are subject to “use-it-or-lose-it” rules, which require employees to use their annual contributions made during the year no later than two and one-half months after the end of the year or lose the money. Under health reform, annual contributions to health FSAs will be limited; as of 2023, the limit is \$3,050. Health reimbursement arrangements (HRAs) are another form of consumer-driven health plan. HRAs allow employers to make money available to employees to use solely for medical expenses. Unspent balances may accumulate year to year, though the funds are owned by the employer. Health savings accounts (HSAs) are the newest option. An individual enrolled in a high-deductible health plan may establish an HSA to receive tax-favored contributions. Much like a specialized IRA, the HSA is owned by the individual, the contributions are pre-tax, and account earnings are not taxed currently. If HSA payouts are used for qualifying health expenses, they are not taxable to the HSA owner. If used for non-health purposes, the payouts are taxable. Contributions to an HSA may only be made while the individual is covered by a high-deductible health plan and does not have disqualifying health coverage.

With the onset of health reform, the IRS has indicated that these types of account-based programs generally cannot be offered as stand-alone benefits (due in part to concerns about circumventing health reform requirements), but instead must be offered only in conjunction (or “integrated”) with a health reform-compliant group health plan. However, the 21st Century Cures Act recently created a new type of HRA, the “qualified small employer health reimbursement arrangement,” that may be adopted as a stand-alone program by certain qualifying small employers. In addition, the Departments of Treasury, Labor, and Health and Human Services jointly issued regulatory guidance in mid-2019 to further govern the use of certain types of HRAs and other account-based group health plans.

The rules governing FSAs, HRAs, HSAs and other consumer-driven health care arrangements are complicated and require careful study before implementing.

Special Rules for Employees Returning from Military Service

Under the Uniformed Services Employment and Re-employment Rights Act (USERRA), employees with military service covered by that act are entitled to certain health plan continuation rights during their period of military service and also are entitled to certain eligibility and coverage rights upon subsequent re-employment. (See Chapter 19, “Veterans’ Re-employment Rights.”)

Medicare Coordination

Group health plans must comply with a number of requirements affecting the coordination of plan benefits with Medicare. Generally, Medicare must be the secondary payer and the plan the primary payer with respect to active employees age 65 or older and their spouses age 65 or older. An employer cannot give a participant the option to make Medicare primary payer and the plan secondary payer, although participants may elect to waive plan coverage and retain Medicare as their only health coverage. Plans with 100 or more participants must generally provide that Medicare is the secondary payer and the plan is primary payer with respect to active employees who are disabled within the meaning of the Social Security Act. Those individuals do not have the option of electing Medicare as primary payer.

Medicare Part D Prescription Drug Benefit

Medicare includes a voluntary prescription drug benefit under Medicare Part D. Included in Part D is a subsidy for employers who provide prescription drug benefits to Medicare-eligible individuals that are actuarially equivalent to the benefits offered under Medicare Part D. The government will pay an employer that sponsors a qualifying prescription drug plan a tax-free subsidy based on the amount of qualifying enrollees’ allowable annual prescription drug costs, provided the employer makes annual and timely applications for the subsidy. Alternatively, the government will coordinate the Medicare Part D benefit with the benefit an employer provides to Medicare-eligible individuals in a variety of ways. An employer who provides prescription drug benefits to Medicare-eligible individuals (whether or not they are retirees) must provide an annual notice to these individuals regarding the Medicare Part D program. Health reform is making several changes with Medicare Part D, including reducing the value of the employer subsidy and enhancing benefits by closing the “donut hole” (the formula’s third cost-sharing level, which requires individuals to pay 100% of drug costs until reaching the catastrophic level, where the individual’s share drops to 95%). Health reform has attacked the donut hole in stages:

1. For 2010, the federal government gave \$250 rebates to cover donut hole expenses.
2. Phasing in from 2011 to 2020, drug companies must give discounts on donut hole drug

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purchases, starting at 50% for brand-name drugs and culminating by 2020 in 75% discounts on both brand-name and generic drugs. (Some aspects of this were accelerated under the Bipartisan Budget Act of 2018).

Provision of Benefits to an Employee's Children

Group health plans must recognize and follow any qualified medical child support order (QMCSO). A QMCSO is a court or state administrative agency order that requires a group health plan to provide health benefits to a plan participant's child. Typically, plans exclude from coverage an employee's dependent children if the employee is not the custodial parent or does not provide financial support to the children. Once a plan administrator determines that a court order is a QMCSO, then the plan must follow it and cover the otherwise excluded child. To determine whether a court or administrative order is a valid QMCSO, the plan administrator must make sure that it contains all of the information required by law. Plans also must establish written procedures for handling and processing court orders that are potential QMCSOs.

A special qualified medical child support order is the National Medical Support Notice. The notice is to be used by state agencies to notify an employer that a court or administrative agency has issued an order requiring the employer's group health plan to provide health coverage to the child of a noncustodial parent-employee of the employer. The notice is several pages long and consists of two parts, one that addresses the employer and one that addresses the plan administrator. Employers and plan administrators must respond to the notice within time limits prescribed by law.

In addition to following qualified medical shield support orders, group health plans must treat children placed in a participant's home for adoption the same as they treat a participant's natural children, even if the adoption is not final. Further, plans may not restrict the coverage provided to placed children solely on the basis of a pre-existing condition.

HIPAA Portability

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) was designed to improve access to health care and promote administrative simplification by, among other things, regulating limitations on pre-existing conditions, limiting evidence of insurability requirements, and imposing guaranteed renewability provisions for health plans.

Under HIPAA, health plans (including self-insured plans) with two or more participants were required to adhere to restrictions on how pre-existing conditions limitations were applied. As of 2014, health reform has effectively eliminated the use of pre-existing condition limitations in most types of health plans (except for a narrow category of grandfathered, individual policies).

HIPAA also required plans and insurers to provide written certifications of creditable coverage, plan waiting periods, and HMO affiliation periods to individuals losing coverage under a health plan. Those certification requirements have also generally been phased out as part of health reform. In certain circumstances, HIPAA requires health plans to permit otherwise eligible employees and dependents who initially decline enrollment in the plan because of other health coverage to enroll in the plan when they lose that other health coverage regardless of a plan's enrollment restrictions.

HIPAA also prohibits a health plan from basing eligibility to enroll on an individual's health status, including the individual's medical history, genetic information and claims experience. This prohibition

applies to late enrollees as well. A health plan also may not require an individual to pay a higher premium or contribution for coverage because of the individual's health status.

Furthermore, HIPAA requires insurers in a state's small group insurance market to accept every small employer in that state who applies. Similarly, once an insurer begins providing coverage in the large or small group markets, the insurer must renew that coverage without regard to a group's claims experience, with a few exceptions, including the failure to pay premiums and fraud or material misrepresentations by the insured.

Finally, HIPAA imposes restrictions on the handling of medical records by health care providers, health plans, and repositories of health care information that are intended to preserve the confidentiality of those records.

HIPAA Privacy and Security

Privacy and security requirements are another addition to the world of health plan regulation. As access to health care and administrative simplification improved with the advent of HIPAA's portability requirements, privacy and security became a concern. The Department of Health and Human Services adopted two sets of regulations to address the concern. The Privacy Rule requires covered entities to make administrative and operational changes to protect the privacy of protected health information. The Security Rule sets forth general physical and technological requirements to secure electronic protected health information. More recently, Congress has added related requirements to notify individuals of security breaches. Almost all employer-sponsored group health plans are subject to the Privacy, Security, and Security Breach Rules, though the compliance requirements vary depending upon the nature of the plans. Employers are not directly subject to the Privacy, Security, and Security Breach Rules, but they are responsible for ensuring that their health plans are in compliance.

Newborns' and Mothers' Health Protection Act

Health plans must provide minimum hospital stays for childbirth. Unless the attending physician, in consultation with the mother, decides otherwise, health insurers and employer plans may not restrict benefits for the mother or the newborn child to periods less than 48 hours for a normal delivery and 96 hours for a cesarean delivery. The act also prohibits insurers and plans from providing monetary inducements to mothers or physicians to encourage stays shorter than the minimums.

Mental Health Parity and Addiction Equity Act

For health plans with more than 50 employees, the Mental Health Parity and Addiction Equity Act requires that a health plan cover mental health and substance use disorder benefits on the same basis as medical/surgical benefits. The legislation does not, however, require a plan to provide mental health or substance use disorder benefits.

Women's Health and Cancer Rights Act

This law requires group health plans that provide benefits for mastectomies to provide coverage for breast reconstruction and prostheses after the mastectomy. The act also requires that plan sponsors give participants written notice of their mastectomy-related benefits annually. The Department of Health and Human Services has issued a model notice that can be used for this purpose.

Genetic Information Nondiscrimination Act (GINA)

The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits group health plans from discriminating based on genetic information. Under GINA, a group health plan may not request or use genetic information for the purpose of determining eligibility for coverage or an individual's cost of coverage under the plan. The law also prohibits most employers from making employment decisions based on genetic information.

Michelle's Law

Michelle's Law requires group health plans to provide to a dependent child/student extended coverage for one year after beginning a medically necessary leave of absence (or until coverage would otherwise terminate). In general, the student on medical leave must be entitled to the same coverage as a student continuing enrollment. Health reform's coverage expansion for dependent children (which generally requires coverage until age 26, regardless of student status) has essentially superseded any practical impact of Michelle's Law.

Group-Term Life Insurance

Internal Revenue Code § 79 provides that, for the cost of the first \$50,000 of group-term life insurance coverage to be excludable from the income of key employees, and for the cost of coverage above that amount to be taxed based on the cost tables in Internal Revenue Service regulations (rather than the actual cost, which would be higher), a group-term life insurance plan must meet certain nondiscrimination requirements. Specifically, the plan cannot discriminate in favor of key employees regarding eligibility to participate. Further, the type and amount of benefits available under the plan cannot discriminate in favor of participants who are key employees.

Cafeteria Plans and Other Constructive Receipt Issues

A tax principle known as "constructive receipt" generally provides that an employee is taxed on wages when he or she has the right to receive them, even if he or she chooses, instead, to postpone the wages or to receive their equivalent in non-taxable benefits. Code § 125 creates an express statutory exception to the doctrine of constructive receipt, which allows employers to offer employees a choice between taxable and certain nontaxable benefits.

A cafeteria plan under Code § 125 must be in writing. The plan generally may not permit employees to change their elections during a plan year unless the change is on account of, and consistent with, a change in family or employment status (for example, the loss or addition of a dependent, a change in the employee's spouse's employment status or a change in the employee's status from full-time to part-time or vice versa).

The plan must offer employees a choice between certain qualified nontaxable benefits and cash (including certain taxable benefits). The qualified nontaxable benefits that may be offered under a cafeteria plan include:

- coverage under an accident or health plan;

- group-term life insurance coverage up to \$50,000;
- group-term life insurance coverage that is includable in gross income solely because the death benefit payable under the coverage is in excess of the \$50,000 limit under Code § 79;
- benefits under dependent care assistance programs;
- elective contributions to a 401(k) plan;
- adoption assistance; and
- benefits under a medical expense reimbursement plan.

Cafeteria plans may also offer, in addition to cash, certain benefits purchased with after-tax employee contributions, such as additional vacation days.

A cafeteria plan must meet certain nondiscrimination requirements. Specifically, the plan cannot discriminate in favor of highly compensated individuals as to eligibility to participate, or in favor of highly compensated participants as to contributions and benefits. Also, the statutory nontaxable benefits provided to participants who are key employees cannot exceed 25% of the total statutory nontaxable benefits provided for all employees under the plan.

A medical expense reimbursement arrangement offered under a cafeteria plan must exhibit the risk-shifting characteristics of insurance. This means that the employee must be able, at any time during the plan year, to draw upon the full amount he or she has elected to receive under the arrangement (minus any previous reimbursements), irrespective of the amount of contributions actually made to the arrangement as of that date. In other words, the plan cannot limit the amount of medical reimbursement available at any time to the amount of contributions that have been credited as of that date to the employee's medical reimbursement account. (These risk-shifting requirements do not apply to dependent care assistance accounts.)

Other Plans

Severance Pay Plans

Severance pay plans are subject to ERISA, generally as welfare plans. This means that severance pay plans must be set forth in writing, and participants must be provided with summary plan descriptions of the plans. One of the most common types of disputes arising for severance pay plans concerns whether employees are entitled to severance pay in connection with the sale of their employer's business to an unrelated entity that continues the business as a going concern. Sellers that want to avoid liability for severance pay in such cases should ensure that their severance pay plans expressly provide that severance pay is not payable in the event of separation from service on account of the sale of the employer's assets or business where the employees become employed by the purchaser.

Vacation and Other Paid Time Off

As a general rule, vacation plans are not subject to ERISA if they are funded from the employer's general assets. They are, however, covered by Indiana law and may have unexpected tax consequences. Under Indiana law, paid vacation and similar paid time off accrue ratably throughout the year, and terminated employees are entitled to payment for unused accrued vacation pay, unless a clear employer policy provides

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otherwise. Employers who do not want vacation pay to accrue until the completion of a vacation year or who do not want to pay terminated employees for accrued unused vacation pay must formulate clear, written vacation pay policies and ensure that they are publicized (for example, through their distribution in an employee handbook) to affected employees.

Employee Assistance Programs

Many employers offer programs under which employees can obtain counseling for substance abuse or marital, family or mental health problems. These programs, unless they are carefully structured, will be employee benefit programs subject to ERISA for which the employer must have a written plan document, file annual reports and distribute summary plan descriptions to participants.

Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA)

Requirements

COBRA's health plan continuation coverage requirements are among the rules most often violated by employers. In normal usage, the term "COBRA" refers to a portion of the Consolidated Omnibus Budget Reconciliation Act of 1985 that requires employers who normally employ 20 or more employees to offer their employees, spouses and dependents who would otherwise lose group health coverage (including dental, vision or employee assistance) as a result of a qualifying event (such as termination of employment or divorce) the option of purchasing continuation health coverage. The length of time an employee is eligible for COBRA benefits depends upon a variety of circumstances (described in the following text) and can be for a period of 18, 29 or 36 months.

Failure to comply with COBRA can be costly, subjecting the employer to hefty excise taxes, ERISA penalties of up to \$110 per day, and civil suits under which plans may be liable for the benefits that COBRA required them to provide, as well as attorneys' fees and costs. The following are among COBRA's requirements.

Initial COBRA Notices

Employees and their spouses must receive an initial notice of their COBRA continuation coverage rights at the time the plan first becomes subject to COBRA or, if later, when the individuals first become covered by the plan. The initial notice must meet certain requirements specified by the Department of Labor (DOL) and must generally be mailed to the participant and spouse at their last known addresses (one notice will suffice if they reside together). The DOL has issued a model initial notice that may be adopted for use by most employers. A copy of the model notice may be obtained on the DOL's web site.

Definition of Qualifying Event

A "qualifying event" is one of the following events if, under the terms of the plan, the event results in a qualified beneficiary losing normal plan coverage:

- The death of a covered employee

- The termination (voluntary or involuntary) of a covered employee's employment for a reason other than his or her gross misconduct. (The Internal Revenue Service has not defined gross misconduct for COBRA purposes. Courts considering the issue generally have looked to the definition of misconduct applied under state law to determine whether a former employee is entitled to unemployment compensation benefits. Indiana unemployment compensation law defines gross misconduct as admission or conviction of a crime.)
- Reduction in the covered employee's hours of employment other than a leave under the Family and Medical Leave Act. (The reduction in hours may be either voluntary or involuntary. A reduction in hours because of a strike, lockout, or other work stoppage is a qualifying event if it causes the covered employee to lose coverage under the plan.)
- A covered employee's entitlement to Medicare benefits under Title XVIII of the Social Security Act
- A covered employee's divorce or legal separation from his or her spouse
- A dependent child ceasing to be a dependent child of the covered employee under the plan's generally applicable eligibility requirements
- A bankruptcy proceeding involving the employer from whom the covered employee has retired

Qualifying Event Notices

COBRA notices also must be distributed to a covered employee and his or her covered spouse and dependents upon the occurrence of a qualifying event. If the employee does not have a covered spouse or dependents, the COBRA notice may be hand-delivered to him or her at work. Otherwise, the notice must be delivered or mailed to the employee and the spouse at their last known addresses. One mailing for the entire family suffices if they all reside at the same address. When a qualifying event occurs, the employer has 30 days to notify the plan administrator, and the plan administrator then has 14 days to notify the employee, spouse and dependents. The DOL has also issued a model qualifying event notice that may be adopted for use by most employers. A copy of the model notice may be obtained on the DOL's web site.

Election and Duration of Coverage

To elect continuation coverage, an individual entitled to COBRA must complete and return an election form within 60 days after the later of:

- the date he or she would lose regular coverage; or
- the date that the employer's qualifying event notice is sent.

If an individual timely elects continuation coverage, that coverage must be identical to the coverage provided to similarly situated active employees and their families.

If an individual elects to continue his or her coverage, that individual has 45 days from the date the election form was filed to pay the first premium. The following are two examples:

1. An individual completes and returns the election form on day one of his or her eligibility to do so. The first premium payment will then be due in 45 days. The amount of premium required would be for 46 days.
2. An individual completes and returns the election form on day 60 of his or her eligibility to do so. The first premium payment will be due 45 days from the date of filing. The premium amount will be due for 105 days of coverage.

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Generally, an individual entitled to COBRA has the opportunity to maintain continuation coverage for three years unless the employee loses regular health coverage because of a termination of employment or reduction of hours. In the case of termination of employment or reduction of hours, the required continuation coverage period is 18 months.

However, if the employee, his or her spouse, or dependent is determined (under Title II or Title XVI of the Social Security Act) to be disabled within the first 60 days of his or her COBRA coverage period and the employee provides the plan administrator with a notice of that determination within 60 days of the date the determination is made, the required continuation coverage period is 29 months, rather than 18 months.

If, during the initial 18-month COBRA coverage period, a second qualifying event occurs (e.g., a death or divorce), the original 18-month period is extended to 36 months from the date of the original qualifying event for COBRA recipients who were entitled to COBRA as of the first qualifying event and were still covered by the plan at the time of the second qualifying event. The 36, 29 or 18 months of continuation coverage will be cut short, however, for any of the following reasons:

- Employer no longer provides group health coverage to any of its employees (coverage will end on the date the employer stops providing group health coverage)
- COBRA recipient fails to pay the premium for his or her continuation coverage within 30 days of the date it is due (coverage will end on the first day of the month for which the payment was not timely made)
- COBRA recipient becomes covered under another group health plan that does not contain any exclusion or limitation with respect to any pre-existing condition of the recipient (coverage will end on the date the new coverage begins)
- COBRA recipient becomes entitled to Medicare (coverage will end on the date the recipient becomes entitled to Medicare)
- A final determination is made that the COBRA recipient is no longer disabled under Title II or Title XVI of the Social Security Act (coverage will end on the date that the recipient ceased to be disabled)

At the end of the 18-month, 29-month or three-year continuation coverage period, the COBRA recipient must be allowed to enroll in any individual conversion health plan that is otherwise generally available under the plan within 180 days.

Payment of COBRA Premiums

A group health plan subject to COBRA may not require COBRA recipients to pay their premiums for COBRA coverage before 45 days from the date of the election of COBRA continuation coverage. COBRA notices should be reviewed carefully to make sure that they do not create a false or misleading impression that payment is required at the time of election or any time before the expiration of 45 days from the date of the election. COBRA notices, in referring to the right to cut off COBRA coverage for failure to pay premiums in a timely manner, should specifically mention that the right to cut off coverage arises only when payment is not made within 30 days of the date that it is due.

Separate Elections

A group health plan subject to COBRA must permit each qualifying beneficiary to make a separate election. For example, if a former employee, his or her spouse, or other dependents are all entitled to elect COBRA coverage, each person may make a separate election whether or not to receive the COBRA

coverage. If dental, vision or employee assistance coverage is offered through separate plans, separate elections will apply to each type of coverage.

Other Notices

If a qualifying beneficiary requests COBRA coverage but the coverage is not available to him or her (e.g., he or she failed to timely elect it), the plan administrator must notify the person that the coverage is not available. If COBRA coverage is cut short, before the end of the maximum coverage period, the plan administrator must notify the person of the termination of coverage.

Controlled Groups and Affiliated Service Groups

The most fundamental question affecting employee benefit plans is, “Who is the ‘employer’ maintaining the plan?” For purposes of most Code and ERISA provisions governing employee benefit plans, related entities must be aggregated and treated as one employer. Failure to recognize the existence and effects of aggregation rules can cause serious compliance problems for an employer’s benefit plans.

Aggregation rules apply to sole proprietorships, partnerships and tax-exempt organizations, as well as taxable corporations. Also, for purposes of determining who owns a particular interest, certain attribution rules apply. For example, one spouse generally is treated as owning interest owned by the other spouse; interests owned by a trust are generally attributed to the beneficiaries of the trust.

Parent/Subsidiary Relationships

Two businesses must be aggregated and treated as a single employer if one owns at least 80% of the other.

Brother/Sister Relationships

Two or more business entities must be aggregated if the same five or fewer individuals, estates, or trusts own at least 80% of each entity and more than 50% of each entity, taking into account the ownership interest of each person only to the extent that the interest is identical with respect to each entity.

Example: John owns 60% and Mary owns 40% of Corporation C. In addition, John is a 40% partner and Mary is a 60% partner in Partnership P. Corporation C and Partnership P must be treated as a single employer because John and Mary together own at least 80% (in this case, 100%) of both Corporation C and Partnership P, and more than 50% (in this case, 80%) of each entity, taking into account their ownership interests only to the extent they are identical with respect to each entity.

Related Tax-Exempt Organizations

Although controlled group rules normally turn on ownership concepts, those concepts do not apply to tax-exempt organizations, which have no shareholders or other owners. The IRS has adopted regulations to provide that a tax-exempt organization must be aggregated with another tax-exempt organization if 80% of

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the directors or trustees of one organization consist of representatives (trustees, directors, or employees) of, or are controlled (through the power of removal from office) by, the other organization.

Affiliated Service Groups

All members of an affiliated service group must be aggregated and treated as a single employer. The affiliated service group rules affect service organizations, defined as corporations, partnerships, sole proprietorships, or other organizations that have as their principal business the performance of services. Historically, the affiliated service group rules were targeted at, and affected primarily, physicians, lawyers and other professional service providers, but they often affect other types of service organizations as well.

Effects of Aggregation

If an employer has to be aggregated with other related entities, that aggregation can have a substantial effect on the employer's employee benefit plans. Aggregation can affect a plan's compliance with nondiscrimination rules, COBRA applicability, and status as a voluntary employee beneficiary association (VEBA), as well as a health plan's status as a multiple employer welfare arrangement (MEWA).

This chapter was edited by Phil Gutwein, Partner, and Mark Rosenfeld, Associate.

Chapter 16

Worker's Compensation and Occupational Diseases

The worker's compensation system in Indiana, as in virtually all states, is a system of insurance designed to provide an expeditious remedy for injury or death that an employee or his or her dependents can access without having to resort to complicated legal procedures. The Indiana Worker's Compensation Board oversees enforcement of the Indiana Worker's Compensation and Occupational Disease Act.

Who Must Carry Worker's Compensation Insurance?

In general, every Indiana employer using the services of another person for pay (with the exception of certain specified employers) must insure and keep insured the employer's worker's compensation liability by either purchasing worker's compensation insurance through a company authorized to transact worker's compensation insurance business in the state of Indiana or, for employers seeking to self-insure, by furnishing the Worker's Compensation Board with an application and satisfactory proof of the employer's financial ability to pay directly the compensation in the amount and manner when due as provided in the worker's compensation statutes. The application must be approved by the Worker's Compensation Board. If approved, the Board will issue a certificate of insurance to the employer. The Indiana Worker's Compensation Board requires annual renewal of self-insurance certificates.

Coverage

The term "employee" is defined to include every person, including minors, in the service of another, under any contract of hire or apprenticeship (written or unwritten). This definition excludes one whose employment is both casual and not in the usual course of the trade, business, occupation or profession of the employer.

Whether the owners and officers of an employer are "employees" for purposes of worker's compensation largely depends on the legal form of the business. An executive officer (elected or appointed) of a corporation (other than a municipal corporation or governmental subdivision, or a charitable, religious, educational or other non-profit corporation) is an employee for purposes of worker's compensation. An officer of a corporation who is an employee or owner of that corporation may elect not to be an employee for purposes of worker's compensation. Executive officers of municipal corporations, government subdivisions and charitable, religious, educational or other non-profit corporations may be brought within coverage of the employer's insurance contract by specifically including the executive officers in the contract of insurance.

An owner of a sole proprietorship may elect to include himself or herself as an employee for purposes of worker's compensation if the owner is actually engaged in the business of the proprietorship. If the owner makes this election, the owner must provide his or her insurance carrier and the Worker's Compensation Board with written notice of this election. Partnerships may elect to include partners as employees for

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purposes of worker's compensation if the partners are actually engaged in the business of the partnership. Again, if this election is made, a written notice of the election must be provided to the partner's/partnership's insurance carrier and to the Worker's Compensation Board.

The partner or sole proprietor will not be considered an employee until the notice is received. If the owner of a sole proprietorship or a partner in a partnership is an independent contractor in the construction trades and does not elect to be included as an employee by notifying the insurance carrier and the Worker's Compensation Board with written notice of the selection, he or she must obtain an affidavit of exemption in order to elect exemption from compensation provisions.

Real estate professionals are not considered employees for purposes of the Worker's Compensation Act if they are licensed real estate agents, substantially all of their pay is directly related to sales volume and not the number of hours worked, and they have written agreements with real estate brokers stating that they are not to be treated as employees for tax purposes.

An owner-operator who provides a motor vehicle and the services of a driver under a written contract to a motor carrier is not considered an employee of the motor carrier. The owner-operator may elect to be covered and have his or her drivers covered under a worker's compensation insurance policy or authorized self-insurance that insures the motor carrier if the owner-operator pays the premiums as requested by the motor carrier.

Finally, a member or manager in a limited liability company may elect to be included as an employee if the individual is actually engaged in the limited liability company business. An election must be served upon the insurance carrier and the Worker's Compensation Board to be valid.

Independent Contractors

Classification of Workers

For purposes of the Indiana Worker's Compensation and Occupational Diseases Acts, the term "employee" does not include independent contractors. However, simply because a worker is called an independent contractor does not necessarily mean that he or she will be treated as an independent contractor for worker's compensation purposes. Even in situations in which there is a contract for services between an employer and an individual, the fact that the contract specifies that the worker is an independent contractor may not be enough in a subsequent worker's compensation proceeding in which that same contractor argues that he or she was, in fact, an employee of the employer.

This is because Indiana law recognizes that the label given to a worker does not necessarily control the treatment of that worker for worker's compensation purposes. To determine whether a worker should be classified, for worker's compensation purposes, as an independent contractor or an employee, the critical issue is whether the employer has or may exercise control over not only the end result of the work, but also the means and conditions of how that work is performed. In determining whether sufficient control exists to reclassify a worker as an independent contractor, the whole of the terms and conditions of the work relationship must be examined.

In this regard, some of the factors that are reviewed by the Internal Revenue Service in determining whether a worker should be classified as an employee for payroll tax purposes are the same factors that come into consideration for worker's compensation coverage purposes.

Several factors may determine whether a worker should be treated as an employee or an independent contractor for worker's compensation purposes. These factors are described as follows.

- **Nature of the Work.** Does the work normally call for specialized services or expertise? For instance, is the work normally engaged in by professionals or those with special training and/or education? The more specialized the work, the more likely the worker will be considered an independent contractor. However, even specialized types of work can be performed by those who are employees. An example would be the employment of a lawyer by a corporation to handle in-house legal work. The same services, if performed by an outside law firm, would be considered the services of an independent contractor.
- **Right to Discharge.** Does the employer have the right to discharge or fire the worker? Conversely, does the worker have the ability to quit or resign from the employment? In general, Indiana is an employment-at will state. Accordingly, within certain limits, employers may generally discharge an employee for any reason whatsoever. (See Chapter 1, "Employment-at-Will.") However, in a contractual relationship, a contracting party may generally terminate the contract only upon certain specified conditions.
- **Equipment/Machinery.** Does the worker own his or her equipment or have a significant investment in equipment used in the work? If the majority of the equipment that is being used belongs to the worker, the more likely the worker is an independent contractor.
- **Payment.** Does the worker receive payment by the hour, by the week, or by any other interval of time, or is he or she paid by the project? To the extent that a worker is paid by the job rather than by the hour or week, the more the worker appears to be an independent contractor.
- **Employees.** Does the worker hire his own employees or assistants? If so, it is more likely that the worker is an independent contractor.
- **Work for Other Employers.** Does the worker work for other employers? If the worker is employed by more than one employer, there is a better chance that the worker is an independent contractor. However, there may be instances in which the same worker is classified as an employee of more than one employer. Again, the critical issue is whether, after taking all factors into consideration, the employer can exercise control over the worker.
- **Scheduled Hours.** Does the worker have regular and scheduled hours of work? If the worker is required by the employer to report and leave at specified times, rather than as needed on the job, the worker is more likely to be an employee.

This list of factors is not all-inclusive. There may be other factors in particular circumstances that have a bearing on whether a worker should be treated as an employee or as an independent contractor for worker's compensation purposes. Employers should exercise care in uncertain cases. Without worker's compensation insurance coverage, employers of workers who are subsequently deemed to be employees will bear significant costs and risks if such workers are injured out of and in the course of employment.

Affidavit of Exemption

The Worker's Compensation Act provides for certain independent contractors in the construction trades to apply for an affidavit of exemption from the Worker's Compensation Board. An affidavit of exemption certifies that the independent contractor has worker's compensation coverage for employees as required by the Worker's Compensation Act. It also certifies that the independent contractor wishes to be exempt from being able to recover under the worker's compensation policy or self-insurance policy of the person hiring the independent contractor.

The Indiana Worker's Compensation Board requires that all individuals requesting an Independent Contractor Exemption must first undergo verification by the Indiana Department of Revenue. In order to receive an independent contractor exemption certification from the Indiana Worker's Compensation Board, an individual must send an application and \$20 to the Indiana Department of Revenue, at the state Government Complex North Building, Room N105, in Indianapolis. The Department of Revenue will check to ensure all taxes are paid. Upon confirming the payment of taxes, the Department of Revenue provides a certificate to the Indiana Worker's Compensation Board indicating the Board may issue the exemption. Thereafter, the Indiana Worker's Compensation Board will process and provide an exemption to the individual. The exemption becomes effective seven days after it is validated by the Indiana Worker's Compensation Board.

The person hiring the independent contractor must secure a copy of a properly validated affidavit of exemption from the independent contractor. The receipt of a properly validated affidavit by the person hiring the independent contractor shall have the effect of holding the person (and the person's worker's compensation carrier) harmless from all claims.

Hiring an Independent Contractor: Obtaining a Certificate of Insurance

In addition to the issues relating to the proper classification of workers as employees or independent contractors, Indiana employers must be aware of potential worker's compensation liability concerns when hiring independent contractors. Specifically, the Indiana Worker's Compensation Act provides that any corporation, partnership, or person contracting for the performance of work exceeding \$1,000 in value by a contractor subject to the Act shall be liable to the same extent as the contractor for worker's compensation benefits due to an injury or death of any employee of the contractor from the performance of the work covered by the contract, unless the entity contracting the work obtains from the contractor a certificate of insurance showing that the contractor has obtained worker's compensation coverage for its employees. A similar rule applies to any principal contractors, intermediate contractors, or subcontractors that sublet any contract for the performance of any work to a subcontractor without requiring from the subcontractor a certificate from the Worker's Compensation Board demonstrating that the subcontractor has complied with the Worker's Compensation Act. Since July 1, 1997, the Worker's Compensation Board has had authority to make a contractor primarily liable to pay compensation if it determines that an uninsured subcontractor is unable to pay. The contractor may then attempt to recover litigation expenses and attorneys' fees from the uninsured subcontractor. Employers are therefore well advised to require production of a certificate of insurance coverage in any situation that contractual services exceed \$1,000 in amount.

What Is a Covered Injury?

Worker's compensation benefits are payable to employees (or their dependents, in the case of an employee's death) injured by accident arising out of and in the course of the employee's employment. Often, this language is mistakenly construed to mean that if an injury occurs at work, the injury is covered by worker's compensation insurance. However, this may not always be the case.

In the past, employers sometimes denied worker's compensation claims on the basis that the employee's injuries were not caused by an accident or were not caused by an untoward or unexpected event. However, in 1986, the Indiana Supreme Court decided that the "by accident" language of the Worker's Compensation Act would be satisfied if the injury that resulted was unexpected from the standpoint of the employee. That is, an injury occurs by accident if the one who suffers the injury did not intend or expect that injury would, on that particular occasion, result from what he or she was doing. In 1994, the Supreme Court again

clarified the "by accident" language by finding that injuries from intentional torts of an employer are not by accident and are not compensable as worker's compensation injuries. Thus, for purposes of worker's compensation, an injury occurs by accident only when it is intended by neither the employee nor the employer. An injury does not occur by accident if the employer acts with the intent to cause harm to an employee. However, intent means nothing short of deliberate intent to inflict injury, or actual knowledge that an injury is certain to occur. Thus, an employer who acts in the belief that it is causing an appreciable risk of harm may be negligent or, if the risk is great, its conduct may be characterized as reckless or wanton, but it is not intentional. For an injury to be by accident because it was intended by an employer, it must be the employer who harbors the intent, not simply a supervisor, manager or foreman.

Occupational injuries also must arise out of the employment and must arise in the course of the employment to be compensable under the worker's compensation laws. In general, the words "arising out of" refer to the relationship between the employee's injury and his or her employment. Because of the growing incidence of many of the types of claims employers are presented with today, such as carpal-tunnel claims, cumulative trauma disorders, and mental/stress claims, the cause of injury is a disputed issue in many cases. Therefore, for an employee's injury to be compensable, it is critical that it be connected with some element in the workplace that was proven to have caused the injury.

The words "in the course of employment" refer to the time, place and circumstances surrounding the incident that caused the injury. The injury must have occurred in such circumstances that obviously indicate that the time, place and circumstances of the injury made it related to the employment.

Example Situations

The following example situations are provided as a general guide to issues that may arise in certain cases. Please note that all facts of particular cases must be viewed before compensation determinations can be made.

Traveling Employees: In general, injuries sustained by traveling employees during the course of their travels are likely to be found to have arisen out of and in the course of employment, unless there is a deviation from his or her route or an intervening personal errand or event that the employee was engaged in at the time of his or her injury. Generally speaking, where employment requires that the employee be away from home, it is generally held that the employee is within the course of the employment from the time he or she embarks until the time of return home or return to his or her place of business.

Recreational Activities: A wide range of recreational activities sponsored by employers can form the basis of worker's compensation claims by injured employees. Indiana law historically provided that injuries sustained during employer-sponsored recreational activities did not arise out of and in the course of employment. However, the Indiana Supreme Court later reversed this trend. The modern rule appears to be that where the recreation that caused the injury, either directly or indirectly, is sponsored by the employer as a matter of business and not due to altruistic motives, the employer exercises sufficient control over the recreation for the purposes of developing better service and greater efficiency among the employees. Accordingly, the employer obtains a direct business benefit from the recreation sponsored. Therefore, where it is shown

that an employer believed that holding recreational events would be in its best business interest, employee injuries sustained during such recreational activities can form the basis of worker's compensation claims.

Although the Indiana Supreme Court in an older ruling attempted to distinguish between employer-sponsored recreational activities that are sponsored through altruistic motives and those sponsored for business reasons, it appears that overcoming the assumption that an employer-sponsored activity results in improved morale, efficiency, etc., will be difficult.

Parking Lot Injuries: Public policy under the Indiana Worker's Compensation Act favors the construction of making awards for accidents involving the entering and exiting of employees to their work facility, based on the theory that such accidents arise out of and in the course of employment. Some Indiana courts have held that employee parking lots and private drives located within the employer's supervision are extensions of the employer's operating premises. Therefore, accidents occurring in these areas that result from the entering and exiting of employees to a plant will likely fall within the worker's compensation coverage as an employment-related risk.

Lunchtime/Time-off Injuries: Injuries that occur during lunchtime or time-off periods may be subject to compensation under worker's compensation, particularly if the injury occurs on the employer's premises. This is because of the theory that an employee eating his or her lunch on the employer's premises is almost universally considered as being in the course of employment. Food or rest during lunchtime or rest periods is considered essential, and without such rest employees could not efficiently perform for the employer during actual work hours. However, simply because an accident occurs during a lunch or rest period does not mean that the injury is work-related. The employee must still prove that there was a connection between the employment and the injury. For instance, employees who are injured during the lunch hour because they engaged in actions that were specifically forbidden by the employer do not generally sustain an employment-related injury.

Acts of God: An "act of God" generally is interpreted as an act that could not happen by the intervention of man. In general, accidents that occur through acts of God – such as being struck by lightning or injuries sustained during a windstorm – may be compensable if the employee was engaged in work activities at the time of the incident, or if the employee would not have been at the place of the incident but for his or her employment.

Assaults, Battery and Homicide: In general, assaults, battery and homicide committed by fellow employees or unknown third parties upon an employee during the workday or on or near the workplace are compensable under the Worker's Compensation Act. However, if the assault, battery or homicide is committed by a fellow employee, the perpetrator will likely lose his fellow servant protection under Indiana Worker's Compensation Act. Fellow servant protection is available to Employee A if an injury occurred to Employee B as a result of Employee A's negligence or error. Employee A is protected under the Worker's Compensation Act and is immune from suit by Employee B unless it can be shown that the employee causing the injury (Employee A) acted with the intention of producing injury. In such a case, Employee A will lose the benefit of the fellow servant rule. Please note that an Indiana Court of Appeals decision in a case involving an incident of domestic violence occurring in the workplace indicates that an employee who is injured by a third party at work for purely personal reasons (unrelated to work) may be able to sue the employer for such injuries.

Horseplay: Generally speaking, it has been held that injuries resulting from horseplay are employment related if the injured employee was an innocent victim rather an active participant in the horseplay.

Injuries Sustained During Commuting: In general, injuries sustained by employees while commuting to and from work are not compensable as work-related injuries. However, if the injury is sustained during travel required or sanctioned by the employer, such as commuting to a customer's office, the injury is likely to be work related.

Mental Stress Claims: The number of claims for mental injuries brought by employees seeking worker's compensation benefits is on the rise. As is the case with physical injuries, however, employees claiming mental injuries must demonstrate that they suffered an injury by accident and that the accident arose out of and in the course of employment. An employer may not defend mental stress claims simply by claiming that the employee was exposed to no more than the day-to-day mental stress that all employees face. The test is not whether the stress was day-to-day in nature. The test is whether the injury occurred by accident, out of and in the course of employment. The complexities of mental stress claims are many. The primary issue in such cases generally revolves around whether the employee sustained the mental stress or mental injury in his or her employment or whether the stress or mental injury occurred for other reasons. The difficulties concerning the issue of causation in mental stress cases require that employers obtain the services of qualified expert witnesses in disputed cases. In addition, an employee's pre-existing condition, if any, will be an important consideration in assessing the cause (as well as the extent of the injury). The Indiana Supreme Court has held that an employee suffering certain mental injuries such as stress, embarrassment, and humiliation could sue the employer where the employee did not have a disability or impairment as the result of the incident causing the stress, humiliation and embarrassment.

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Employers should bear in mind that the Americans with Disabilities Act Amendment Act (ADAAA) significantly affects an employer's ability to inquire as to an employee's or job applicant's prior medical history. Employers are well advised not to undertake such inquiries unless the inquiries are made through discovery in a case pending before the Worker's Compensation Board or are expressly allowed by the ADA. (See Chapter 6, "Disability Discrimination.")

Cumulative Trauma and Back Injury Cases: Some of the same factors that arise in mental stress injury cases arise in cumulative trauma and back injury cases. Often the dispute in these cases revolves around whether the injury arose out of and in the course of employment. There is no bright-line test for determining whether such injuries are work related in origin. Each case must be decided on its own merits. Obviously, pre-existing conditions and the task that the employee was engaged at the time of the injury will have a direct bearing on whether the injury fairly can be said to be work related.

Exclusive Remedy

Under the Indiana Worker's Compensation Act, an injured employee's exclusive remedy against his or her employer is the receipt of worker's compensation benefits. In general, the employee will not be able to successfully sue the employer for injuries that were sustained out of and in the course of the employment. However, an exception applies if the employee's injuries were caused by the intentional act of the employer, involving an act that was taken with the intent to injure the employee.

This is an extreme situation for which worker's compensation benefits would be inadequate to recompense the employee for injuries and to punish the employer for such conduct. Without such circumstances, however, an employee's sole recourse for benefits is generally through the receipt of worker's compensation benefits. (See the previous discussion of assaults in the workplace and certain mental injury claims.)

Disability Benefits

The term "disability," for purposes of the Indiana Worker's Compensation Act, means the inability of the employee to return to work. Temporary total disability (TTD) benefits are payable during the period of time the employee is temporarily unable to return to regular work. Temporary partial disability (TPD) benefits are paid when an employee is able to return to some limited form of work, such as light duty work, but earns less than he or she earned at his or her regular job prior to the injury. TTD or TPD benefits are payable beginning with the eighth day of disability. Compensation is to be paid for the first seven calendar days of disability only if the employee's disability continues for longer than 21 days. Permanent total disability benefits (PTD) are payable when an employee's injury is so severe that he or she is permanently unable to return to any employment.

Calculation, Payment and Denial of Benefits

Temporary total disability benefits are calculated on the basis of two-thirds of an employee's maximum average weekly wage. Benefits are capped at statutory maximum levels, as shown in the following table.

Worker's Compensation and Occupational Diseases

Table A: Temporary Total Disability Benefits

For Injuries Occurring Between:	Maximum Average Weekly Wage	Maximum Benefit Per Week:
7/1/06 – 6/30/07	\$900	\$600
7/1/07 – 6/30/08	\$930	\$620
7/1/08 – 6/30/09	\$954	\$636
7/1/09 – 6/30/14	\$975	\$650
7/1/14 – 6/30/15	\$1,040	\$693.33
7/1/15 – 6/30/16	\$1,105	\$736.67
On or after 7/1/16	\$1,170	\$780

The employee's average weekly wage is calculated by taking the earnings of the injured employee in the employment in which he or she was working at the time of the injury for the period of time 52 weeks immediately prior to the injury and dividing this amount by 52. In cases where the employee lost seven or more calendar days during the period (even though not in the same week), the employer may calculate average weekly wages based on earnings for the remainder of the 52 weeks remaining after the time lost has been deducted. If the employee's employment before the injury was less than 52 weeks in length, the employee's earnings during the period of actual employment are to be divided by the actual weeks and subparts of weeks the employee was employed to obtain a fair result.

It is important to note that where allowances of any character are made to an employee in lieu of wages as a specified part of the wage contract or agreement, they are to be included in the computation of earnings of the employee. Therefore, items such as overtime, bonuses, tips and room and board must be included in the calculation of earnings.

The first weekly installment of compensation for temporary disability benefits is due 14 days after the disability begins. No later than 15 days from the date that the first installment of compensation is due, the employer or its insurance carrier must pay to the employee or to the employee's dependents all compensation due and must tender a properly completed compensation agreement in a form prescribed by the Worker's Compensation Board. Benefits may be payable for up to 500 weeks, depending upon the severity of the disability.

If the employer denies liability, the employer must inform the Worker's Compensation Board and the employee (or the employee's dependents) of the denial. Notice of denial must be made in writing, in a form prescribed by the Worker's Compensation Board, and must be mailed no later than 30 days after the employer's knowledge of the injury. If the employer is unable to determine whether it has liability to pay compensation within the initial 30-day period, the Worker's Compensation Board may approve an additional 30 days upon written request by the employer or the employer's insurance carrier setting forth reasons why the determination could not be made within 30 days and stating the facts or circumstances necessary to determine liability within an additional 30 days. If the employer or carrier still cannot determine liability, it may file a petition with the Worker's Compensation Board that sets forth the following:

- Extraordinary circumstances precluding determination within the initial 60 days
- Status of the investigation
- Facts necessary to make a determination
- A timetable for completion

Monetary penalties as outlined in Indiana Code § 22-3-4-15 may be assessed against an employer, after notice and hearing, who fails to comply with this requirement.

Discontinuation of Benefits

Once payment of temporary total disability benefits has begun, such payments may not be terminated by the employer unless:

- the employee has returned to any employment;
- the employee has refused to undergo a medical examination or the employee has refused to accept suitable employment requested by the employer;
- the employee has received 500 weeks of temporary total disability benefits or has been paid the maximum compensation allowed;
- the employee is unable or unavailable to work for reasons unrelated to the compensable injuries;
or
- the employee has died.

The employer must notify the employee in writing of its intention to terminate the payment of temporary total disability benefits and of the availability of any suitable light duty employment opportunities on a form approved by the Worker's Compensation Board. If the employee disagrees with the proposed termination of the payment of such benefits, the employee must then give written notice of disagreement to the Worker's Compensation Board and the employer within seven days after receipt of the notice of the employer's intention to terminate benefits. It is recommended that, for this reason, employers send any notices of their intention to terminate benefits by certified mail, return receipt requested. If the board and employer do not receive a notice of disagreement from the employee under this section, the employee's temporary total disability benefits may be terminated.

If, on the other hand, the board and employer receive the employee's notice of disagreement, the Worker's Compensation Board must contact the parties and attempt to resolve the disagreement. If the Worker's Compensation Board is unable to resolve the disagreement within 10 days of receipt of the employee's notice of disagreement, the board is to immediately arrange for the evaluation of the employee by an independent medical examiner (IME). The IME will be appointed by mutual agreement of the parties or if the parties are unable to agree, the IME will be appointed by the board. If the IME determines that the employee is no longer temporarily disabled or is still temporarily disabled but can return to employment that the employer has made available, or if the employee fails or refuses to appear for examination by the IME, temporary total disability benefits may be terminated. If either party disagrees with the opinion of the IME, the party may request a hearing before the board.

The employer is not required to continue to pay the temporary total disability benefits for more than 14 days after the employer's proposed termination date unless the IME determines that the employee is temporarily disabled and is unable to return to any employment that the employer has made available. If it is determined that temporary total disability benefits were overpaid, the overpayment shall be deducted from any benefits due the employee for any permanent partial impairment (PPI). If there are no PPI benefits due the employee, or the benefits due to the employee do not equal the amount of the overpayment, the employee shall be responsible for paying any overpayment that cannot be deducted from the benefits due the employee.

Second Injury Fund

Indiana's Second Injury Fund is misnamed. This is because an employee need not suffer a second or subsequent injury to apply for benefits from the fund. Employees who have received the maximum award payable for their injuries are eligible to apply for additional benefits from the fund if they are unable to return to gainful employment due to the fact that their injuries are so severe that they've become permanently totally disabled. The award for benefits from the fund may not exceed three years in duration. However, the injured employee may reapply or renew his or her application for successive periods not exceeding three years per period. Theoretically, such renewals could continue until the death of the injured employee. Under a provision inserted on July 1, 1997, when a compensable injury results in amputation, enucleation of an eye or loss of teeth, the employer is required to provide braces, prosthodontics or artificial members, but the cost of repair and replacement of these artificial members is paid out of the fund upon order of the Worker's Compensation Board.

Additionally, when a compensable injury results in damage to an artificial member, brace, implant, eyeglasses, prosthodontics, or other medically prescribed device, the employer must repair or replace the device.

Impairment Benefits

Calculation of Benefits

Impairment benefits are payable to an employee for the loss of bodily function. Impairment benefits are to be paid based upon a schedule setting forth degrees of impairment under the Worker's Compensation Act. A schedule listing the permanent partial impairment compensation per degree of impairment is listed on the following page.

Table B: Permanent Partial Impairment Compensation per Degree of Impairment

Accident Date	Degrees	Dollars per Degree of Impairment
7/1/10 through 6/30/14	1-10	\$1,400
	11-35	\$1,600
	36-50	\$2,700
	51-100	\$3,500
7/1/14 through 6/30/15	1-10	\$1,517
	11-35	\$1,717
	36-50	\$2,862
	51-100	\$3,687
7/1/15 through 6/30/16	1-10	\$1,633
	11-35	\$1,835
	36-50	\$3,024
	51-100	\$3,873

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On or after 7/1/16	1-10	\$1,750
	11-35	\$1,952
	36-50	\$3,186
	51-100	\$4,060
<i>*For amputations occurring on or after 7/1/97, the dollar value of the award is doubled.</i>		

A partial schedule detailing the maximum degrees of impairment assigned to various affected body parts is as follows.

Table C: Maximum Degrees of Impairment Assigned to Various Affected Body Parts

Affected Body Part	Maximum Degree Value
Leg above knee	45
Foot below knee	35
Third toe	4
Big toe	12
Arm above elbow	50
Hand below elbow	40
Index finger	8
Thumb	12

Translated into dollar values, Table C is as follows:

Table D: Maximum Impairment Awards for Various Affected Body Parts

Affected Body Part	7/1/10 – 6/30/14 Maximum Award	7/1/14 – 6/30/15 Maximum Award	7/1/15 – 6/30/16 Maximum Award	On or After 7/1/16 Maximum Award
Leg Above Knee – 45 degrees	\$70,000	\$75,265	\$80,555	\$85,820
Foot Below Knee – 35 degrees	\$54,000	\$58,095	\$62,205	\$66,300
Third Toe – 4 degrees	\$5,600	\$6,068	\$6,532	\$7,000
Big Toe – 12 degrees	\$17,200	\$18,604	\$20,000	\$21,404
Arm Above Elbow – 50 degrees	\$94,500	\$101,025	\$107,565	\$114,090
Hand Below Elbow – 40 degrees	\$67,500	\$72,405	\$77,325	\$82,230
Index Finger – 8 degrees	\$10,720	\$10,920	\$11,040	\$11,200
Thumb – 12 degrees	\$16,490	\$16,790	\$16,970	\$17,200

Note: For permanent impairments resulting in amputation or loss by separation (after July 1, 1997), the dollar value of the award is doubled.

As an example, calculation of the amount of benefits payable for a leg injury is as follows:

- Assume a PPI rating of 75% to the leg above the knee.
- The maximum degree value for the leg above the knee = 45 degrees. (See Table C.)

Worker's Compensation and Occupational Diseases

- Assume the injury occurred after July 1, 2016.
- 45 degrees x 75% = 33.75 degrees
- Refer to Table B: 33.75 degrees = 10 degrees (\$1,750 ea.) + 23.75 degrees (\$1,952 ea.)
- 10.00 degrees x \$1,750 = \$17,500
- + 23.75 degrees x \$1,952 = + \$46,360
- 33.75 degrees = \$63,860
- \$63,860 divided by \$780 (maximum TTD rate, see Table A) = 81.87 weeks

Disability Benefits That Exceed 125 Weeks in Duration

The Worker's Compensation Act provides that, in cases where the injured employee is paid temporary total disability benefits for a period of time exceeding 125 weeks in duration, the employer is allowed a credit or offset against any impairment award or amount due the employee. The credit or offset is calculated by taking the amount of TTD benefits the employee received in excess of 125 weeks and subtracting this excess amount from the impairment award.

Medical Benefits

Employer Choice of Physician

Under current Indiana law, the employer may direct an employee to a physician of the employer's choice for treatment of a work-related injury. The employer must provide and pay for such surgical, hospital and nursing services and supplies as the attending physician or the Worker's Compensation Board may deem necessary. If the employee is required or requested by the employer to submit to treatment outside the county of employment, the employer shall also pay reasonable expenses of travel, food and lodging necessary during the travel, but this should not exceed the amount paid by the state to its employees under the state travel policies and procedures at the time of the employee's travel. If the treatment or travel to or from the place of treatment causes a loss of working time to the employee, the employer must reimburse the employee for the loss of wages using the basis of the employee's average daily wage.

If the employee unjustifiably refuses to accept such medical services and supplies when provided by or on behalf of an employer, the employee's refusal shall bar the employee from all compensation payable during the period of refusal. Also, the employee's right to prosecute any proceeding under the Worker's Compensation Act shall be suspended and abated until the employee's refusal ceases. In such cases, the employee must be served with a notice setting forth the consequences of refusal under the Worker's Compensation Act. This notice must be in a form prescribed by the Worker's Compensation Board. In addition, the employer is not required to pay compensation for any permanent total impairment, permanent partial impairment, permanent disfigurement or death for that portion of the impairment, or disfigurement or death that is the result of the failure of the employee to accept the treatment, services and supplies provided by the employer.

The employer may permit an employee to have treatment for injuries by spiritual means or prayer in lieu of the services of a physician or surgeon.

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The employee may seek treatment from a physician other than that provided by the employer in emergency situations that include the following:

- Situations where the employer fails to provide an attending physician or surgical, hospital or nursing services and supplies
- During treatment by spiritual means or prayer
- Because of any other good reason

The reasonable cost of that physician's services and supplies shall, subject to the approval of the Worker's Compensation Board, be paid by the employer. The employer and the employer's employees may enter into an agreement binding the parties to medical care furnished by health care providers selected by the parties by agreement before or after the injury. The parties also may agree to accept the findings of a health care provider who was chosen by agreement. As with all such agreements, these agreements must be approved by the Worker's Compensation Board.

How Long Must Medical Benefits Continue?

Under Indiana law, medical benefits are to continue as long as is necessary to alleviate or treat the employee's injury. Of course, the primary consideration will be the care provider's assessment of the need for such treatment. It has been held that such treatment may, in fact, be for the life of the employee where necessary.

Independent Medical Examinations

The services of an independent medical examiner (IME) may be requested by the employee or the employer in cases involving such disputes as treatment, diagnosis, or any matter involving provision of services or supplies. Following issuance of the IME report, any further disputes may be referred to the Worker's Compensation Board for judgment.

Any employer requesting an examination of any employee residing within Indiana must pay, in advance of the time fixed for the examination, sufficient money to defray the necessary expenses of travel by the most convenient means to and from the place of examination, and the cost of meals and lodging necessary during the travel. If the method of travel is by automobile, the mileage rate to be paid by the employer must be the rate currently being paid by the state to its employees under the state travel policies and procedures established by the department of Administration and approved by the Office of Management and Budget. If the examination or travel to or from the place of examination causes any loss of working time on the part of the employee, the employer must reimburse the employee for the loss of wages upon the basis of the employee's average daily wage. When any employee injured in Indiana moves outside Indiana, the travel expense and the cost of meals and lodging necessary during the travel must be paid from the point in Indiana nearest to the employee's then-residence to the place of examination. No travel and other expenses must be paid for any travel and other expenses required outside Indiana.

Employer Defenses

The following is a list of defenses that may arise in specific cases. This discussion is not meant to be an all-inclusive list of employer defenses but is provided as a guide to defenses that may apply in a given case.

Affirmative Defenses

The Indiana Worker's Compensation Act provides that employers are not responsible for compensation in cases involving an injury or death due to the employee's:

- self-inflicted injury;
- intoxication;
- commission of an offense;
- knowing failure to use a safety device;
- knowing failure to obey a reasonable written or printed rule of the employer that has been posted in a prominent position in the place of work; or
- knowing failure to perform any statutory duty.

The employer bears the burden of proof of any of these conditions. In addition, the rules of the Worker's Compensation Board of Indiana require that the board and the plaintiff/employee be provided notice of the employer's intention to raise any of these affirmative defenses at least 45 days prior to the hearing in the matter.

Causation

As indicated previously, causation is often an issue in worker's compensation cases. Therefore, it is important for the employer to immediately document the time, place and circumstances of the injury and to find out if there were any witnesses to the incident causing the injury. Proper documentation is critical to preserve the statements of witnesses whose memories are fresh regarding the incident.

Obviously, care should be exercised by the employer in questioning the injured employee. In some cases, because of the lack of witnesses or lack of information regarding the alleged incident, employers may be required to secure the services of outside professionals such as medical experts, psychiatric and psychological experts, occupational hygienists and experts, and, in some cases, private investigators to make determinations regarding the causation of an alleged work-related injury.

Degree or Extent of Injury

In some cases, the employer and employee disagree over the extent of injury to the employee. In such cases, employers must provide medical evidence sufficient to prove the employer's position regarding the extent of injury. In general, employees are incompetent to testify as to the length of time they believe they will be impaired. Such employees may, however, testify as to how extensive the injury is (e.g., amount of pain, etc.).

Refusal of Employee to Submit to Treatment/Examination

As indicated previously, the refusal of an employee to submit to an employer-provided treatment/examination may subject that employee to cessation of worker's compensation benefits and the suspension of the employee's ability to submit the matter to the Worker's Compensation Board for hearing.

Light-Duty Work

Light-duty work is really not as much a defense as it is a way to bring the injured employee back to work and off worker's compensation leave. Of critical importance in providing light-duty work is that the employee's work responsibilities do not exceed the written return to work release signed by the employee's physician. In some cases, sedentary and clerical jobs may be provided to employees without violating physician restrictions. In addition, the Americans with Disabilities Act Amendment Act (ADAA) may require, in some circumstances, that some light-duty work be provided for certain injured employees.

Limitations

Initial Filing Deadline

An employee or employee's estate seeking to receive compensation under the Worker's Compensation Act must, within two years after the occurrence of the accident, or if death results from the accident within two years after such death, file a claim for worker's compensation benefits with the Worker's Compensation Board. A failure to file this claim with the board within this two-year period bars the employee from seeking benefits under the Act for the injury. In limited cases, this two-year period may be tolled or extended. For instance, in cases where there has been constructive fraud of the employer, Indiana courts have held that the two-year period may be tolled. In addition, precise calculation of the time of the occurrence of the accident may be difficult in cases including back injuries or cumulative trauma injuries.

Subsequent Deadlines

In cases where an employee seeks to modify an award of worker's compensation for an injury, the Worker's Compensation Board is barred from making any modification of benefits after the expiration of two years from the last day that compensation (i.e., disability or impairment benefits) was paid under the original award or agreement, except that applications for increased permanent partial impairment or additional medical expenses are barred unless filed within one year from the last day that compensation was paid.

Note that the last day that compensation was paid does not mean the last day that compensation was paid. This language means that when worker's compensation benefits are calculated, the last day for which compensation was or is to be paid begins the running of the time of limitations.

Occupational Diseases Act

The Indiana Occupational Diseases Act covers diseases and illnesses that arise out of and in the course of employment. Some – but not all – of the procedural, definitional, and evidentiary provisions of the Worker's Compensation Act apply under the Occupational Diseases Act; however, there are many significant differences. Certain differences with respect to claims procedures and causation exist under the Occupational Diseases Act.

Limitations Periods

There is a two-year limitations period for filing claims under the Occupational Diseases Act that is similar to the initial claims filing limitations provision of the Worker's Compensation Act. However, the

language of the Occupational Diseases Act is different in that the two years within which an employee must file a claim under the Occupational Disease Act begins to run as of the date of disablement.

Therefore, employees who fail to file a claim for occupational diseases within two years after the date of disablement generally are barred from filing claims. An additional provision of the Occupational Diseases Act provides, however, that disablement must occur within two years after the last day of the last exposure to the hazards of the disease with the exception of silica dust, coal dust, asbestos and radiation for which other time periods are listed. In death cases under the Occupational Diseases Act, the dependents of the deceased employee must file a claim within two years after the date of death, and death must occur within two years of the date of the disablement.

The term "disablement" is defined in the Occupational Diseases Act as the event of becoming disabled from earning full wages at the work in which the employee was engaged when last exposed to the hazards of the occupational disease by the employer from whom he or she claims compensation or equal wages in other suitable employment. The term "disability" is defined as the state of being so incapacitated.

In 1990, the Indiana Supreme Court, interpreting these definitions, held that the term "disability" means a loss of wage-earning ability that has two distinct components: severity and duration. Under the Supreme Court's analysis, an employee is entitled to permanent total disability benefits under the Occupational Diseases Act if he or she is permanently unable to earn any wages at his or her last work or in "other suitable employment."

Causation

Causation issues under the Occupational Diseases Act are usually complex, particularly for diseases such as cancer that may have non-occupational causes. Because of this, it is critical that occupational hygienists and physicians with experience in occupational disease matters be retained when faced with issues regarding causation in occupational disease cases. Chemicals that are known to produce illnesses or disease and that are present in the work environment must be identified, and the particular employee's exposure or lack of exposure to such chemicals must be demonstrated. In addition, the use of personal protective equipment may be an issue in such cases. The Occupational Diseases Act provides that a disease shall be deemed to arise out of employment only if:

... there is apparent to the rational mind, upon consideration of all of the circumstances, a direct causal connection between the conditions under which the work is performed and the occupational disease, and which can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment, and which can be fairly traced to the employment as the proximate cause, and which does not come from a hazard to which workers would have been equally exposed outside of the employment. The disease must be incidental to the character of the business and not independent of the relation of the employer and employee. The disease need not have been foreseen or expected but after its contraction it must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a rational consequence.

Special Evidentiary Issues

As noted previously, evidence must be produced regarding the amount of the employee's exposure to the hazard. In this regard, the Occupational Diseases Act provides that an employee shall be conclusively

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deemed to have been exposed to the hazards of an occupational disease when for any length of time, however short, he or she is employed in an occupation or process in which the hazard of the disease exists. The employer liable for the compensation provided for in this chapter is the employer in whose employment the employee was last exposed to the hazards of the occupational disease claimed upon regardless of the length of time of the last exposure. Under the literal language of this statute, an employee need only prove that his work included some, even minimal, exposure to the hazards of the disease to establish a conclusion that the employee was exposed to that hazard.

Because of the difficulty of proof in the occupational disease setting, the Occupational Diseases Act provides that the board, either on its own motion or upon the request of either party, may appoint a disinterested and duly qualified industrial hygienist, industrial engineer, industrial physician, or chemist to investigate the employee's occupation, and testify regarding the occupational disease health hazards found by the expert to exist in the employee's occupation.

Reporting Requirements and Procedures

Notice of Injury

Unless the employer (or a representative of the employer) has actual knowledge of the occurrence of an injury or a death at the time of the occurrence (or acquires such knowledge afterward), the injured employee (or his dependents, in the case of death) must give written notice of the injury or death as soon as it is possible to do so.

Furthermore, unless the notice is given or the employer gains knowledge of the injury or death within 30 days from the date of the injury or death, no compensation must be paid until the date the notice is given or the knowledge is obtained.

First Report of Injury

A first report of injury must be filed with the Worker's Compensation Board by a self-insured employer within seven days of the employer's knowledge of the injury in all cases where the injury caused the death of an employee or the need for medical care beyond first aid. If the employer has a worker's compensation insurance carrier, the employer must provide this report to the carrier within seven days. Within seven days after receipt of the report from the employer or 14 days after the employer's knowledge of the injury, whichever is later, the carrier must file the report with the Worker's Compensation Board. A failure to comply with this requirement may subject the employer or the carrier to monetary penalties as outlined in Indiana Code § 22-3-4-15.

Denial of Claims

As noted previously, an employer's denial of claims generally must be made on a form approved by the Worker's Compensation Board within 30 days of the employer's knowledge of the injury. A failure to file this form within this period may subject the employer or the insurance carrier to a \$50 penalty. The Worker's Compensation Board has exclusive jurisdiction to adjudicate whether an employer, a third-party administrator, or the employer's worker's compensation carrier has acted with a lack of diligence, in bad faith, or has committed an independent tort in adjusting or settling a claim. The board has authority to levy awards

between \$500 and \$20,000 depending on the degree of culpability and damages sustained. The board also has authority to fix attorneys' fees in an amount not to exceed 33-1/3% of the award. Such an award must be forwarded by the board to the Department of Insurance for review.

Other Reports/Forms

The Worker's Compensation Board provides a variety of forms for reporting matters to the board. Employers are advised to review these forms. They can be obtained directly from the Worker's Compensation Board by calling (317) 232-3808 or going to www.in.gov/wcb/forms.

OSHA Reports

In all cases involving alleged work-related injuries, an employer must be careful to note such injuries on OSHA Form 300 and Form 301. In addition, in cases involving the death of an employee or the hospitalization of three or more employees, the employer must notify OSHA within eight hours of the incident. Notification may be made by telephone call to the office of IOSHA.

Board Procedures and Claim Settlements

Employers should be aware that the Worker's Compensation Board has adopted its own procedures and that the strict trial rules of evidence may not apply in board proceedings. While the board's rules allow parties to represent themselves before the board, employers are well advised to hire counsel to represent them before the board because of procedural complexities and matters involving the collection and presentation of evidence. In addition, the appeals process from an adverse decision of a single hearing member, from the board, or from the Court of Appeals can be complicated. Time frames within which appeals must be begun are very short, and employers should contact counsel at the very early stages of a dispute.

Types of Settlements

Agreement as to Compensation

In general, many worker's compensation cases can be settled between the parties by filing an agreement to compensation (Indiana Board Form 1043) with the Worker's Compensation Board. Following approval by the Worker's Compensation Board, this agreement has the same effect as an award of the board.

Compromise Settlement Agreement (Section 15 Agreement)

In cases involving dispute over causation, nature and extent of injuries, or future medical treatment, employers may wish to enter into a compromise agreement (Indiana Code § 22-3-2-15) in which the parties acknowledge that a dispute exists and that to avoid litigation, the employee will agree to forego certain rights under the Worker's Compensation and Occupational Diseases Acts and in consideration thereof, the employer will pay an amount to the employee (usually in a lump sum). A compromise agreement should be used primarily if there is a bona fide dispute regarding compensability of the claim (e.g., where causation is at issue). As with all agreements, approval of the Worker's Compensation Board is required. This agreement,

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when approved, is designed to cut off the employee's future right to reopen his or her case for additional benefits. Failure to pay compensation under an approved settlement agreement triggers monetary penalties as outlined in Indiana Code § 22-3-4-15.

Stipulation of Facts

As an alternative approach to litigating before the board, the parties may agree to submit a stipulation of facts to the board, and the board will then render a decision based upon the stipulated submission. In general, this technique is most commonly used when there is no dispute as to the compensability of the claimant's claim (i.e., where the parties agree that the injury was work related); however, the parties disagree as to the extent of the benefits (disability, impairment or medical) due to the claimant.

Adverse Award

Another settlement technique is the use of an adverse award. The parties requesting an adverse award are requesting that the board enter an award that the claimant is to receive nothing on his claim. In effect, the claimant agrees to receive nothing from the board in exchange for some remuneration from the employer (usually a lump-sum payment).

The advantage to the claimant of requesting an adverse award from the board is that the claimant receives some payment from the employer. In addition, this award may be used to avoid obligations to reimburse a group medical insurance or disability insurance carrier who may have previously paid benefits to or on behalf of the employee. This technique should be used only where there is a significant question as to whether the employee's injury is compensable (e.g., whether it is work related).

The board does not favor these requests, and the use of this technique is considered by many to present many ethical and perhaps legal problems. As with the Section 15 agreement discussed previously, this technique is used by employers in an attempt to forever cut off a claimant's future right to compensation.

Re-employment Considerations

Returning the injured worker to employment, whether it is light duty or regular employment, is of critical concern to employers. Under the Americans with Disabilities Act Amendment Act (ADAA), there may well be an obligation on the part of an employer to provide light-duty or alternative work programs or schedules for certain injured employees as a reasonable accommodation of their disability (if they fit the definition of a qualified individual with a disability under the ADAA). (See also Chapter 18, "Family and Medical Leave Act," for return-to-work requirements under that law.)

In addition, programs such as "work hardening" and related therapy may benefit employees and prepare them for return to work following a work-related injury. Any return to work by an injured employee should be based on a physician's written statement that clearly outlines any restrictions or limitations of the employee, including any specific lifting, bending or other physical and/or mental restrictions that the physician believes are applicable.

This chapter was edited by Jeff Beck, Counsel.

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Unemployment Compensation

Both federal and state laws govern an employer's liability for unemployment compensation. Thus, an employer may have unemployment tax obligations to both the state of Indiana and the federal government.

Unemployment compensation is a benefit provided through the state of Indiana's unemployment insurance system. Every Indiana employer contributes to the system that pays temporary benefits to wage earners who lose their jobs through no fault of their own.

This chapter focuses on Indiana's unemployment compensation scheme. Federal rules will be mentioned where appropriate.

Indiana Department of Workforce Development

The Indiana Department of Workforce Development (DWD) administers the state's unemployment compensation insurance system. In addition, the DWD serves as a public employment agency and offers job training to displaced workers. The DWD's web site is www.in.gov/dwd.

How Are Benefits Funded?

By law, most employers in Indiana contribute to an unemployment insurance compensation fund that is largely made up of a payroll tax paid by employers on a quarterly basis. This fund is the source for unemployment compensation benefits paid to out-of-work claimants. No payroll deductions are made from a worker's wages to subsidize the unemployment insurance compensation fund.

The amount of contributions (taxes) an employer pays depends upon the total taxable wages an employer pays, and whether the employer is subject to certain penalties – for example, if the employer has failed to timely file a quarterly report. The amount also depends upon an employer's experience rating. An experience rating is the DWD's system of assigning unemployment insurance tax rates to employers based upon an employer's experience account balance. Generally, if an employer has experienced few unemployment insurance claims, its tax rate will be lower than an employer with many unemployment insurance claims. Whether the employer has made voluntary payments or has a history of making late payments may also affect this rating.

On the next page you will find a list of terminology that may be helpful in communicating with officials at the DWD. Employers will frequently hear these terms with regard to unemployment compensation.

Useful Terminology in Dealing with Unemployment Compensation

Base Period: The time period that unemployment compensation benefits are calculated. It consists of the first four of the last five completed calendar quarters immediately preceding the first day of an individual's benefit period.

Benefit Year: The 52-consecutive-week period that benefits can be claimed. It begins with the calendar week that a claimant files his or her valid claim.

Benefits: Money payments of unemployment insurance to eligible claimants.

Calendar Quarter: A three-month period ending on March 31, June 30, Sept. 30, or Dec. 31.

Claim, Initial: A claimant's first application to determine eligibility for receiving unemployment insurance benefits.

Contributions: The unemployment insurance tax an employer pays quarterly into the unemployment insurance benefit fund.

Covered: A term used to determine whether either an employer or employee is subject to the provisions of the Indiana Department of Workforce Development Act (IDWD Act).

Employer: An employing unit (an individual or organization that has one or more employees in Indiana) subject to the provisions of the act.

Experience Account: The credit/debit record maintained by the DWD for each covered employer. This record shows the amount of tax and voluntary contributions an employer has paid and the charges made against the employer's account for unemployment insurance benefits drawn by the employer's former employees.

Fund: The unemployment insurance compensation fund maintained and administered by the DWD.

Remuneration: The compensation an employer pays an employee, whether in cash or by some other form of value, including but not limited to commissions, bonuses, dismissal pay, vacation pay, and sick pay.

Taxable Wage Base: The first \$9,500 of remuneration an employer pays to each employee during a calendar year. It's important to note that this amount is the taxable portion of remuneration for services an employer paid in a calendar year.

Valid Claim: A claim made by an unemployed worker that satisfies the terms and conditions of the IDWD Act.

Coverage

Employers and employees each have different requirements to satisfy before qualifying as a “covered” employer or employee under Indiana’s unemployment compensation laws.

Eligibility Requirements for the Employee

To be eligible for unemployment benefits, a claimant must satisfy three basic requirements. The claimant must:

1. have earned a sufficient amount of wages during the base period;
2. be out of work through no fault of his or her own; and
3. be able, available, and actively seeking full-time work.

In certain instances, the claimant may also be required to use re-employment services, such as job assistance services.

Employer Coverage

Unemployment insurance coverage applies to the following general types of employers:

- Regular business entities that have paid one dollar or more in remuneration to a covered worker
- Non-profit organizations employing four or more persons
- State and local government
- Agricultural and domestic-type entities, subject to certain threshold requirements
- Entities that are subject to any federal tax against which credit may be taken for contributions required to be paid into a state unemployment insurance fund and that have any employees in Indiana
- An entity that has acquired substantially all of the assets of another employer, resulting in the continuation of a business, or an employer that acquired all or part of an organization, trade, or business that had been subject to Indiana’s unemployment insurance compensation law
- Entities that voluntarily elect to be subject to the IDWD Act

Monetary Criteria for Establishing a Valid Claim

The law provides that a worker’s earnings during the covered employment period determine the amount of unemployment compensation for which he or she is eligible. Several factors come into play as the DWD determines whether a claimant has earned sufficient wages to establish a valid claim. These factors are discussed below.

- **Total Wages:** A claimant’s total wages for his or her base period must be at least \$4,200.
- **Wages for the Last Two Quarters:** A claimant’s wages for the last two quarters of his or her base period must total at least \$2,500.
- **Total Wages to High Quarter Ratio:** A claimant’s total base period wages must equal at least one and one-half times the wages paid to the claimant in the calendar quarter in which his or her wages were the highest.

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- **Maximum Benefits:** The maximum benefit for which a claimant may be eligible depends upon the amount of earnings during the covered employment period. The maximum payable on a weekly claim is presently \$390, while the minimum benefit is presently \$37.

Period of Coverage for an Employer

Regardless of when in a calendar year an employer becomes subject to the provisions of the IDWD Act, the employer becomes subject for the entire year. If, during the course of a year, an employer does not meet the qualifying provisions, the employer will have until January 31 of the following year to file a written application to the DWD for termination of coverage.

How Much Tax?

An employer's contribution rate and the rate schedules are set out in Indiana Code § 22-4-11. The schedules are similar to standard federal and state tax schedules. In broad terms, an employer who has an experience account reflecting a credit balance will pay less unemployment compensation tax than one who has a debit balance.

An employer's tax rate is based on the solvency of the unemployment insurance compensation fund (also called the Fund Ratio) and the employer's individual account status. Unless the solvency of the fund changes, an employer with a credit balance in its experience account can expect to incur a 0.5% to 3.8% tax rate, while employers with debit balances will pay anywhere from 4.9% to 7.4%. For a detailed explanation of tax liability and the basis for assigning a particular rate, an employer should contact the DWD.

Displaying Posters

All covered employers must display posters that inform employees about their rights to obtain unemployment insurance benefits. Posters can be found on the DWD's web site (www.in.gov/dwd/2455.htm). These federal and state posters can also be ordered from the Indiana Chamber in laminated sets. They can be obtained by calling (800) 824-6885 or going online to www.indianachamber.com/events-products/employment-posters/.

Recordkeeping Requirements

Every Indiana employer, whether subject to the unemployment insurance tax or not, must keep accurate employment records.

An employer must maintain accurate payroll and employment (personnel) records. These records must be retained for at least five years. The information that the employer must maintain includes the following:

- Name and social security number of each employee
- Cash paid to each employee each calendar quarter
- Remuneration other than cash
- Dates each employee worked
- The reason(s) the employee left work
- The reason(s) for any lost time that affected wages

- The amount earned by each employee each calendar week
- Whether each week worked by each employee is a full-or part-time week
- The base of operations of each employee

Audits

The DWD may periodically audit employer records to determine compliance with the unemployment insurance compensation law.

Most employers selected for an unemployment insurance audit are randomly chosen from a list containing all Indiana employers covered under the unemployment insurance laws.

The length of time an audit will take varies, depending upon the size of the employer and the condition of the employer's records. The types of records an auditor will examine may include any or all of the following:

- General ledgers
- Chart of accounts
- Master vendor lists
- Financial statements
- Cash disbursement records
- Check registers and check stubs
- Disbursement journals
- Canceled checks
- Petty cash receipts
- Daily cash reports
- Payroll records for each employee reflecting the dates and amount of wages paid
- Copies of W-2 forms and W-3 transmittal form
- Copies of 1099 forms and 1096 transmittal forms
- Quarterly SUTA reports
- Copies of FUTA reports: 940 forms
- Copies of FICA reports: 941 forms
- Federal income tax returns, including 1040 form Schedule C, 1220, 1120S or 1065
- Any other records indicating payments for services performed
- Source documents showing basis for non-payroll payments to individuals such as invoices, business cards, certificates of insurance, contracts, receipts, etc.

The DWD provides guidance for employers that are selected for audits. The materials may be found at www.in.gov/dwd/files/Preparing_for_a_UI_Audit.pdf.

What Happens When a Former Employee Files a Claim for Unemployment Compensation Benefits?

Notice to Employer of Initial Claim

Once a person files an initial unemployment compensation claim, the DWD informs that person's last employer and all of his or her base period employers and asks the employer to verify the reason for the person's unemployment. This notification is known as a separating and base period employer notice. An employer has 10 days from the date on the notice to report any facts to the department that might impact a claimant's rights. This 10-day period is known as the 10-day protest period. If an employer wishes to challenge its former employee's claim, for example, that he or she was terminated without cause, the employer must inform the department of its protest or else lose the right to challenge the employee's claim. It is important to remember that the matter of a claimant's eligibility cannot be reopened at a later date.

Notice of Benefit Liability

A claims deputy reviews the initial claim and any protest forms provided to the DWD and makes a determination of eligibility. He or she then issues a Determination of Eligibility to both the employer and the claimant. The Determination of Eligibility will contain the legal result of the decision and the date the decision becomes final.

Appealing a Deputy's Determination

An employer, employee, or the DWD itself may appeal a claims deputy's initial determination on liability or claimant eligibility. Appeals are taken first to an administrative law judge (ALJ).

Time for Filing Appeal

A party has 10 days from the date on the Determination of Eligibility to appeal.

Perfecting the Appeal

To perfect or initiate an appeal, a party must do so in writing (the reverse side of the Determination of Eligibility provides instructions) and file the entire form by either mailing it to UI Appeals, 100 N. Senate Ave., Suite N800, Indianapolis, IN 46204 or by faxing it to (317) 233-6888. The report must be signed and filed within the 10-day period. Otherwise, the initial determination becomes final.

Result of Appeal

A party timely appealing an eligibility determination is entitled to an evidentiary hearing commonly known as an unemployment compensation hearing.

Hearing Process

Unemployment compensation hearings are administrative proceedings in which both employer and employee present documentary evidence, oral testimony, or both, before the ALJ. The hearing may be the only chance that both the employer and claimant have to present evidence to challenge a deputy's determination of eligibility.

Notice of Hearing

Once an appeal is filed and an ALJ is appointed to preside, the DWD sends a notice of hearing to each party. It contains the place and time of the hearing, and the issues to be decided. The second page of the Notice of Hearing (also known as the "Acknowledgment Sheet") must be returned indicating that you wish to participate in the hearing and providing the ALJ a telephone contact number.

If a hearing does not start within an hour of the time indicated on the notice, either party may request that the hearing be postponed (also known as a continuance) and the request must be granted.

Role of the Administrative Law Judge

The ALJ is the judge and one-person jury who bases his or her decision on the actual evidence presented at the hearing. It is important to note that the ALJ does not consider the statements in the deputy's determination of eligibility.

What Should an Employer Take to a Hearing?

An employer should take all relevant documents such as the employee's personnel file, attendance record, employee handbook, personnel policies, physician's statements, and witnesses who have first-hand knowledge of events leading to the employee's termination. If the hearing is by telephone, documents that will be introduced as evidence need to be provided to the ALJ and the other party before the hearing.

If an employer is concerned about adequately presenting its case, the employer should consult with counsel to determine whether an attorney should represent it at the hearing.

What Happens at a Hearing?

Hearings are conducted to allow either an employer or an employee to appeal from an unfavorable determination of eligibility.

Format

Hearings are like trials but less formal. Both parties have an opportunity to present their evidence, and both sides may cross-examine witnesses. Typically, an ALJ will allow each side to present a closing argument.

Under Indiana law (Indiana Code § 22-4-17-8.5), hearings may be conducted by telephone if:

- either the claimant or the employer is no longer in Indiana;
- either the Indiana claimant or Indiana employer requests a telephone hearing without objection;

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- a party is unable to appear in person due to illness; or
- the ALJ determines without any interested party filing an objection that a hearing by telephone is just and proper.

Most hearings are now conducted by telephone, in which case the ALJ calls both parties. Telephone hearings are the most efficient and economical means of conducting hearings and are easier for all parties to attend because it saves time and travel expense.

Evidence

Because hearings are informal, non-judicial proceedings, parties are not bound by the usual rules of evidence. As a general rule, an ALJ may not consider hearsay evidence but could, if that evidence would otherwise qualify as a hearsay exception under Indiana law. The ALJ determines what evidence is relevant, and he or she may disregard or exclude any irrelevant evidence.

Typical Issues

In general, the issue of whether an employee is eligible for unemployment compensation insurance benefits is most frequently raised. In this regard, the following subjects are the ones an ALJ is most often asked to decide.

Discharge for Just Cause

By law, if an employee was discharged for just cause, he or she is not eligible for benefits in the week the separation occurred, and until they earn – through employment – at least as much as their normal weekly benefit amount for eight weeks.

The phrase “discharge for just cause” is specially defined by statute (I.C. § 22-4-15-1 [d]) and has been the source of contention between parties in Indiana courts for many years. The following are examples of conduct that support a just cause discharge:

- Falsification of an employment application
- Knowing violation of a reasonable and uniformly enforced policy or work rule
- Unsatisfactory attendance
- Damaging employer’s property through willful negligence
- Refusal to obey instructions
- Reporting to work under the influence of alcohol or drugs
- Consuming alcohol or drugs at the workplace during working hours
- Endangering the safety of self or coworkers
- Imprisonment following conviction of a misdemeanor or felony
- Breach of any duty related to work that the employee reasonably owes the employer

Gross Misconduct

The term “gross misconduct” is specially defined by statute (I.C. § 22-4-15-6.1). This statute states that gross misconduct includes any of the following, if committed in connection with work: a felony or Class A misdemeanor, reporting to work in a state of intoxication, battery on another individual on the employer’s property or during work hours, theft or embezzlement, or fraud. If a worker is discharged for gross misconduct, all of that worker’s wage credits established prior to the day he or she was discharged for gross misconduct are canceled. This means that the worker will be ineligible for benefits.

Voluntary Quit

If a claimant voluntarily left his or her employment without good cause in connection with the work, the claimant is not eligible for benefits in the week the separation occurred and until they earn, through employment, at least as much as their normal weekly benefit amount for eight weeks.

Good cause can include a variety of circumstances. Indiana courts have found good cause in the following circumstances:

- Sexual harassment
- Physical disability substantiated by medical opinion
- Where the employer unilaterally changes the terms and conditions of employment to an employee’s detriment
- Where the employee’s religious beliefs prevented continued work with the employer
- Where an employer compels or requires a claimant to commit a crime

Refusal of Suitable Work

Unemployment compensation benefits may be denied by the DWD to a claimant who was offered suitable work but declined the offer of employment for subjective reasons. Whether a job is suitable depends upon the risk involved to the claimant’s health, safety and morals; the claimant’s physical fitness, prior training and experience; the claimant’s length of unemployment; and the distance of the available work from the individual’s residence.

Labor Disputes

If the unemployment is the result of a labor dispute, a claimant is ineligible to recover unemployment compensation benefits unless the claimant or the employer terminated the employment. Indiana courts have held that an employer’s act of permanently replacing striking workers severs the employment relationship and thus removes the labor dispute disqualification.

Duration of Hearing

How long a hearing lasts depends upon the issues to be resolved and the extent of evidence to be presented. Because ALJs schedule numerous hearings in a given day, if it appears that a hearing will last more than several hours, the hearing can be postponed for completion until the following day or whenever the ALJ reconvenes proceedings.

Findings of Administrative Law Judges and Finality

By law, the ALJ's decision must be issued in writing. That decision will contain findings from the evidence and his or her legal conclusions that support the decision.

The ALJ's decision becomes final and binding on the parties if the losing party fails to appeal. That decision may not be used as evidence in separate legal proceedings between an employer and employee.

Appeals to the Review Board

Appeals from an ALJ decision are taken to the Review Board of the DWD (Review Board), a three-member body appointed by the governor. At least one member of the board must be admitted to practice law in Indiana.

A party wishing to appeal an ALJ's decision must do so within 15 days after the date the ALJ's decision was mailed to the parties. To initiate an appeal, a party must file a Form 651 (or its equivalent) with a specific statement explaining why the ALJ's decision is wrong. The document can be filed by either mailing it to the Department of Workforce Development, UI Review Board, 10 North Senate Avenue, Suite SE001, Indianapolis, IN 46204, or by faxing it to (317) 233-3348.

The Review Board may affirm, modify, set aside, remand or reverse the ALJ's decision, usually based upon the record of the hearing. In a few instances, the Review Board may conduct a hearing of its own, but usually those hearings are limited to oral arguments only. During Review Board hearings, a party may not introduce additional evidence unless the board specifically permits it.

Like ALJ hearings, Review Board hearings may occur by telephone. However, the Review Board may, in its discretion, conduct hearings in person in Indianapolis. A Review Board decision becomes final 30 days after the decision is mailed to the parties.

Appeals to the Indiana Court of Appeals

Appeals from Review Board decisions are taken directly to the Indiana Court of Appeals. It's important to note that this is the first stage in which an Indiana court becomes involved in unemployment compensation determinations.

The appealing party must follow the Rules of Appellate Procedure under Indiana law. Because these are strict rules of procedure, an appealing party should consult counsel.

The Court of Appeals only reviews the record for errors of law. It does not reweigh the evidence, and it does not conduct evidentiary hearings. Only under rare circumstances will the court even allow oral argument.

Miscellaneous Issues

Seasonal Employer

Indiana law defines a "seasonal employer" as one who operates all or part of a business for recurring periods of less than 26 weeks in a calendar year because of either the seasonal nature of the business (e.g., farming) or weather conditions (e.g., golf course).

Special eligibility rules apply to seasonal employers. Employers who believe they qualify as seasonal employers should contact the local DWD office for filing information.

Independent Contractors, Temporary and Leased Employees

With the growing use of so-called “temporary employees” and “independent contractors,” the issue some employers might face is added unemployment compensation exposure.

The answer as to whether an employer is liable for these employees depends on whether the recipient employer and leased worker have an “employment” relationship as that term is defined in the Indiana unemployment compensation statute. That statute sets out three criteria that determine whether an “employment” relationship exists:

1. Is the worker free from direct control and command of the employer?
2. Is the service provided beyond the employer’s usual course of business for which the service is performed?
3. Is the worker independently established in the trade or business related to the services the worker provides the employer and does the worker offer those same services to the general public, or is the worker a sales agent paid solely on commission and has complete control over his or her time and effort?

The Department must be satisfied that the worker’s service meets all three of these criteria before it will determine the worker is not an “employee” for purposes of unemployment compensation coverage.

If an employer has any question as to whether a worker is an independent contractor or an employee, the employer should check with the local Workforce Development office for a ruling before completing its next quarterly payroll and tax report.

On-Call or As-Needed Employees

Employees who report to work on an on-call or as-needed basis do not qualify for unemployment insurance benefits if the employees are regularly and customarily employed as on-call or as-needed employees and either:

- have been paid during the week in question; or
- refused available work during the week in question.

Employers are responsible for informing their employees of the employee’s on-call or as-needed employment status. Employers should make this status known to pertinent employees in job descriptions, job postings or written published policies.

When determining whether an employee was employed on an on-call or as-needed basis, the DWD will consider whether:

- the claimant accepted a position with knowledge of a flexible work schedule;
- the claimant had a reasonable expectation of regular employment;
- the employer restricted the pool of applicants on the job description to ensure the on-call or as-needed employee is available;

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- the employer had established policies and procedures that detail how the employer will make work available to the claimant; and
- the claimant's position is regularly or customarily known to the general public as an on-call or as-needed position.

Exception for Employer Pension, Retirement or Annuity Plan Recipients

Typically, an employee is ineligible for unemployment insurance benefits during any given week to the extent he receives payments from any pension, retirement or annuity plan of an employer that are equal to or exceeding the employee's weekly benefit amount. However, the employee is not ineligible to receive unemployment insurance benefits when an employee uses the pension, retirement or annuity plan payments to satisfy a severe financial hardship resulting from an unforeseeable emergency that is the result of events beyond the employee's control. The DWD evaluates the existence of severe financial hardship on a case-by-case basis.

Ineligibility of Benefits During Employer-Mandated Vacation

Employees are not considered totally, part-totally or partially unemployed during a week if the employee is on vacation or receiving compensation. Furthermore, an employee is not totally, part-totally or partially unemployed even if the employee is on an employer-mandated vacation week due to:

- the terms of a written contract; or
- the employer's regular vacation policy and practice.

Mandated or planned facility shutdowns are included under this exception.

Although indicative of intent, an employer's designation of "paid vacation" versus "unpaid vacation" is not treated as conclusive by the DWD. Instead, the DWD considers the following factors when determining whether an employer is on a vacation week. The DWD considers whether:

- a written contract between the employer and employee provides for a paid or unpaid vacation week;
- a vacation week was the result of an employer's regular vacation policy or practice;
- an employer provided a reasonable assurance to the employee that the employee would have employment available after the vacation period ends;
- the employer provided reasonable notice concerning the vacation week or facility shutdown; or
- the employer provided the DWD with advance notice of any vacation week or shutdown period.

Employees with Multiple Employments

Sometimes employees may be on the payroll for an Indiana employer as well as an out-of-state employer. Like most states, Indiana has a law that helps an employer determine the proper reporting procedures for so-called multi-state employments.

Similarly, employees may be on the payroll of more than one Indiana employer at the same time. In those circumstances, state regulations provide that such employees are deemed employees of both employers, and each employer must contribute based upon the wages each paid to the employee.

If an employer has any questions on how such employees should be treated, it can ask the DWD for assistance in interpreting the state law and help determining the proper way to report either multi-state employments or multiple Indiana employers.

Treatment of Lump-Sum Severance Benefits

If an employer pays lump-sum severance pay to a terminated employee, such a payment may result in postponing payment of unemployment compensation if the pay is based upon the accrued term of work. For example, if an employee's severance pay is equivalent to three weeks of wages (based upon the accrued work term), the employee's unemployment compensation benefits are postponed for three weeks. It's important to remember, however, that severance pay does not diminish the benefits to which an employee is otherwise entitled; the benefits are simply postponed.

On the other hand, if a lump-sum severance benefit is categorized as a bonus, unemployment compensation benefits are not postponed. To ensure compliance with the applicable statutes, employers should contact their local Workforce Development office with questions regarding how lump-sum payments are categorized.

Effect of Administrative Decisions on Litigation

Generally, findings of fact, judgments, conclusions, or final orders made by the DWD during proceedings initiated under the Indiana unemployment statutes are not conclusive or binding and may not be used as evidence in other proceedings before other courts. (I.C. § 22-4-17-12[h]; 22-4-32-9).

This chapter was edited by Ryan Funk, Partner.

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Family and Medical Leave Act (FMLA)

Under the Family and Medical Leave Act of 1993 (FMLA), 29 U.S.C. § 2601 *et seq.*, covered employers must provide eligible employees with up to 12 weeks of leave per year for certain family care and medical reasons. Although the FMLA requires only unpaid leave, the employee is entitled to certain benefits during leave. At the end of an FMLA leave, the employer must restore the employee to the same job from which the employee took leave, or one that is virtually identical.

In late 2008, the Department of Labor issued new FMLA regulations, which became effective January 16, 2009. In addition, the National Defense Authorization Act for Fiscal Year 2008 added new military family leave provisions to the FMLA. Thereafter, the National Defense Authorization Act for Fiscal Year 2010 expanded those newly added military family leave rights. The new military family leave rights included qualifying exigency and military caregiver leave for families of covered military servicemembers. The Airline Flight Crew Technical Corrections Act of 2009 established certain new FMLA leave rules for airline flight crewmembers and flight attendants. In February 2012, the Department of Labor proposed updates to its 2008 regulations to address these more recent statutory changes. The Department of Labor finalized those changes and reissued the full set of FMLA regulations in February 2013. The Department of Labor issued a notice of proposed rulemaking in June 2014 to modify the definition of “spouse” in existing FMLA regulations to reflect implications from the U.S. Supreme Court’s 2013 decision in *United States v. Windsor*. The Department of Labor subsequently finalized that rule in February 2015. In early 2020, in response to the COVID-19 pandemic, Congress enacted the Families First Coronavirus Response Act (FFCRA). The FFCRA temporarily granted paid sick leave and expanded family leave rights for certain absences and needs for leave related to the pandemic. As enacted, the FFCRA’s paid sick leave and expanded FMLA leave provisions expired on December 31, 2020.

Coverage and Eligibility

The FMLA covers any employer who employs 50 or more employees for each working day during at least 20 weeks in the current or preceding calendar year. Public agencies are covered employers without regard to their number of employees. In applying the 50-employee standard, all employees on the payroll of the employer, not just FMLA-eligible employees, are to be counted.

In some situations, the FMLA treats separate corporations as the same entity. Affiliated employers may be combined into a single integrated employer if their operations are sufficiently interrelated and if they share the same management, ownership and control of labor relations. Separate employers involved in employee leasing and similar relationships may be treated as joint employers. The regulations also include a discussion of the circumstances under which a professional employer organization or “PEO” will be treated as a joint employer for FMLA purposes. The regulations also address the circumstances under which an entity, when acquiring a covered business, will inherit FMLA coverage automatically as a successor in interest (generally if the acquiring entity maintains sufficient continuity of personnel, equipment and business operations).

Generally, to be eligible for FMLA leave, an employee must have worked for the employer, as of the date the requested leave is to begin, for at least 12 months, and for at least 1,250 hours during the immediately

preceding 12-month period. However, if an otherwise-eligible employee works at a worksite with fewer than 50 employees at the time the employee requests leave (counting all those employed within 75 miles of the worksite), then the employer is not required to provide FMLA leave to that employee. A separate set of eligibility rules apply to airline flight crew employees.

Reasons for Leave

An eligible employee may request FMLA leave for any one or more of the following reasons:

- **Parenting Leave.** Leave to care for the employee's new son or daughter, including by birth, by adoption or by foster-care placement.
- **Family Medical Leave.** Leave to care for the serious health condition of the employee's spouse, son, daughter or parent.
- **Employee Medical Leave.** Leave for the employee's own serious health condition, if the condition renders the employee unable to perform his or her job functions.
- **Military Family Exigency Leave.** Leave because of a qualifying exigency arising from the fact that the employee's spouse, son, daughter or parent is a covered servicemember who is on, or has been notified of a call or order to, covered active duty in the U.S. Armed Forces. Qualifying exigencies include things such as: making arrangements necessitated by short-term deployments; attending certain military events and related activities; assisting the servicemember with alternative childcare arrangements when the active duty or call to active duty status necessitates a change in the existing arrangements; and assisting the servicemember with certain financial and legal arrangements related to active duty or the call to active duty.
- **Covered Servicemember Leave.** Leave to care for the employee's spouse, son, daughter or parent who is a covered servicemember with a serious illness or injury incurred or aggravated in the line of duty on active duty. This leave may also be taken by an employee who is next of kin of the covered servicemember.
 - "Covered servicemember" for this purpose means a member of the Armed Forces who is undergoing medical treatment, recuperation or therapy, is otherwise in outpatient status or is otherwise on the military's temporary disability retired list for the serious illness or injury. "Covered servicemember" also means a veteran who is undergoing medical treatment, recuperation or therapy for a serious illness or injury and who was a member of the Armed Forces at any time during the five-year period preceding the date on which the veteran undergoes that medical treatment, recuperation, or therapy. ("Veteran" is defined in 38 U.S.C. § 101.)
 - "Serious illness or injury" for this purpose, with respect to a member of the Armed Forces, means an injury or illness incurred or aggravated in the line of duty on active duty that renders the covered servicemember unfit to perform the duties of his or her office, grade, rank or rating. With respect to a veteran, a serious illness or injury means a qualifying illness or injury (as defined by the Secretary of Labor) that was incurred or aggravated in the line of duty on active duty in the Armed Forces that manifested itself before or after the member became a veteran.

One of the more important defined terms under the FMLA is "serious health condition." Not surprisingly, this concept has proved difficult for many employers and has been litigated in numerous court cases. A "serious health condition" is defined as an illness, injury, impairment, or physical or mental condition that

involves inpatient care, or involves continuing treatment by a health care provider that includes one or more of the following:

- A period of incapacity (e.g., inability to work, attend school, or perform other regular daily activities) of more than three consecutive, full calendar days that also involves treatment two or more times, within 30 days of the first day of incapacity, by or under the direct supervision of a health care provider (or treatment by a health care provider one time with a regimen of supervised continuing treatment). For these purposes, the first (or only, if applicable) in-person treatment visit must take place within seven days of the first day of incapacity.
- Any period of incapacity due to pregnancy or for prenatal care.
- Any period of incapacity or treatment for such incapacity due to a chronic serious health condition (e.g., asthma, diabetes, epilepsy, etc.). In order to qualify, the condition must require visits for treatment at least twice per year.
- A period of incapacity that is permanent or long-term due to a condition for which treatment may not be effective (e.g., Alzheimer's disease, severe stroke, terminal stages of disease).
- Any period of absence to receive multiple treatments either for restorative surgery after an accident or other injury or for a condition that likely would result in a period of incapacity of more than three consecutive calendar days if left untreated (e.g., cancer [chemotherapy], severe arthritis [physical therapy], kidney disease [dialysis]).

Conditions for which cosmetic treatments are administered (e.g., plastic surgery) generally are not serious health conditions, unless inpatient hospital care is required or unless complications develop. Treatments for allergies, mental illness caused by stress, or substance abuse can be serious health conditions if all the requirements are met.

The definitions of relevant family relationships also are critical, and they have differed in their acceptance of non-legal relationships. For FMLA purposes, "spouse" had historically included only a husband or wife recognized under state law and would not have included same-sex spouses. However, the U.S. Supreme Court's decision in *United States v. Windsor*, No. 12-307 (June 26, 2013), which overturned certain provisions of the federal Defense of Marriage Act, generally had the effect of requiring employers to recognize same-sex spouses for certain FMLA purposes when same-sex marriage is recognized under state law. The Department of Labor issued a notice of proposed rulemaking in June 2014 to modify the definition of "spouse" in the then-current FMLA regulations to reflect that the laws of the state in which the marriage was celebrated would be applied to determine who is a "spouse" for FMLA purposes (the existing FMLA regulations had applied the more-restrictive "state of residence" rule). The Department of Labor subsequently finalized the new regulation in February 2015. The term "parent" includes, in addition to the employee's biological or legal parent, any individual who stands or stood *in loco parentis* (in the position or place of a parent) to the employee, by assuming day-to-day financial and care obligations, when the employee was a child. Similarly, "son or daughter" means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing *in loco parentis*, who is either under 18 years of age or age 18 or older and incapable of self-care because of a mental or physical disability. A separate definition of son or daughter applies for the military family leave provisions (the definition is similar but removes the age restriction).

Amount of Leave

The employee is entitled to a total of 12 workweeks of FMLA leave (based on the employee's normal hours per week) during a 12-month period, for leave other than covered servicemember leave.

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The employer may choose one of the following as the 12-month measuring period:

- The calendar year
- Any fixed 12-month leave year, such as a fiscal year or year required by state laws
- The 12-month period starting on the employee's anniversary date of employment
- The 12-month period measured forward from the date the employee's first FMLA leave begins
- A rolling 12-month period measured backward for each employee from the date he or she uses FMLA leave

For covered servicemember leave, eligible employees are entitled to up to 26 workweeks of leave in a single 12-month period. For purposes of covered servicemember leave only, the "single 12-month period" is the 12-month period measured forward from the first date of covered servicemember leave.

A special rule applies where a husband and wife are both eligible employees of the same employer. In that situation, the employer may limit the husband and wife to a combined total of 12 weeks of FMLA leave if the leave taken is a parenting leave or a family medical leave to care for a parent, or a combined total of 26 weeks in a single 12-month period for covered servicemember leave. This limitation applies even if the spouses are employed at two different worksites of an employer located more than 75 miles from each other, or by two different operating divisions of the same company. This special limit does not, however, apply to employee medical leave, family medical leave to care for someone other than a parent, or military family exigency leave.

Example: If the husband requests FMLA leave for his own serious health condition, his allowable leave for that purpose is not reduced by the amount of FMLA leave his wife has already taken.

In some cases, employees will take FMLA leave in continuous weeks. In others, they may break the leave down into intermittent leave or reduced schedule leave.

"Intermittent leave" generally means leave taken in separate blocks of time due to a single illness or injury, and it may include time periods as small as one hour (or even smaller, depending on the employer's payroll system). For example, an employee may be eligible to take time off occasionally for medical appointments or therapy.

"Reduced schedule leave" means a leave schedule that reduces an employee's usual number of working hours per week or per day. In other words, a reduced leave schedule is a change in the employee's schedule for a period of time, usually from full-time to part-time.

For family medical, employee medical, or covered servicemember leave, an employee may take intermittent or reduced schedule leave if it is medically necessary. If the leave is based on planned medical treatment, the employer may temporarily transfer the employee to another position that better accommodates the leave if the new position has equivalent pay and benefits. Generally, an employee is not entitled to take parenting leave intermittently or on a reduced schedule. The employee may, however, take parenting leave intermittently before an adoption or foster-care placement if absence from work is required for the adoption or foster-care placement to proceed (e.g., counseling sessions, court appearances, attorney consultations). Military family exigency leave may also be taken on an intermittent or reduced schedule basis.

When an employee takes intermittent leave or reduced schedule leave, only the time actually taken counts against the employee's 12-week leave allotment.

Example: If a full-time employee who usually works 40 hours per week takes four hours of FMLA leave one week for a medical treatment, the employee is using only one-tenth of a week of FMLA leave.

The employee must provide certification that a medical need for leave exists and that the medical need can best be accommodated through the intermittent or reduced schedule leave. In addition, the employee must attempt to schedule the intermittent or reduced schedule leave so as not to disrupt the employer's operations.

Employee Notice and Certification Requirements

An eligible employee must notify the employer of his or her desire to take FMLA leave at least 30 days before the date FMLA leave is to begin, if the need for the leave is foreseeable. If the need for leave is not foreseeable, the employee must notify the employer as soon as practicable under the facts and circumstances of the particular case. The regulations indicate that in general, it should be practicable to provide notice with respect to an unforeseeable need for leave "within the time prescribed by the employer's usual and customary notice requirements applicable to such leave."

An employer may require an employee to substantiate the need for medical leave by providing a certificate from a health care provider that confirms the date the condition commenced, the probable duration of the condition and other appropriate medical facts. If the employer questions the medical certification, it may require and pay for a second medical opinion from a provider of the employer's choice (who cannot be regularly employed by the employer). If the first two opinions differ, the employer may invoke a type of binding arbitration by obtaining, at its own expense, a third opinion from a health care provider approved jointly by the employer and the employee.

Note: The term "health care provider" includes: physicians; other licensed health providers operating within the scope of their license (e.g., podiatrists, dentists, clinical psychologists, optometrists and chiropractors); Christian Science practitioners; nurse practitioners; nurse-midwives; clinical social workers; and health care providers from whom the employer's group health plan will accept certification for a claim for benefits.

Pay and Benefits During Leave

The FMLA requires only unpaid leave. Nevertheless, an employee may elect, or an employer may require the employee, to "substitute" (i.e., take concurrently) during the FMLA leave period any paid vacation, paid personal leave or certain other paid leaves available to the employee. The employee may claim paid leave rights during FMLA leave only if the circumstances of the leave would otherwise qualify under the paid leave policy.

While an employee is on leave, the employer must continue to provide to the employee its regular group health plan coverage at the same cost and on the same conditions as for active employees. For unpaid FMLA leaves, the employer may require employees to pay their share of premium payments at the same time as normal payroll deductions, COBRA payments or established payment schedules for other unpaid leaves. Generally, the employer's obligation to continue coverage will cease if the employee's premium payment is

more than 30 days late and the employer has provided the employee 15 days' advance notice of the coverage termination with an opportunity to make up the missed payments.

The FMLA permits an employer to pursue recovery of its share of health plan premiums for a period of unpaid FMLA leave if the employee fails to return to work after the leave expires, unless the reason the employee does not return is due either to the continuation, recurrence or onset of a serious health condition, or to circumstances beyond the employee's control. Generally, however, most employers are unlikely to find it cost effective to pursue recovery of those premiums.

Job Restoration After FMLA Leave

Upon return from FMLA leave, an employee is entitled to be restored to the same position held when leave commenced, or to an equivalent position with equivalent pay, benefits and other terms and conditions of employment. If the employee is no longer qualified for the position because of his or her inability to attend a necessary course or renew a license as a result of the leave, the employee should be given a reasonable opportunity to fulfill those conditions upon return to work. If the employee is unable to perform the functions of the position because of a physical or mental condition, including the continuation of a serious health condition, the employer's obligations may be governed by the Americans with Disabilities Act.

The employee is entitled, upon return to work, to any unconditional pay increases that may have occurred during the FMLA leave period, such as cost-of-living increases. Generally, pay increases conditioned upon seniority, length of service, or work performed would not have to be granted, unless it is the employer's policy or practice to do so with respect to other employees on other types of leave without pay. The employee also is entitled to immediate resumption of all benefits in effect when the leave began — without new waiting periods, insurability requirements or pre-existing conditions limitations — even if the employee let the benefits lapse during leave by failing to make premium payments.

The employee must be reinstated to the same worksite or to a geographically proximate one. Ordinarily, the employee is entitled to return to the same shift or the same or equivalent work schedule.

While on FMLA leave, an employee has no greater right to reinstatement than if the employee had been continuously employed during the leave period.

Example: If the employee would have been laid off had he or she not taken the leave, the employer's responsibility to continue FMLA leave comes to an end at the time the layoff would have occurred. The employer would have the burden of proving that the employee would have been laid off during the FMLA leave. Similarly, if the employee was hired temporarily for a separate project, the employer has no obligation to reinstate the employee if the project is completed.

The FMLA contains a limited exception to the requirement that the employer restore the employee to the same or equivalent job upon return from leave. The employer may refuse job restoration to a "key employee" if the restoration would cause the employer "substantial and grievous economic injury." This level of injury is defined by regulations and may include situations where reinstating the key employee "threatens the economic viability" of the employer or would cause "substantial, long-term economic injury" to the employer, but not situations involving "minor inconveniences and costs" that the employer would experience in the normal course of doing business. A "key employee" is defined as a salaried, FMLA-eligible employee who

is also among the highest paid 10% of all employees of the employer — salaried and non-salaried, eligible and ineligible — who are employed within 75 miles of the worksite.

School Instructors

Certain special rules apply to instructional employees of local educational agencies, including both public and private elementary and secondary schools. The special rules do not apply to other kinds of educational institutions, such as colleges and universities, trade schools and preschools.

The special rules apply to the taking of intermittent leave or leave on a reduced schedule, as well as leave near the end of an academic term, by instructional employees (employees whose principal function is to teach students in a class, a small-group or an individual setting). This includes not only teachers, but also athletic coaches, driving instructors, and special education assistants, such as signers for the hearing impaired. As a general rule, it does not include teacher assistants or aides, counselors, cafeteria workers, maintenance workers or bus drivers.

If an instructional employee requests intermittent or reduced schedule leave for planned medical treatment, and if the employee would be on leave for more than 20% of the total working days over the entire leave period, the school may require the employee to make a choice. The employee may be asked to choose between taking continuous leave or transferring temporarily to an available position (with equivalent pay and benefits) for which the employee is qualified and that better accommodates recurring periods of leave.

There also are different rules for instructional employees who would otherwise return from leave near the end of an academic term. The employer may require the employee to stay on leave until the end of the term if the leave:

- begins more than five weeks before the end of a term, will last at least three weeks, and would end during the three-week period before the end of the term;
- begins, for a purpose other than the employee's own serious health condition, during the five-week period before the end of a term, will last more than two weeks, and would end during the two-week period before the end of the term; or
- begins, for a purpose other than the employee's own serious health condition, during the three-week period before the end of a term and will last more than five working days.

Joint Employers and the FMLA

The FMLA imposes several unique requirements on joint employers. In the joint employment setting, only the employee's "primary" employer is required to furnish FMLA notices, provide FMLA leave, and maintain the employee's health benefits during leave. In determining which employer is the "primary" employer, courts examine which employer has the most control over the employee, including which entity is responsible for paying the employee, hiring or firing the employee, and assigning or placing the employee.

Even so, when an individual is jointly employed by two employers, he or she must be counted by both employers in determining whether the employer is covered under the FMLA and whether the employee is eligible to take leave. With respect to the secondary employer, it must count an employee who takes leave for FMLA coverage and eligibility purposes if the secondary employer has a reasonable expectation that the employee will return to his or her employment.

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When an employee returns from FMLA leave, the responsibility to restore the employee's job falls to the primary employer. If the employee works for the secondary employer through a temporary staffing agency, the secondary employer must accept placement of the returning employee over a replacement employee if it continues to use employees from the temporary placement agency and the agency places the returning employee with the secondary employer.

Posting and Recordkeeping Requirements

The employer must post in prominent places a notice setting forth the pertinent provisions of the FMLA. Employers may be assessed a monetary penalty not to exceed \$110 for each violation of the notice requirement.

Covered employers must make and preserve records pertaining to their obligations under the FMLA in accordance with the recordkeeping requirements of Section 11(c) of the Fair Labor Standards Act (FLSA) and in accordance with FMLA regulations. The employer must keep the records for no less than three years and make them available to the Department of Labor upon request.

Although the FMLA does not require any particular form of records, the employer's records must disclose basic payroll and employee identification data; dates and hours that FMLA leave is taken; copies of employee leave notices; copies of all general and specific employer notices given to employees as required under the FMLA and its regulations; documents describing benefits or policies regarding paid and unpaid leaves; premium payments for employee benefits; and records of any disputes between the employer and employees regarding the designation of FMLA leave.

Employee Remedies

If an employer violates the FMLA, an individual employee may recover damages equal to the employee's lost wages, salary and benefits. If none were lost, a successful plaintiff may recover any actual monetary losses sustained as a direct result of the violation (up to the equivalent of 12 weeks of the employee's wages or salary). In addition, the prevailing plaintiff may recover interest on those amounts, equitable relief such as reinstatement and promotion, and, in some cases, double damages. Courts also may award reasonable attorneys' fees, reasonable expert witness fees, and other costs of the action.

In general, a civil action under the FMLA must be brought within two years after the date of the last event constituting the alleged violation; for willful violations, the FMLA extends that period to three years.

Indiana Military Family Leave Act

Indiana employers with at least 50 employees are required to provide leave under state law to certain family members of military servicemembers. The Indiana Military Family Leave Act (Indiana Code 22-2-13-1 *et seq.*) makes job-protected leave available to certain family members of individuals on active duty in the Armed Forces of the United States or the Indiana Army or Air National Guard.

Generally, to be eligible for military family leave, an employee must have been employed by the employer for at least 12 months and have worked at least 1,500 hours during the 12-month period immediately

preceding the date on which the leave is to begin. Eligible employees may take up to 10 days off work per calendar year for qualifying circumstances during one or more of the following periods:

- the 30 days before active duty orders are in effect;
- the period in which the person ordered to active duty is on leave while active duty orders are in effect; or
- the 30 days after termination of the active duty orders.

The employer is entitled to certain notice and documentation from the employee to support the leave request.

When the employee returns from leave, the employer must restore the employee to the same position from which leave was taken, or to an equivalent position with equivalent seniority, pay, benefits and other terms and conditions of employment. Generally, if the circumstances of a leave under the Indiana Military Family Leave Act would also entitle the employee to FMLA leave, the employer appears to be able to count the leave against both leave entitlements.

For more information on this type of leave, please see the discussion in the section entitled Indiana's Military Family Leave Act in Chapter 19, "Veterans' Re-employment Rights."

The Families First Coronavirus Response Act of 2020

In early 2020, in response to the COVID-19 pandemic, Congress enacted the Families First Coronavirus Response Act (FFCRA). The FFCRA temporarily granted paid sick leave and expanded family leave rights for certain absences and needs for leave related to the pandemic. As enacted, the FFCRA's paid sick leave and expanded FMLA leave provisions expired December 31, 2020.

Where to Obtain More Information

For more information regarding the FMLA, contact the following agency:

United States Department of Labor Wage and Hour Division

Indianapolis District Office
135 North Pennsylvania Street, Suite 700
Indianapolis, IN 46204
(317) 226-6801

Information is also available on the U.S. Department of Labor's web site at www.dol.gov.

This chapter was edited by Mike MacLean, Senior Counsel.

Chapter 19

Veterans' Re-employment Rights

Federal law creates significant rights and obligations with regard to military leave and the re-employment of veterans. The Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. §4301 *et seq.*, and the Department of Labor's implementing regulations, 20 C.F.R. Part 1002, govern employers' obligations with respect to military leave and provide a variety of protections with regard to seniority, benefits, discharge, discrimination, retaliation, and other facets of employment.

USERRA protects the employment rights of individuals who, voluntarily or involuntarily, leave employment to serve in the uniformed services in any capacity as long as they meet certain requirements. Upon return from military service, USERRA requires employers to provide returning veterans the employment status, seniority, pay, and other benefits they would have earned had their employment not been interrupted as long as certain basic requirements have been satisfied. Like its predecessors, USERRA prohibits employers from taking adverse employment action because of military service (or for filing a claim or participating in a proceeding to enforce rights under USERRA). Unlike its predecessors, however, USERRA has revised re-employment prerequisites, revamped job placement requirements, expanded pension benefit rights, added protection from discrimination and retaliation, provided for continuation of health benefits during military service, strengthened enforcement by the Department of Labor, and increased remedies to include liquidated damages, attorneys' fees, and expert witness fees.

In addition, some states have laws regarding military leave and veterans' rights. USERRA preempts state laws that would decrease rights or impose additional eligibility criteria. However, it does not supersede or diminish state laws that provide additional or greater rights. For private-sector employers, Indiana generally does not have military leave and re-employment laws that provide rights or create obligations greater than those USERRA has established, so USERRA is controlling. As discussed in this chapter, however, Indiana's Military Family Leave Act provides family members of military personnel called to active duty the right to take leave under certain circumstances. Additionally, the Indiana Civil Rights law protects veterans who have served in the United States armed forces, the Indiana National Guard, or a reserves component of the armed forces.

Coverage

USERRA applies to all civilian employers, including the federal government, state and local governments, and private employers, regardless of the number of employees. "Employer" is broadly defined under USERRA to include any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities. Therefore, in cases involving discrimination in hiring, USERRA covers even a potential employer.

USERRA does not make distinctions based upon the category of military training or service or the timing, frequency, duration, or nature of the service. It protects persons absent from employment by reason of service in the uniformed services. It further protects individuals who engage in any of the activities protected by the statute regardless of whether they actually have performed service in the uniformed services. The uniformed services include full-time and reserve components of the Army, Navy, Air Force, Marine Corps, Coast Guard, National Guard, Commission Corps of the Public Health Service, and any other category

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designated by the President in time of war or emergency. Individuals in the uniformed services receive the same re-employment and seniority protections regardless of whether their service is on a voluntary or involuntary basis or whether it involves active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, the period of absence for fitness for duty examinations, funeral honors duty performed by National Guard or reserve members, or duty performed by intermittent employees of the National Disaster Medical System when activated for a public health emergency or for approved training to prepare for such service. On January 5, 2021, Section 4303 of USERRA was amended to extend employment and reemployment rights to members of the National Guard performing certain types of duty under state authority. Specifically, members of the National Guard are covered by USERRA for serving on State Active Duty:

- for 14 days or more;
- in support of a national emergency declared by the president of the United States under the National Emergencies Act; or
- in support of a major disaster declared by the president under Section 401 of the Stafford Act.

In 2022, the Supreme Court ruled that state government employers were not immune from private suits brought under USERRA. Specifically, in *Torres v. Texas Dep't of Pub. Safety*, 213 L. Ed. 2d 808, 142 S. Ct. 2455, 2457 (2022), the Court ruled that the states agreed their sovereignty would yield to the national power to raise and support the Armed Forces. Therefore, Congress may exercise this power to authorize private damages suits against nonconsenting states, and private USERRA claims against state employers are permissible.

Employer Notice Requirements

Employers must notify employees of their rights under USERRA. Notice of such rights must be placed in the area(s) in which employers customarily place notices for employees. Employers can find a poster containing the required information on the U.S. Department of Labor's web site, www.dol.gov. Mandatory federal and state posters also can be ordered from the Indiana Chamber in laminated sets. They can be obtained by calling (800) 824-6885 or going to www.indianachamber.com/publications.

Indiana also requires employers to provide notice of the law. The Indiana Civil Rights Commission has offered the following language to meet this requirement:

Effective July 1, 2014, under Indiana House Enrolled Act (HEA) 1242, it is against public policy of the State of Indiana and a discriminatory practice for an employer to discriminate in employment or against a prospective employee on the basis of status as a veteran of the armed forces of the United States, a member of the Indiana National Guard, or a member of a reserve component.

Entitlement to Re-employment

Employee Must Have Left Employment

To be eligible for re-employment, an employee must have left employment that was reasonably expected to continue indefinitely or for a significant period and was other than employment for a brief or nonrecurrent period. However, the job left need not be permanent or regular. For example, at will employees and

probationary employees are covered. An employee for purposes of USERRA is broadly defined to include any person employed by an employer, and U.S. citizens employed overseas by U.S. employers are protected. Courts generally determine whether a person is an independent contractor or employee under USERRA using the test to make that determination for purposes of the Fair Labor Standards Act.

Employee Must Have Given Notice

Under USERRA, employees entering any category of military training or service generally must give advance written or oral notice to their employer that they will be leaving the job for such training or service to be eligible for re-employment. Such notice also may be given by an appropriate officer of the uniformed services in which the persons serve. However, there are exceptions to the notice requirement where military necessity prevents the giving of notice or where the giving of notice is otherwise impossible or unreasonable. Therefore, employers should consult these exceptions before denying a returning employee re-employment due to inadequate notice prior to departure for service.

Length of Absence

Under USERRA, employees returning from military service receive the same re-employment and seniority protections regardless of the type of military service so long as the cumulative length of absence from their employer by reason of military service does not exceed five years. Thus, the length of time an individual may be absent for military duty and still retain re-employment rights is limited. While most types of service are counted in the computation of the cumulative five-year period, USERRA exempts several categories of service from the five-year limitation. Some common examples include certain military specialties that require an initial obligation of more than five years; service from which individuals may not obtain a release within the five-year limit through no fault of their own (e.g., a member of the Navy's five years expire while the ship is at sea); service performed to fulfill periodic National Guard and Reserve training requirements; certain situations involving war or national emergency; and others. Moreover, military service performed before an individual began working for a particular employer is irrelevant in establishing this prerequisite to re-employment.

The regulations also make clear that employees do not have to begin service in the uniformed services immediately after leaving their employment position to have USERRA re-employment rights. They provide that, at a minimum, employees must have enough time after leaving their employment position to travel safely to the uniformed service site and arrive fit to perform service. Depending on the circumstances, including but not limited to the duration of the service, the amount of notice received, and the location of the service, employees may be entitled to pre-service time off from employment of varying duration to rest, arrange personal affairs, and report to duty.

Reporting Back to Work

Under USERRA, employees must report to work or submit an application for re-employment by certain specified deadlines that vary based on the length of their military service.

- Employees who have served from one to 30 days must return not later than the beginning of the first regularly scheduled work period that begins on the day after release from service after allowing for safe travel home from the military duty location and an eight-hour rest period. Employees absent from work for fitness-for-duty examinations must report back to work in the same manner regardless of the length of their absence.

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- Employees who have served from 31 days to 180 days must seek re-employment within 14 days of completion of the period of military service. The re-employment application can be written or oral as long as it clearly conveys that the person is a returning servicemember seeking re-employment. However, there is an exception for circumstances under which it is impossible for employees to seek re-employment that quickly. In that case, they must apply on the next full calendar day when seeking re-employment becomes possible. Additionally, if the 14th day falls on a day on which the employer's offices are closed or a day on which no one is available to accept the application, the deadline extends to the next business day.
- Employees who have served more than 180 days must apply for re-employment within 90 days after completing the period of military service.
- The reporting or application deadlines are extended for up to two years for persons hospitalized or convalescing from an illness or disability incurred or aggravated during the period of military service. Certain limited exceptions allow for the extension of that period as well.

USERRA provides certain exceptions for circumstances that make it impossible for individuals to report back to work or seek re-employment within the required time period. Moreover, individuals who fail to report or to seek re-employment within the statutory time frame do not forfeit all re-employment rights. Rather, they merely become subject to the consequences of the employer's existing policies with regard to discipline for absence from work. An application for re-employment need not follow any particular format, and the regulations make clear that an employee may seek re-employment orally or in writing.

Disqualifying Service

Under USERRA, employees returning from military service are not entitled to re-employment benefits if they received a dishonorable or bad conduct discharge, were separated from the military under other than honorable conditions, were dismissed by reason of court-martial, or have been dropped from the military rolls by reason of absence without authority for more than three months or by civilian imprisonment.

Documentation Upon Return

For individuals absent 31 or more days by reason of military service, employers have the right to request that they provide documentation showing that their application for re-employment is timely, that they have not exceeded the five-year service limitation, and that they were not separated from service under disqualifying conditions. However, if an individual does not provide satisfactory documentation because it is not available or does not exist, the employer still must promptly re-employ the person.

Employer Obligations

Time That Re-employment Must Occur

Employees returning from military service who fulfill the prerequisites described previously must be promptly re-employed. What is considered "prompt" generally will be determined on a case-by-case basis. However, informal guidance from the Department of Labor suggests that prompt re-employment after weekend National Guard duty generally would be the next regularly scheduled workday, whereas prompt re-employment following five years on active duty might be a slightly longer period due to the need to make necessary arrangements for the employee's return from a business standpoint.

Escalator Principle

Employees returning to work after having served in the uniformed services generally must be returned to the same status, seniority, and pay they would have enjoyed had they never left. In practice, this escalator principle requires an employer to reconstruct returning servicemembers' employment history as it would have been but for their absence due to military service. It requires that such employees step back onto the seniority escalator at the precise point they would have occupied had they remained continuously employed. Therefore, returning employees are entitled to seniority and other rights and benefits determined by seniority to which they were entitled on the date they commenced service as well as the additional seniority rights and benefits they would have attained had they remained continuously employed.

Re-employment Required

As a general rule, an employee is entitled to re-employment in the job position he or she would have attained with reasonable certainty if not for the absence due to uniformed service. Moreover, the position in which re-employment is required depends on whether the period of service in the uniformed services was for more or less than 90 days.

If the period of service was for one to 90 days, employees returning to work from military service must be promptly re-employed in the following order of priority:

1. In the position they would have held had they remained continuously employed, so long as they are qualified for the position or can become qualified after reasonable efforts by the employer to qualify them; or
2. In the position they held when they left (but only if they are not qualified to perform the duties of the position they would have held under the escalator principle after reasonable efforts by the employer to qualify them).

If employees cannot become qualified for either of these positions even after reasonable employer efforts, they are entitled to re-employment in a position that is the nearest approximation to those positions they are able to perform, with full seniority.

If the period of service was for 91 or more days, employees returning to work from military service must be promptly re-employed in the following order of priority:

1. The position they would have held had they remained continuously employed or a position of like status, seniority and pay, so long as they are qualified for the position or can become qualified after reasonable employer efforts; or
2. In the position they held when the left or a position of like status, seniority and pay that they are qualified to perform (but only if they are not qualified to perform the duties of the positions referred to in Item 1 after reasonable employer efforts to qualify them).

If employees cannot become qualified for these positions even after reasonable employer efforts, they are entitled to re-employment in any other position that most nearly approximates these positions (in that order) that they are qualified to perform, with full seniority.

Re-employment Must Be Possible

Under USERRA, employers are not required to re-employ individuals who have served in the uniformed services if changed circumstances have made re-employment impossible or unreasonable, if the employer establishes that assisting the employee in becoming qualified for re-employment would impose an undue hardship, or if the employment from which the individuals left was not reasonably expected to continue indefinitely or for a significant period. The determination of whether re-employment would create an undue hardship takes into account a variety of factors, including the nature and cost of the action and whether it would impose significant difficulty or expense in light of the employer's financial resources, size, type of operation, workforce composition and other related criteria. The employer bears the burden of proving conditions that would justify denial of re-employment rights.

If two persons are entitled to re-employment in the same position and both report for re-employment, the person who left the position first generally should be given superior right to re-employment in that position. The other person generally is entitled to re-employment with all seniority in any other position that provides similar status and pay.

Rights and Benefits

Seniority-Dependent Benefits

USERRA's general rule with regard to seniority-dependent benefits is simple: If a right or benefit is related to seniority, it must be provided to returning servicemembers as if they never left. A right or benefit is based on seniority if it is determined by or accrues with longevity in employment. On the other hand, a right or benefit is not seniority-based if it is compensation for work performed or is subject to a significant contingency.

In applying the escalator principle, rights and benefits determined by seniority must be reconstructed to compensate for an employee's period of absence due to military service. This could mean, for example, that depending upon an employer's policies, an employee (upon re-employment after military service) may be entitled to receive benefits such as promotions, pay raises, pensions, transfers, stock options, displacement allowances, and retroactive seniority adjustments as if he or she had been continuously employed, as well as other seniority-determined benefits to be awarded in the future such as pensions, severance pay, supplemental unemployment benefits, etc., that must be calculated upon continuous service that includes the time the individual served in the uniformed services.

Benefits Not Dependent Upon Seniority

If a right or benefit is not related to or dependent upon seniority, individuals returning from military service must be provided the same level and extent of benefits as any other employees who were deemed to be on non-military furloughs or leaves of absence. Moreover, individuals who leave employment to serve in the military are deemed to be on furlough or leave of absence while performing military service and are, therefore, entitled to participate in any rights and benefits, paid or unpaid, that are not based on seniority that are available to employees on other non-military leaves of absence. However, persons serving in the military have no greater right to leave of absence benefits than they would have had, had they remained continuously employed.

The rights and benefits to which persons serving in the military are entitled include not only those available at the time their military service began, but also those that became effective during their military service. Further, if there is a variation among the rights and benefits of different types of non-military leaves of absence, the most favorable treatment must be provided to the servicemembers.

Rights and benefits such as vacations, profit sharing, sick days, and life insurance often are not seniority related, although this of course depends on the employer's policies. However, if a portion of the vacation benefit is related to seniority, it may be considered seniority related. For example, although vacation benefits, like salary, are usually considered short-term compensation, the rate at which the benefits accrue often is directly related to the employee's length of service. Under USERRA, if the amount of vacation an employee accrues is related to seniority, credit must be given for time spent in military service. Again, whether a benefit is related to seniority depends in large part on how employers treat that benefit as a matter of policy and practice.

Use of Accrued Vacation

Employers must permit employees whose employment has been interrupted by military service to use accrued vacation or other paid leave for such service. However, it is unlawful for employers to force employees to do so.

Health Insurance

USERRA contains provisions with regard to employee health benefits. USERRA specifically provides that if an employee is absent from employment by reason of military service, the employer must allow the employee to elect to continue health insurance coverage for up to 24 months following departure for military service or for the period of service plus the time allowed to apply for re-employment, whichever is shorter. If the period of service is 30 days or less, an employee cannot be required to pay more than the normal employee share of any premium. For periods of service exceeding 30 days, an employee may be required to pay up to 102% of the full cost of continuing insurance coverage on a basis similar to health insurance continuation under COBRA.

USERRA also provides that except for situations involving certain illnesses or injuries incurred in or aggravated during military service, an employer may not impose an exclusion or waiting period in connection with the reinstatement of coverage upon re-employment if such an exclusion or waiting period would not have been imposed had coverage not been terminated as a result of military service.

Pension Benefits

Under USERRA, periods of military service constitute continuous service for pension purposes. Thus, pension benefits are not forfeited by a break in service and continue to accrue under the plan. USERRA's detailed treatment of pension plans, set forth in 38 U.S.C. § 4318, provides that a re-employed person must be treated as not having left employment with the employer maintaining a pension plan, military service must be considered service with an employer for vesting and benefit accrual purposes, an employer is liable for funding any resulting obligations, and the re-employed person is entitled to any accrued benefits from employee contributions but only to the extent the person repays the employee contributions.

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Employers must make employer contributions to a pension plan for employees during their period of military service to the same extent they make such contributions for other employees, calculated on the pay rate the employees would have been receiving if continuously employed. Returning veterans are entitled to all employer contributions actually made during their absence regardless of whether the plan was a defined contribution plan or not. Therefore, if an employer contributes to pension funds but is not required to do so in any given year and the contributions vary depending on the employer's earnings, returning veterans still would be entitled to the accrual of the contributions made during their absence.

Employees returning from military service are also entitled to benefits contingent on employees' contributions or elective deferral as long as they continue to make payments to the plan for the period of service.

Prohibited Discrimination

Under USERRA, an employer cannot deny any benefit of employment (such as initial employment, re-employment, retention in employment, promotion, or others) on the basis of a person's past or present membership in the uniformed services, a person's application to be a member of the uniformed services, or a person's future uniformed service obligations. Therefore, past, current or future military obligations cannot be a motivating factor for an employer's adverse employment action.

Employers also cannot take adverse employment action against a person because the person filed a complaint under USERRA, exercised any right provided under USERRA or testified, assisted, or otherwise participated in an investigation or proceeding under USERRA. This protection extends not only to those who seek to enforce their rights under USERRA but also to others who testify or participate in investigations or proceedings regardless of whether they themselves have performed military service. This retaliation protection extends to all jobs, including those that are brief or nonrecurrent in duration and cannot reasonably be expected to continue for a significant period. Therefore, even though those persons do not have re-employment rights, they are still protected from retaliation under USERRA.

In addition, the Indiana Civil Rights Law includes additional protections for veterans. The law makes it against the public policy of the state of Indiana and a discriminatory practice for an employer to discriminate:

- in employment based on veteran status; and
- against a prospective employee (applicant) on the basis of status as a veteran by refusing to employ an applicant for employment on the basis that the applicant is a veteran of the armed forces of the United States, a member of the Indiana National Guard, or a member of a reserve component.

Special Protection Against Discharge

Protection under USERRA does not end when the veteran is reinstated. Individuals re-employed under USERRA cannot be discharged without cause within one year after their date of re-employment if they served in the military more than 180 days, or within 180 days of the date of re-employment if they served from 31 to 180 days. The regulations state that in situations involving discharge for conduct, the employer bears the burden of proving both that it was reasonable to discharge the employee for the conduct in question and that the employee had notice that such conduct would constitute a basis for discharge. Thus, clear communication of conduct policies and expectations is essential.

Enforcement and Remedies

USERRA provides authority to the Department of Labor to conduct initial investigations and issue subpoenas, referral to the Attorney General for enforcement, and a private right of action in the United States district courts. Courts can order employers to comply with USERRA and can award damages for lost wages or benefits suffered because of the employer's failure to comply as well as reasonable attorneys' fees, expert witness fees and other litigation expenses. No fees or court costs can be charged or taxed against a person claiming rights under USERRA. The courts also have equity powers and can issue temporary and permanent injunctions, temporary restraining orders, and contempt orders to vindicate fully the rights or benefits of persons under USERRA. If it can be shown that an employer's violation of USERRA was willful, the employer can be forced to pay liquidated damages in an amount equal to the employee's or applicant's actual damages.

Indiana Military Family Leave Act

Indiana employers with at least 50 employees for each working day during each of at least 20 calendar workweeks have additional obligations with respect to military leave. The Indiana Military Family Leave Act (Indiana Code 22-2-13) makes job-protected leave available to certain family members of individuals on active duty in the Armed Forces of the United States or the Indiana Army or Air National Guard. "Active duty" is defined as full-time service on active duty orders for a period that exceeds 89 consecutive calendar days. Employees who are eligible for military family leave include: spouses, parents, biological or adoptive mothers or fathers, brothers or sisters (whether by blood, half-blood, or adoption), biological grandparents, and court-appointed guardians or custodians.

To be eligible for family military leave, an employee must have been employed by the employer for at least 12 months and worked at least 1,500 hours during the 12-month period immediately preceding the date on which the leave is to begin. Eligible employees may take up to 10 days off work for qualifying circumstances during:

- the 30 days before active-duty orders are in effect;
- a leave provided to the eligible family member on active duty while the active duty orders are in effect; or
- the 30 days after the termination of the active duty orders.

Under the Indiana Military Family Leave Act, employers may require verification of an employee's eligibility for leave, and employees must give employers written notice, with a copy of active duty orders if available, before taking military family leave. Employees must provide at least 30 days' notice before the date the requested leave is to begin unless the active duty orders are issued fewer than 30 days prior to the date the requested leave is to start.

Additionally, under the Indiana Military Family Leave Act, employers cannot take adverse action such as discipline, withholding promotions, or otherwise penalizing or retaliating against employees for taking this legally protected leave and cannot take any action that interferes with, restrains, denies the exercise of, or denies the attempt to exercise any right provided under the law. Moreover, employers must either hold the employee's position or return the employee to a position equivalent in seniority, pay, benefits, and other terms and conditions of employment to the one held before the leave. Employees also are entitled to continuation of their group health benefits while on leave.

Interaction with the FMLA

The Family and Medical Leave Act (FMLA) is discussed in Chapter 18. For purposes of USERRA, however, employers should note that the FMLA provides leave rights to certain family members of the uniformed services, commonly known as Military Caregiver Leave and Qualifying Exigency Leave.

Military Caregiver Leave

A covered employer must grant an eligible employee who is a spouse, son, daughter, parent, or next of kin of a covered servicemember with a serious injury or illness up to a total of 26 workweeks of unpaid leave during a single 12-month period to care for the servicemember. A covered servicemember is a current member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness. In general, a serious injury or illness is one that a servicemember incurred in the line of active duty that may render the servicemember medically unfit to perform the duties of his or her office, grade, rank, or rating.

Qualifying Exigency Leave

A covered employer must grant an eligible employee up to a total of 12 workweeks of unpaid leave during the normal 12-month period established by the employer for FMLA leave for qualifying exigencies arising out of the fact that the employee's spouse, son, daughter, or parent is on covered active duty, is on call to covered active duty status, or has been notified of an impending call or order to covered active duty. Qualifying exigencies can include such things as issues arising from a covered military member's short notice deployment, military events and related activities, childcare and related activities arising from active duty or a call to active duty status, the need to make or update financial and legal arrangements to address a covered military member's absence, the need to attend counseling, rest and recuperation leave during deployment, certain post-deployment activities, and any other event that the employee and employer agree is a qualifying exigency.

For more information on these leaves and their coverage/eligibility criteria, see Chapter 18, "Family and Medical Leave Act (FMLA)."

In addition, the DOL has issued guidance explaining that returning servicemembers should be given credit for time spent on military leave that would have been worked but for the military service for purposes of calculating both the months of employment and hours worked requirements for FMLA eligibility. Employers should consult this guidance and the statute/regulations when addressing FMLA and USERRA issues.

Voluntary Veterans' Preference for Employment

A law passed by the Indiana state legislature in 2015 allows Indiana employers to establish a policy providing preference to military veterans for employment, promotion or retention purposes. The state law provides that such a policy does not violate local or state equal employment opportunity laws. This policy must be in writing and must be applied uniformly to employment decisions regarding hiring, promotion, and retention during a reduction in force.

One difficulty with this law is that it cannot provide protection from claims of discrimination under federal law and employers may face claims of disparate impact if they adopt such a policy (e.g., minority or female claimants showing that more males and non-minorities enter the military, and thus such policies have a disparate impact on lesser represented groups). As such, employers implementing such policies should be careful in how they are crafted and applied and should seek counsel before adopting such a policy.

This chapter was edited by Grayson F. Harbour, Associate.

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National Labor Relations Act

The National Labor Relations Act (NLRA) was passed in 1935 to give support to union organizing and thereby foster collective bargaining in America. The legislation was based on the belief that unionization would provide the American worker with a greater ability to achieve wage and benefit equity during the years following the Depression. Although the NLRA has been amended since 1935, the NLRA as amended continues today to provide the framework for labor-management relations. The NLRA applies to union and non-union employers alike.

The NLRA gave birth to the National Labor Relations Board (NLRB) and vested it with the authority to administer the law in two major respects:

1. Conducting elections for the certification or decertification of union representation; and
2. Investigation and prosecution of charges of unfair labor practices, that is, employer or union conduct that violates the right of employees to engage in union or protected concerted activity or refrain from such activity.

Because the NLRA regulates union activity in the workplace of private employers, state laws attempting to regulate private employee rights regarding unionization are preempted by the NLRA (with the exception of “right-to-work” laws, which are discussed later in this chapter).

Jurisdiction

The NLRB will assert jurisdiction over a matter where a labor dispute exists, “affecting commerce” involving private employers, employees and, where applicable, labor unions. The “affecting commerce” standard makes the NLRA applicable to nearly all private employers. In the early years of the NLRA, the NLRB adopted administrative jurisdiction standards in broad categories that have resulted in only the smallest of employers not being subject to the NLRB’s assertion of jurisdiction. They are discussed below.

“Non-retail enterprises” must have annual direct or indirect inflow or outflow of gross revenues of at least \$50,000 across state lines and are employers who are not engaged in retail business.

“Retail establishments” must have annual gross business volume of at least \$500,000 and substantial purchases from, or sales to, other states. Notably, in addition to “traditional” retailers, “retail establishments” also include employers in the amusement industry, apartments and condominiums, cemeteries, casinos, home construction, hotels and motels, restaurants, private clubs, and taxis.

Supplementing the general retail and non-retail standards, the NLRB also has industry-specific jurisdictional standards, as outlined below:

- Childcare institutions (annual revenue of at least \$250,000)
- Health care institutions (nursing homes, visiting nursing associations and related facilities with an annual revenue of at least \$100,000; hospitals and other health care institutions with an annual revenue of at least \$250,000)
- Instruments of interstate commerce (annual revenue of at least \$50,000)

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- Law firms and legal assistance programs (annual revenue of at least \$250,000)
- Multi-family residential housing (annual revenue of at least \$500,000)
- National defense enterprises (substantial impact on the national defense)
- Newspapers and other written publications (annual business volume of at least \$200,000)
- Non-profit institutions (annual revenue of at least \$1 million. Examples include symphony orchestras; art museums; non-profit colleges and universities, and private educational institutions.)
- Office buildings and shopping centers (annual revenue of at least \$100,000, of which at least \$25,000 is derived from organizations that meet any jurisdictional standard other than the non-retail enterprises standard)
- Public utilities (annual business volume of at least \$250,000, or satisfying the non-retail enterprises standard)
- Telecommunications (annual business volume of at least \$100,000)
- Transit Systems (annual business volume of at least \$250,000)

Also, it is important to note that the NLRA expressly excludes from coverage:

- public employers and employees of political subdivisions;
- employers subject to the jurisdiction of the Railway Labor Act (typically airline and railroad employers);
- agricultural employers; and
- employers with domestic workers in their homes.

Note: Many states and local municipalities have enacted legislation establishing a collective-bargaining framework for public employees. In Indiana, there are several municipalities that have passed ordinances granting their employees the right to engage in collective bargaining, and the state legislature has created collective-bargaining rights for teachers, police, and firefighters.

Union Elections

Unions have two choices when attempting to organize employees of a covered employer: seeking voluntary recognition or seeking a representational election.

Voluntary recognition has been uncommon over the years and, except for the construction industry, can only be granted based on a union showing that a majority of the employees in an appropriate unit choose to be represented by the union. In recent years, there has been some resurgence in unions' reliance in demand for voluntary recognition. "Neutrality agreements" and other related recognition devices have received substantial legal attention since the early 2000s. Until recently, the NLRB would not hold an election to vote a union out in cases of voluntary recognition until at least six months had elapsed from the time of the voluntary recognition. In 2020 the NLRB issued a new rule that requires that the Board and employees be notified when their employers have voluntarily recognized a union and allows employees a 45-day window to file a decertification petition. In 2022, however, the Board issued a notice of proposed rulemaking that would eliminate this rule and restore the prior six-month recognition bar.

The far more common method for union recognition is through the NLRB's election procedure. To trigger that process, a labor organization must file with the NLRB a representation petition supported by a 30% showing of interest by employees. Once such a union petition is filed, the NLRB engages in an investigatory process to determine whether it will assert jurisdiction over the employer and the appropriate bargaining unit of employees eligible to vote. Automatically excluded from the unit of employees eligible to vote are supervisors, who are defined as:

...any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsible to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Whether an employee is or is not a "supervisor" under the NLRA is a common source of NLRB litigation, and the NLRB frequently modifies its analysis regarding, and interpretation of, "supervisory status" under the NLRA. As a result, employers are encouraged to consult with counsel if an issue involving supervisory status under the NLRA arises.

Additionally, guards may not be included in a unit with other employees, nor can professional employees unless a majority of the professionals vote for inclusion.

Ordinarily, the NLRB will attempt to secure an agreement between the union and employer as to both jurisdiction and which employees will be included in the unit eligible to vote. However, if such an agreement cannot be reached, then generally within 14 days of the filing of the petition the NLRB will conduct a hearing to resolve either or both of those questions. For example, if a union petitions to represent a group of production and maintenance employees and the union and employer cannot agree on whether plant clerical employees ought to be eligible to vote, the NLRB will conduct a hearing to determine the eligibility of plant clericals. Typically, the NLRB applies a community-of-interest test to determine eligibility unless one's supervisory status is an issue. The community-of-interest test is applied on a case-by-case basis, weighing several factors, including the following:

- Similarity in wages and benefits
- Similarity in working conditions and hours
- Common supervisory structure
- Similarity in skills
- Commonality of job functions
- Location of work
- Frequency of interchange between employees
- Frequency of contact among employees
- Integration of work functions
- Bargaining history of the employees or the industry in which they work
- Desires of the employees

Current Board law applies a traditional community-of-interest standard for determining an appropriate bargaining unit. In *The Boeing Co*, a 2019 decision, the Board created a three-step process to determine whether a bargaining unit is "an appropriate" unit even if not the "most" appropriate unit. First, the Board must consider whether the proposed unit shares a community of interest among those within the petitioned-

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for unit. Second, the Board analyzes and weighs the interests of those within the proposed unit, and the shared and distinct interests of those excluded from the proposed unit. Lastly, the Board must consider its earlier decisions on appropriate units in the industry involved.

Since 2016, the NLRB has allowed a union to organize a group of employees where some employees are directly employed by an employer, but others are jointly employed with another employer (such as a staffing agency).

Also in 2016, the NLRB issued its decision in *Columbia University*, which found that undergraduate and graduate teaching assistants have the right to organize and engage in collective bargaining because they are “employees” under the Act. Note that public higher education institutions are not affected by the NLRB’s *Columbia University* decision because the NLRB has no jurisdiction over governmental entities. In 2020, the NLRB held in *Bethany College* that it does not have jurisdiction over the faculty at religious institutions of higher education.

Election Procedures

Election procedures were amended in 2019 and the new rules went into effect on June 1, 2020. The 2019 Final Rules allow for more time between when a petition for an election is filed and an NLRB election will occur. The 2019 Final Rules also contain a number of other changes.

Region 25 is the NLRB region that covers most of Indiana. Under the 2019 NLRB election rules, depending upon the facts, the representation election likely will be held between 20 and 34 days after the filing of the election petition or the date the Board issues a direction of election. Employers must file with the NLRB and give to the union a voter eligibility list providing names, personal and company email addresses (if known), personal phone numbers (if known), shift, location, job classification, and the home addresses of all eligible voters within two business days after the NLRB issues a decision and direction of election or approves a stipulated election agreement. Failure of the employer to file the list will be grounds to set aside an election. In July 2020, the NLRB announced a proposed amendment to the rules to eliminate the requirement that employers provide available personal email addresses and home and personal cellular telephone numbers citing employee privacy concerns. As of the publication date of this book, the Board has yet to announce whether it will proceed with this amendment or withdraw it, but given the passage of time and the change in composition of the Board, it is likely this rulemaking will not proceed.

The following procedures apply for each NLRB-conducted election:

- It is conducted by an agent of the NLRB.
- It is conducted by secret ballot.
- Results are determined by a majority of those who vote.
- It is typically held on company property.
- Each party is afforded an observer and, if more than one is necessary, then each has an equal number of observers.
- The company’s observer must be non-supervisory.
- Either the observer or the NLRB agent may challenge the ballot of any individual who presents himself or herself to vote on the belief he or she is not eligible to vote. If a challenge ballot is determinative of the outcome of an election, then the NLRB will conduct an investigation and may hold a hearing to determine the eligibility of the challenged individual’s vote.
- In response to the COVID-19 pandemic, most NLRB elections have been conducted by mail

ballot since March 2020. In *Professional Transportation, Inc.* (August 2021), the Board established a new rule concerning solicitation of mail ballots. The Board held that it is objectionable conduct – which may be grounds for setting aside an election – to offer to collect employee mail-in ballots or by otherwise offering to assist in mail ballot submission.

After the election, each party has seven days within which to file objections to the election, asserting that due to either unlawful or objectionable conduct, the laboratory conditions of the election were interfered with and, therefore, the employees could not freely express their opinion regarding unionization. If no objections are filed, then the regional director will certify the election results. If objections are filed, the regional office will conduct a hearing to determine the merit of the objections. During this period, if the union has won the election, it will not have yet been certified as the employees' collective bargaining representative. No duty to bargain will yet exist.

If a union files a petition for an election but withdraws the petition prior to a hearing, then it may refile the petition at any time. If it withdraws the petition after the commencement of the hearing, then the union may not refile for six months. If the election is held and the union loses, then the employer is not subject to another election effort for 12 months from the date of the election.

The NLRB's new election rules contain a host of other procedural and substantive changes to the NLRB's election process and additional amendments are anticipated. If an Indiana employer is notified by the NLRB or other entity that it has a union election petition filed against it, the employer should promptly call counsel.

The Campaign

It is common that both the employer and union campaign for votes during the weeks prior to an election. Section 8(c) of the NLRA provides:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this act, if such expression contains no threat of reprisal or force or promise of benefit.

Consequently, employers are entitled to share their views of unionization with employees as long as they do not violate the provisions of the NLRA. It is lawful for an employer to inform employees of the reasons it believes unionization is not in their best interest. On the other hand, employers are prohibited from engaging in certain conduct that can be categorized as follows:

- Threats
- Promises
- Interrogations
- Surveillance

Threats and promises are not just the actual statement of such, but the implication of either by word or deed. Interrogation is the questioning by employers of employees about their union activities or the union activities of union officials and employees or the questioning of employees regarding the reasons they have an interest in unionization. Finally, surveillance is the observation of employees or union officials engaged in union activities by an employer or its agent where the opportunity for observation has not been created by the union or employees. Employees are entitled to engage in union activity free from the watchful eye of the employer and free from coercion or interference of the employer. It has long since been settled that express or implied threats or promises, unlawful interrogation and unlawful surveillance, or creating the

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impression of surveillance causes coercion or interference with the employees' exercise of their Section 7 rights.

Unions, too, are prohibited from engaging in campaign activities that interfere with or coerce employees in the exercise of their right to refrain from union activity.

Special Construction Rules

It should be noted that special rules have been included within the NLRA for construction employers. Section 8(f) allows construction employers to recognize labor organizations as the collective-bargaining representative for their construction employees without either a showing of majority status or an election. This is because of the itinerant nature of construction workers, many of whom historically have been supplied to construction employers through union hiring halls. Once a construction employer enters into a contract with a labor organization covering its construction employees, that contract may not be repudiated for the life of the agreement. Yet, unlike non-construction employers, if the labor agreement is entered into without a showing of majority status, then on the date of expiration of the agreement, the construction employer is free to refuse continued recognition of the union and repudiate its union relationship. Until recently, a Section 8(f) bargaining relationship with a union could be converted to a "majority-status" relationship (known as a Section 9(a) relationship) simply by executing a written agreement that stated that the employer recognizes the union and the union has shown or offered to show evidence that it has the majority support of employees. A 2020 amendment to the rules changed that. Now an 8(f) relationship cannot be converted to a 9(a) relationship based on contract language alone: Unions currently have to show evidence of majority employee support. However, in 2022 the Board issued proposed rulemaking to undo this 2020 amendment, at least in part to hold that the parties' contract language must unequivocally state that the construction employer granted the union Section 9(a) recognition so there could be no doubt if a party wants to challenge its lawfulness. Further, a challenge to the union's majority status during the term of the agreement, either through a petition or a charge, must be filed within six months.

Decertification and Other Representation Petitions

When discussing the representation process, it is important to note decertification and other types of petitions that can be filed with the NLRB. Of course, decertification is the opposite of certification and is a procedure by which employees may rid themselves of union representation. Decertification petitions may be filed only at certain prescribed times and like other NLRB petitions, require adherence to other procedural requirements. Other petitions that can be filed for other purposes include the following:

- One union wishing to replace an incumbent union
- An employer alleging one or more individuals or unions have presented it with a claim for recognition
- To clarify the unit description where there is uncertainty about which employees ought to be included within the unit
- To amend the unit description, for example, if the employer has added a new group of employees to perform a function that was not performed previously
- For deauthorization that allows employees to vote as to whether they wish to rescind a union's authority to make an agreement with an employer to require membership in the union as a condition of employment

The NLRB rules and regulations should be consulted in determining the circumstance for which it is appropriate to file any of the above-referenced petitions.

Withdrawal of Recognition

Once a union wins an election and is certified by the NLRB as the collective bargaining representative of the employees, the union will enjoy a presumption that it has the majority support of the bargaining unit for one year. After the first year, an employer can challenge that presumption.

If an employer has a “good faith reasonable uncertainty” as to an incumbent union’s continued majority status, it too may file a petition initiating an election procedure to determine whether the union continues to enjoy majority status. Although the type of evidence upon which employers can rely to demonstrate good faith uncertainty is decided on a “case-by-case” basis by the NLRB, the NLRB has stated that it will take into account all of the evidence that might establish uncertainty as to a union’s continued majority status when determining if an election is proper. If an employer is considering filing a petition to initiate an election, it should consult with counsel to determine whether the NLRB’s “good-faith reasonable uncertainty” standard has been met.

As an alternative to such a petition, in limited circumstances, an employer may be entitled simply to withdraw recognition from the incumbent union. In *Johnson Controls*, decided in 2019, the Board provided a framework for an employer’s withdrawal of recognition in anticipation of a contract’s expiration. Under *Johnson Controls*, if an employer receives evidence of a union’s loss of majority support within 90 days prior to the contract expiration, it may notify the union and withdraw recognition at the end of the contract. A union may regain its status by filing a petition for a Board election within 45 days of the employer’s notice of withdrawal of recognition. The NLRB has held that the employer has the burden of proving by a preponderance of the evidence that the incumbent union has lost its majority support. For example, if an employer is presented with a petition signed by a majority of the employees in the bargaining unit stating they no longer desire union representation, the employer would have to prove that every employee actually signed the petition and that the petition accurately reflected each employee’s desire to withdraw support from the union. Because of this difficult standard, employers that seek to withdraw recognition from a union should consult with counsel in order to determine whether the employer could actually prove such a loss of majority support. In addition, an employer can withdraw recognition from a union if there is only one employee in the bargaining unit on a permanent basis. Because of the potentially severe penalties if an employer improperly withdraws recognition, however, employers should consult with counsel before doing so.

Unfair Labor Practices: Substance and Procedure

Section 7 of the National Labor Relations Act

Section 7 of the NLRA provides that employees shall have the right to:

- self-organization;
- to form, join or assist labor organizations;
- to bargain collectively through representations of their own choosing; and
- to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

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Employees also shall have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).

Section 8(a), Subsections (1) through (5) of the NLRA define “unfair labor practices” to be as follows:

- To interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7.
- To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.
- Discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.
- To discharge or otherwise discriminate against an employee because he or she has filed charges or given testimony under the NLRA.
- To refuse to bargain collectively with the representatives of employees, subject to the provisions of Section 9(a).

Unfair labor practices can arise in the context of union organizing. For example:

- in the form of employer threats, promises, interrogations;
- through unlawful discharge of union ringleaders in violation of Section 8(a)(1); or
- they can arise after certification through other forms of unlawful activity.

Also, certain types of employee committees or quality circles serve as a basis of unfair labor practice in violation of Section 8(a)(2).

Section 8(b) of the NLRA makes it unlawful for unions to engage in the following activities:

- To restrain or coerce employees in the exercise of the rights guaranteed in Section 7, provided that this shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein, or an employer in the selection of his or her representatives for the purposes of collective bargaining or the adjustment of grievances.
- To cause, or attempt to cause, an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his or her failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.
- To refuse to bargain collectively with an employer, provided it is the representative of employees subject to the provisions of Section 9(a).

Certain forms of picketing constitute a violation of Section 8(b)(4) and Section 8(b)(7) of the NLRA. For example, picketing a secondary employer to force it to cease doing business with a primary employer with whom the union has the labor dispute is unlawful. The network of laws and cases dealing with picketing and handbilling is substantial and elastic and, therefore, if a reader desires more information in this area, the authors recommend consultation with counsel.

Processing Charges

The investigation of an alleged unfair labor practice is initiated by the filing of a charge with a regional office of the NLRB. The charge must be in writing, signed, and affirmed under the penalties of perjury that the contents are true and correct. Once a charge is filed, an investigation of the merits of the charge is commenced, and the NLRB gathers evidence from both the charging party and the charged party (respondent). If the evidence does not support the charge, the charging party will be given the option of withdrawing the charge or having it dismissed. If the charge is dismissed, then the charging party has 14 days to appeal to the general counsel of the NLRB the regional director's refusal to issue a complaint. If the NLRB believes there is significant evidence to support a finding of unfair labor practice, or if it determines that there is a sufficient credibility conflict in the evidence between the charging party and respondent's witnesses, then the matter will be set for resolution by an administrative law judge (ALJ) at a trial. Prior to a formal complaint being issued triggering the trial procedure, the respondent will be given an opportunity to settle the charge through an informal negotiating process.

If the charge is not settled, then the complaint is scheduled for trial before an ALJ. The ALJ's decision is a recommended decision to the NLRB. Within 35 days, either party may file exceptions to the ALJ's decision. If one party does file exceptions, then the NLRB will review the ALJ's decision and either accept or modify it. If neither party files exceptions, the ALJ's decision becomes final.

If the respondent disagrees with the NLRB's final decision, then it can either petition a U.S. Circuit Court of Appeals to set aside such decision or refuse to comply with the decision and await an NLRB petition to enforce the decision. In either situation, the Court of Appeals, although deferential to the authority vested in the NLRB to resolve unfair labor practices, will review the NLRB decision. Where the court believes the NLRB's decision is legally incorrect or not supported by substantial evidence, it will set the decision aside or refuse to enforce it.

Deferral

Certain types of unfair labor practice charges also give rise to questions of interpretation of a collective bargaining agreement. In some such situations, the NLRB will defer the processing of such a charge to the grievance and arbitration procedure of the collective bargaining agreement. For a charge to be deferred:

- there must be a collective bargaining agreement in effect at the time of the dispute providing for "final and binding" arbitration;
- the issues alleged in the charge are encompassed by the terms of the collective bargaining agreement;
- the employer is willing to process the grievance concerning the allegations in the charge and arbitrate it, if necessary, including waiving any time limitations; and
- the allegations of the charge are likely to be resolved through the grievance and arbitration procedure.

In December 2019, the NLRB issued its decision in *United Parcel Service, Inc.* and held that deferral to an arbitral decision is appropriate where:

1. the arbitration proceedings appear to have been fair and regular;
2. all parties have agreed to be bound by arbitration;
3. the arbitrator considered the unfair labor practice issue; and
4. the arbitrator's decision is not clearly repugnant to the Act.

Joint Employers

There are situations where the NLRB will find a second employer jointly liable with another employer for unfair labor practices. Once two employers are found to be joint employers by the NLRB, they both share a bargaining obligation with the union and are vulnerable to strikes, picketing and other economic protest from unions. Joint employer liability is an area of the law that has experienced great flux. Historically, the NLRB found two employers to be joint employers if there was evidence that the second employer could actually or directly impact the other employer's employees' terms and conditions of employment. In 2015, the NLRB, in a case called *Browning-Ferris Industries*, reversed precedent and greatly expanded the joint employer relationship. In 2017 the Board overruled this case in its *Hy-Brand Industrial* decision but then *Hy-Brand* was vacated just two months later. In 2020, the Board issued a new rule in order to (seemingly) settle the joint employer standard once and for all. The new rule states that a business is a joint employer of another employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment. This means that a business must exercise "substantial direct and immediate control" over such issues as wages, benefits, hours of work, hiring, discharge, discipline, supervision and work direction. The rule notes that "sporadic, isolated, or de minimus" direct control will not be enough to find joint employer status. In 2022, the NLRB issued a notice of proposed rulemaking, however, seeking to undo the 2020 rule and memorialize the *Browning-Ferris* standard, which would find joint-employer status in part based on the right to exercise joint control, even where such control is not actively exercised. As of this publication, no final rule has been issued, and thus the 2020 standard remains in effect.

Collective Bargaining

A union successful in organizing an employer wins the right to bargain collectively with the employer on behalf of the employees. Pursuant to Section 8(d) of the NLRA, this means the employer must:

. . . meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement or any question arising there under, and the execution of a written contract incorporating any agreement reached if requested by either party [the union], but such obligation does not compel either party to agree to a proposal or require the making of a concession.

An entire body of law has arisen concerning what it means to bargain in good faith. To fully discuss such subject again would be a book unto itself. However, there are certain points worth discussing as a part of this overview of the topic.

Subjects of Bargaining

The duty to bargain applies to terms and conditions of employment. Therefore, some topics are "mandatory subjects" of bargaining, not left to the discretion of management but which can be bargained to impasse. Examples of "mandatory subjects" of bargaining include wages, benefits, and work rules. There are other "permissive" topics of bargaining about which the parties can, but are not required, to negotiate and which cannot be bargained to impasse. Examples of "permissive subjects" of bargaining include the definition of the bargaining unit, retiree benefits, or internal union matters. Finally, there are "illegal" subjects of bargaining about which the parties cannot bargain lawfully and cannot be lawfully included in a contract. An example of an "illegal" subject of bargaining is discrimination against people in classifications protected

by state or federal civil rights laws. Therefore, employers must differentiate between mandatory, permissive, and illegal subjects and know when such subjects are (and are not) bargainable.

Bargaining Related to Plant Closings, Subcontracting, and the Relocation of Work

Decisions affecting employment security are mandatory subjects of bargaining. There has been a substantial amount of attention focused on how to deal with an obligation that exists for an employer to bargain about such a decision. Although the United States Supreme Court has rendered decisions in this area, the NLRB has fashioned its own formula that many management lawyers would argue departs significantly from the Supreme Court precedent. Nonetheless, unionized employers need to remember that decisions which affect the job security of groups of employees, such as closings, subcontracting, or relocation of work, may be mandatory subjects of bargaining. Therefore, when considering such decisions, such employers should seek legal advice.

Also, regardless of whether decisional bargaining is required, bargaining is required concerning the effects of such a decision unless the union chooses otherwise. This includes negotiating with the union as to payment of all accrued and unpaid vacation, holiday, medical insurance, sick pay, and pension benefits due under the labor contract.

Duty to Supply Information

As a part of the duty to bargain, employers are required to provide unions with information that is necessary and relevant to the bargaining relationship. Many times, this may mean background information, such as the number of hours worked or insurance information that will help a union prepare for the actual bargaining process. Other times, such a duty arises during the life of a collective-bargaining agreement, when a union seeks information as a part of its duty to provide effective representation to employees. For example, in a situation where a safety grievance is pending, a union may be entitled to information about accidents in the workplace. If the grievance questions the propriety of discipline, then a union may be entitled to information about other similar disciplinary actions in the workplace.

One area regarding information that has caused particular concern for employers is the duty, if any, an employer has to produce financial records to a union. Generally, financial records are not subject to a request for information, except where in the bargaining relationship the employer has caused its financial condition to be an issue. For example, if the employer says at the bargaining table it needs concessions because it is losing money, then the union is entitled to test such a representation by examining the employer's financial books and records. There has been much debate about whether an employer's claim that it needs concessions because it is not competitive in its industry gives rise to a duty to produce financial records. The current state of the law is that if the employer represents that it cannot afford to provide a benefit or pay level, then it likely is required to produce its records. If it represents that it is merely unwilling to meet the demand of the union, then it is not required to produce financial records to substantiate its position. There continue to be new cases discussing this issue which need to be considered by any employer faced with a request for financial records by a union recognized as its employees' collective bargaining representative.

Successorship

Special rules apply when an employer purchases another business. If it is a stock purchase where the purchaser continues the business enterprise, then the duty to recognize the union and the bargaining

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relationship, including adherence to the collective-bargaining agreement, likely continues.

If the purchase is of assets, then the rules are different:

- The purchaser is not obligated to the labor contract unless it does something affirmatively to assume the contract.
- The purchaser is free, unilaterally, to set terms and conditions for its new employees, unless it is perfectly clear that the purchaser's employees will come from the seller's workforce.
- Even if it is perfectly clear that the purchaser's employees will come from the seller's workforce, the purchaser is only required to comply with the contract terms or conditions until it bargains in good faith regarding new terms and conditions that the purchaser wishes to impose.
- Where the purchaser is entitled to set initial terms and conditions, but then a majority of the purchaser's workforce comes from the seller, an obligation to recognize and bargain with the union arises, and all terms and conditions, including those initially set, are bargainable. If a majority of the purchaser's workforce does not come from the seller, the purchased entity is non-union.

These are simple statements of complex rules that have grown out of the duty to bargain in good faith. Indiana employers finding themselves confronted with these issues need to consult with legal counsel to evaluate carefully their legal obligations.

Grievance and Arbitration Procedure

It is nearly universal that collective-bargaining agreements contain grievance and arbitration provisions that provide for a final and binding procedure by which contract disputes arising during the life of a labor agreement are resolved. Typically, there are two kinds of disputes: 1) contract interpretation, and 2) discipline, including discharge.

Contract interpretation obviously involves an issue of whether a specific provision of the contract has been violated, and discipline questions require a decision of whether the discipline was for cause. Because the grievance and arbitration procedure is a creation of the contract, the parties are required to comply with the obligation to bargain in good faith when dealing with grievances. For example, as discussed earlier, an employer has a duty to supply a union with information relevant to its representational function. Furthermore, the procedural provisions of the grievance and arbitration clause, such as time limits, must be strictly complied with. If a party fails to do so, it could jeopardize that party's ability to prevail in its position concerning the grievance.

Arbitrators are selected pursuant to a negotiated contractual procedure, typically through one of the following three methods:

1. Agreement of the parties
2. From a permanent panel of arbitrators negotiated as a part of the collective-bargaining agreement
3. From an arbitration service, either the American Arbitration Association or the Federal Mediation and Conciliation Service, depending on what is specified in the contract

Arbitrators are intended to be impartial third parties who typically have some prior work experience qualifying them to sit in judgment of the dispute. The grievance and arbitration procedure normally is a faster and more cost-efficient method for dispute resolution than a court proceeding and, therefore, is generally deferred to by courts. Consequently, if a party believes an arbitration decision to be wrong, a court will not review such decision except in the most limited of circumstances. This typically would occur only

where the arbitrator ignored the plain meaning of the collective-bargaining agreement, or where the arbitrator's decision did not draw its essence from the contract.

Representation During Discipline

In 1975, the United States Supreme Court issued its *Weingarten* decision that agreed with the National Labor Relations Board that in the situation of an employer's investigation of suspected employee misconduct, the employee is entitled to the presence of a union representative as follows:

(1) "only in situations where the employee requests representation"; (2) the employee's right to request representation as a condition to participation in the interview "is limited to situations where the employee reasonably believes the investigation will result in disciplinary action"; (3) the employer may carry on its inquiry without interviewing the employee, thus leaving the employee "the choice between having an interview unaccompanied by his representative, or having no interview and foregoing any benefits that might be derived from one"; (4) "the employer has no duty to bargain with any union representative who may be permitted to attend the investigatory interview."

After *Weingarten*, the question then became whether a non-union employee had the right to representation by a coworker under Section 7. The current state of National Labor Relations Board law is that the *Weingarten* right to representation is only applicable to employees represented by a union. Employees for whom there is no recognized union representation have no right to insist upon a representative, even if an employee reasonably believes the investigation may result in disciplinary action to himself or herself.

Strikes and Lockouts

If, during the collective bargaining process the parties cannot agree, either when bargaining a first contract or after expiration of an agreement, then either party (in order to force agreement to its position) is entitled to resort to its economic weapons — for unions a strike, and for employers a lockout. Section 7 of the NLRA protects employees who exercise their right to strike. Yet, if employees choose to exercise that right, then the employer is entitled to hire permanent replacements for those who engage in an economic strike. An economic strike occurs when a union is striking over its bargaining demands. Permanent replacements are entitled to continue working even after the striking employees abandon the economic strike, therefore, if there is no position to which a striker can return upon cessation of the labor dispute, his or her name is placed on a preferential recall list for return at such time as a position becomes available for which he or she is qualified. Employees who are striking over unfair labor practices can only be temporarily replaced. At the conclusion of the unfair labor practice strike, they must be returned to their jobs.

An employer suffering a strike is faced with numerous issues, including the following:

- Its ability to communicate directly with employees
- The rights of laid-off or disabled employees at the time of the strike
- Termination of dues check-off after contract expiration
- The duty of the employer to observe the grievance and arbitration procedure after expiration of the contract
- The employer's right to make regressive bargaining proposals after a strike begins

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- Legal and potential contractual obligations concerning removal, sale or permanent subcontracting of work during a strike
- Strikers' entitlement to unemployment compensation and food stamps
- The strikers' right to resign from a union and the employer's corollary right to inform employees of the right to resign from the striking union
- Dealing with non-bargaining unit employees who refuse to cross the union's picket line
- Advertising for, and hiring permanent replacements during, an economic strike
- The ability of a company to pay wages and benefits less than or in excess of what was proposed to the union in the company's final offer
- The terms and conditions of employment that can be applied to strikers who cross the picket line
- The ability of strikers to use seniority to bump replacement workers

Finally, it should be noted that it is lawful for an employer to lock out employees because of a labor dispute. A lockout occurs when an employer withholds the opportunity for employees to work either because the employer wants to gain concessions or resist agreement to a union proposal. A lockout is a legitimate economic weapon for an employer to pressure agreement to its bargaining position. A variety of issues arise in the context of a lockout. For example, although an employer has the right to hire temporary replacements for locked-out employees, it cannot hire permanent replacements. Also, the parties do not need to be at an impasse in bargaining for an employer to lock out employees and hire temporary replacements. However, the employer's decisions in these respects will be unfair labor practices if motivated by union animosity. In other words, an employer's lockout and resulting actions need to be motivated by legitimate business justification.

Caution: Because of the myriad of legal issues involved in strikes and lockouts, employers are encouraged to consult with counsel.

Protected Concerted Activity

Not only does Section 7 of the NLRA protect employees' rights to engage in union activity, but it also protects their right to engage in protected concerted activity. Over the years, the NLRB has struggled with a precise definition of "protected concerted activity." In essence, it is activity engaged in by an employee in concert with one or more employees in furtherance of a common concern regarding any term or condition of employment. Consequently, it is unlawful for an employer to punish employees for engaging in protected concerted activity. Examples of protected concerted activity include the following:

- Two or more employees clearly acting together (e.g., a walkout, petition or a group complaint)
- One employee acting on behalf of others complaining about work schedules, overtime, pay, the temperature of the plant, etc.
- One employee exercising employees' rights under a collective bargaining agreement

Complaints may arise in various contexts. For example, the NLRB has ruled that an employee using email to speak with coworkers about complaints regarding working conditions was engaged in protected concerted activity. In its 2019 *Caesars Entertainment* decision, the NLRB ruled that employers can restrict employees' use of email and other IT systems, provided they do not discriminate against union or other

protected concerted activity. In addition, complaints made via social media (e.g., Facebook, Twitter, etc.) might constitute protected concerted activity depending upon the facts. Importantly, the NLRB has interpreted protected concerted activity broadly to include strikes for political purposes. For instance, in 2017 the Board issued an Advice Memorandum stating that a political day of action such as a “Day Without Immigrants” was protected activity. Furthermore, complaints registered with state or federal agencies regarding employment by their nature may constitute protected concerted activity because such complaints are at least explicitly made on behalf of a group of employees.

Until 2020, employees were protected even if they made an abusive or offensive statement as long as they were engaged in protected concerted activity. However, in *General Motors LLC*, the NLRB modified its standard for determining whether employees have been lawfully disciplined or discharged after making abusive or offensive statements in the course of otherwise protected concerted activity and held that employers may present evidence showing they would have disciplined or discharged the employee for their conduct in the absence of the protected activity. The current Board has had opportunity to comment on the continued viability of *General Motors LLC* and has declined to do so, which implies that this will remain good precedent during the current administration.

In recent years, the NLRB has scrutinized a variety of common employment policies in non-union employers’ employee handbooks to determine if they chill employees’ ability to engage in protected concerted activity. Examples of policies that the NLRB has evaluated include certain types of confidentiality, social media, workplace behavior, anti-gossip, and at-will employment disclaimers. Since the NLRB’s 2017 *Boeing Inc.* case, the Board has evaluated facially neutral policies or work rules on a case-by-case basis and has taken into consideration an employer’s business justification for the rule. The Board will find rules that are based on a legitimate business interest valid. For instance, in 2019, the Board held in *Apogee Retail* that a work rule requiring confidentiality during the course of workplace investigations is presumptively valid. In its 2020 decisions in *Bemis Company* and *Motor City Pawn Brokers*, the NLRB further clarified that the following company policies are valid:

- Social media policies requiring employees to be “respectful and professional” so as to safeguard the employer’s reputation and interests
- Policies that prohibit disclosing proprietary employer information
- Policies that prohibit employees from communicating to a customer or third party a claim intended to “cause embarrassment, disparagement, damage or injury to the reputation...” of the company

However, an employer may not prohibit employees from making statements about the company to one another. Even though a policy or rule may be valid, the NLRB will still find a violation of the NLRA if the policy or rule is discriminatorily applied to employees.

All that being said, there is significant appetite within the current NLRB composition to pare back or in fact undo *Boeing Inc.* altogether. In January of 2022, the Board invited briefing in *Stericycle, Inc.* as to whether *Boeing, Inc.* should be reversed, and if not, whether the specific applications of *Boeing* discussed in *Apogee Retail* and *Motor City Pawn Brokers*, among others, should be reversed. While the *Stericycle* decision has yet to be issued, the NLRB has signaled that they are leaning toward outright reversal. Specifically, *Tesla, Inc.* held that it was unlawful for an employer to interfere in any way with an employee’s right to display union insignia, absent “special circumstances” justifying such interference, expressly stating that the *Boeing* standard should not apply.

Another area of the law that changed recently concerns employment arbitration agreements. Notably, in 2018 the U.S. Supreme Court issued its decisions in *Epic Systems*, holding that employment arbitration

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agreements providing for individual arbitration and class-action waivers were lawful and enforceable. In August 2019, the NLRB issued its decision in *Cordua Restaurants*, applying *Epic*, holding that employers can update their mandatory arbitration agreements to include class/collective action waivers in response to employees opting in to participate in collective legal actions. Since 2012, the NLRB had found that such agreements violated the NLRA. Therefore, employers with policies and agreements providing for individual arbitration and/or class action waivers will no longer be found to violate the NLRA.

Indiana employers should consult with counsel as to whether their employment policies comply with the current state of NLRB law.

No-Solicitation/No-Distribution/No-Access Rules

It is common for employers to provide in their handbooks that employees may not engage in solicitation or distribution in certain circumstances. The NLRB has issued specific decisions outlining an employer's right to prohibit solicitation or distribution, and the following is a lawful statement of such a rule:

Solicitation for any purpose is prohibited during working time. Distribution of literature of any kind during working time or in working areas at any time is also prohibited. An employee who is not on working time, such as an employee on break or lunch period, may not solicit an employee who is on working time for any cause or distribute literature of any kind to that person.

Additionally, some employers attempt to restrict access to their property by non-employees and off-duty employees, generally as a device to discourage union activity. A blanket prohibition against access for non-employees is permissible, except where it is discriminatorily applied. However, no access for off-duty employees is only allowable where clearly announced in advance of union activities, the restriction only applies to the interior of the employer's facilities and other working areas, and is non-discriminatorily enforced. For more specific guidelines regarding these restrictions, counsel should be consulted.

Indiana Is a Right-to-Work State

Effective March 14, 2012, Indiana became what is known as a "right-to-work" state. Under Indiana's right-to-work law, it is a Class A misdemeanor to require an individual as a condition of employment to:

- become or remain a member of a labor organization;
- pay dues, fees, assessments or other charges to a labor organization; or
- pay to a charity or another third party an amount that is equivalent to, or a pro rata part of, dues, fees, or other charges required of a member of a labor organization.

Individuals may file a complaint that alleges a violation or threatened violation of the right-to-work statute with the Indiana Attorney General, the Indiana Department of Labor, or the prosecuting attorney of the county in which the individual is employed.

If an individual is aggrieved because of an actual or threatened violation of Indiana's right-to-work law, that individual can also bring a civil action in state court. The court can award a successful plaintiff:

- the greater of:
 - the actual and consequential damages resulting from the violation or threatened violation; or

- liquidated damages of not more than \$1,000;
- attorneys' fees, litigation costs, and expenses;
- declaratory or injunctive relief; and
- any other relief the court considers proper.

Significantly, Indiana's right-to-work law does not apply to union contracts that were in effect as of March 14, 2012, but once any such contracts expire, are modified, renewed, or extended, then Indiana's right to work prohibitions will apply.

This chapter was edited by Alexander Preller, Associate.

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Worker Adjustment and Retraining Notification Act (WARN)

Introduction

The Worker Adjustment and Retraining Notification Act (WARN) became effective on February 4, 1989. A common misconception about WARN is that it only applies to manufacturing operations or to employers who operate a plant. WARN, however, applies to all types of employers (including non-profit organizations of sufficient size), with the exception of certain government agencies and federally recognized Indian tribal governments. In general, WARN requires that employers provide 60 days' advance written notice of plant closings or mass layoffs to affected non-union employees, union representatives of affected union employees, and certain state and local officials.

Coverage

An employer is covered by WARN if it is a business enterprise that employs:

- 100 or more employees (not including part-time employees); or
- 100 or more employees (including part-time employees) who in total work at least 4,000 hours per week (not including hours of overtime).

In determining whether an employer is covered by WARN, the employer must count all employees in its organization (including all of the employer's U.S. employees at foreign sites of employment, even though the foreign sites of employment are not covered under WARN). Also, note that an employer must count all employees on layoff or leave (of any kind) who have a reasonable expectation of recall.

Example: Some large employers may have plants that employ less than 100 workers. To determine whether there is coverage under WARN, such employers must total all employees at all plants the employer maintains. Therefore, even though a particular plant may employ less than 100 workers, the employer operating the plant will be covered under WARN if, in total, it employs 100 or more workers at all of its plants.

In addition, to determine whether an employer is covered by WARN, the employer must count all employees (e.g., salaried and hourly workers; production, professional, executive, administrative and clerical workers), except part-time employees, as noted above. (However, note the provision that includes part-time employees in the count if the employer employs 100 or more employees who in total work at least 4,000 hours per week, excluding hours of overtime). WARN defines a part-time employee as any employee who is employed for an average of fewer than 20 hours per week or who has been employed for fewer than six of the 12 months preceding the date on which WARN notice is required.

Notice Requirements

Even if an employer is generally covered by WARN, a WARN notice is only required if certain conditions occur. In particular, WARN requires that employers provide advance notice of an employment loss that occurs during a “mass layoff” or a “plant closing.” The terms “employment loss,” “plant closing,” and “mass layoff” have been defined under WARN and have been clarified, to an extent, by the WARN regulations. Depending upon whether the situation involves a plant closing or mass layoff, separate rules will apply in determining whether a WARN notice must be provided.

What Constitutes an Employment Loss?

An “employment loss” is defined, under WARN, as any of the following:

- An employment termination other than a discharge for cause, voluntary departure or retirement
- A layoff exceeding six months in duration
- A reduction in hours of work of more than 50% during each month of any six-month period

Plant Closing

A “plant closing” is defined under WARN as the permanent or temporary shutdown of:

- a single site of employment, if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees (excluding any part-time employees); and
- 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 during any 30-day period for 50 or more employees (excluding any part-time employees).

Therefore, under this definition and in a plant shutdown situation, if 50 or more employees will suffer an employment loss during any 30-day period, the employer must provide a WARN notice.

However, because the term “plant closing” also applies to shutdowns of facilities or operating units within a single site of employment, there may be WARN notice requirements where an employer shuts down a certain segment or certain operating unit within a plant. For instance, if an employer shuts down a particular department or discontinues a separate operating or organizational unit within a plant and 50 or more employees are affected within the requisite time frame, there is a plant closing under WARN.

Important: An employer does not have to close an entire plant for there to be a plant closing under WARN. It is also important to note that the “site of employment” has been a point of contention in many WARN cases. Careful analysis of the circumstances must be undertaken with respect to WARN regulatory and case authority.

If the shutdown affects a separate unit of employees, even for a temporary period (e.g., a layoff exceeding six months in duration for all 60 employees on a particular product line), there may well be a “plant closing,” even though the rest of the plant remains in operation.

Note: The term “plant closing” is somewhat of a misnomer because the shutdown or closure of an office, retail establishment, or other facility will be considered a plant closing, as long as a sufficient number of workers suffer an employment loss within the time frames established by WARN.

Employers that plan to conduct plant closings should consult legal counsel before decisions are made with respect to such closings (whether the closing occurs in phases or all at once). Please note that there are special rules that must be observed and discussed with legal counsel when plant closings occur in stages or phases.

Mass Layoff

A “mass layoff” is triggered where there is a reduction in workforce that is not due to a plant closing and that results in an employment loss at a single site of employment during any 30-day period for at least 50 employees (excluding part-time employees) and at least 33% of the employees (excluding any part-time employees). A mass layoff also may be triggered whenever at least 500 employees (excluding part-time employees) suffer an employment loss, regardless of what percentage they comprise of the total workforce at that site of employment.

Example: If, at a plant that employs 100 full-time employees, 40 employees suffer an employment loss within a 30-day period, no WARN notice would generally be required because the threshold number of 50 employees has not been exceeded – even though the 40 affected employees exceeds 33% of the total number of employees at the facility.

Further Example: In a plant that employs 210 full-time workers, if 51 employees who work in various areas are affected by an employment action during any 30-day period, there is still no mass layoff under WARN because 33% of the total number of employees at the facility (70) have not been affected. This is true even though more than 50 employees were affected. To have a mass layoff WARN event at this 210-employee plant, the number of affected employees must equal or exceed 70 during the relevant WARN time frame (assuming that the event is not otherwise a “plant closing” under WARN).

Again, there is no 33% test if at least 500 employees suffer an employment loss at the single site of employment. Moreover, please note that the distinction between a plant closing and mass layoff is important because the WARN requirements are activated in a plant closing as long as 50 employees are affected during the relevant WARN time frame, without regard to any percentage limitations.

As in the case of plant closings, employers that plan to conduct mass layoffs should consult counsel before decisions are made with respect to such mass layoffs (whether the mass layoff occurs in phases or all at once). Again, there are special rules that must be observed when mass layoffs occur in stages or phases.

Voluntary Notice

Even in circumstances where there is no notice required under WARN, some employers voluntarily give their employees advance notice of layoffs or employment terminations to lessen the severity of the situation if employees were to be notified about the layoff or termination shortly before it occurs. In fact, WARN expressly provides that “it is the sense of Congress that an employer who is not required to comply with the notice requirements of [WARN] should, to the extent possible, provide notice to its employees about a proposal to close a plant or permanently reduce its workforce.” Employers that decide to provide voluntary advance notice of layoffs or employment terminations should consult legal counsel first to discuss the implications of doing so.

Aggregation Rule

As noted previously, plant closings occur under WARN if there is 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 during any 30-day period for 50 or more employees (excluding part-time employees). In addition, as noted above, a mass layoff is triggered where there is a reduction in workforce that is not due to a plant closing and that results in an employment loss at a single site of employment during any 30-day period of at least 50 employees and at least 33% of the workforce (excluding part-time employees). Therefore, if an employer at a plant that employs 100 workers discharges 10 workers on day one, 10 workers on day five, 20 workers on day 10, and 30 workers on day 15, that employer will have violated WARN if it did not provide at least 60 days’ notice to all of the 70 affected employees. This is because all of the employees who were terminated within that 30-day period are added together to determine whether the WARN threshold of 50 employees has been exceeded.

In addition, WARN provides an aggregation rule that was designed to prevent employers from “stretching out” employment terminations or layoffs over a period of time greater than 30 days in length in an effort to avoid WARN obligations. Without this aggregation rule, an employer at a 100-employee plant could, for example, discharge 40 people on day one and wait until day 40 to discharge an additional 30 workers in an attempt to avoid WARN responsibilities. To prevent this type of situation, Congress supplied an aggregation rule providing that, where an employment loss occurs in a staggered fashion such that the employee number and/or percentage limits are not reached in any 30-day period, a WARN notice may still be required where, in a 90-day period, the WARN numerical/percentage limitations are exceeded and where the layoffs cannot be considered as being from separate and distinct causes. Therefore, this aggregation rule applies where employment losses occur over a 90-day period, each of which is lower than the threshold figures necessary to trigger WARN, but that in total exceed the threshold figures and where the employer cannot show that these small employment actions occurred as a result of separate and distinct causes.

Finally, there are certain circumstances under which employment losses that occur well outside of any 90-day period can be aggregated. Again, it is important to consult with legal counsel when considering any multi-phase set of reductions in force.

Specific Requirements

As noted previously, WARN generally requires that employers provide 60 days’ advance written notice of plant closings and mass layoffs. The notice must include certain information under WARN.

Who Must Receive Notice?

Whenever it is determined that a WARN notice must be provided, the notice must be provided to the appropriate entities, as follows:

- Directly to each affected employee, if there is no union representing them.
- To the chief elected union representatives of any employees represented by a union. (This should include local, regional and international union representatives. Consulting the applicable collective bargaining agreement for notice obligations is also necessary.)
- To the chief elected official of the unit of local government that has jurisdiction over the site where the employment loss will occur.
- To the state dislocated workers' unit in the state where the employment loss will occur.

In some cases, there may well be more than one union official, state dislocated workers' unit, and/or local government official who must be notified regarding a particular WARN action. Also, employers must provide notice to any employee affected by the employment loss who is on leave or layoff of any kind, especially where the employee has a reasonable expectation of recall.

What Must the Notice Contain?

Under WARN, the content of the notice varies, depending upon the identity of the recipient. It is important to note that the content of advance employment loss notices under state and local laws can vary and those laws will need to be checked to determine the requisite content. Further, the adequacy of information in the WARN notice has also been a point of dispute in WARN cases. Accordingly, very careful attention to the content of WARN notice is required. In general, the following is a list of required content arranged by the category of recipient.

Employees

WARN requires that the notice given to affected non-union employees must include at least the following:

- A statement as to whether the planned employment action is expected to be permanent or temporary. If the entire plant is to be closed, the employer must provide a statement to that effect
- The expected date when the plant closing or mass layoff will begin, and the expected date when the individual employee will be separated from employment
- An indication as to whether or not bumping rights exist for the affected employee
- The name and telephone number of a company official the employee may contact for further information regarding the plant closing or mass layoff

Again, it is important to also notify affected employees who are on leave or layoff (and who have a reasonable expectation of recall). The notice may include additional information such as the location and telephone number of the state dislocated worker's unit.

Union Officials

If there is a union representative of affected employees, the federal WARN notice to the union must be sent to the chief elected officer of the union. It is recommended that this notice be sent not only to the chief

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elected officer of the local union, but also to any regional union representative and to the chief elected officer of the national union.

Under WARN, the union notice must include the following information:

- 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
- A statement as to whether the planned employment action is expected to be permanent or temporary in nature. If the entire plant is to be closed, the notice must make this clear
- The expected date of the first separation and anticipated schedule for making further separations
- A schedule listing the job titles of the positions that will be affected and the names of the workers who currently hold affected jobs (as well as those who are affected, but are on leave or laid off with a reasonable expectation of recall)

Again, the notice may include additional information such as the address and telephone number of the dislocated worker's unit. Also, please note that union collective-bargaining agreements may contain notice provisions that are wholly separate from and in addition to WARN requirements.

State and Local Officials

Under WARN, content of the notices that are required to be sent to the state dislocated workers' unit and the chief elected official of the unit of local government will be the same (again, state and/or local laws may vary with respect to content to particular government officials). Under WARN, these notices should contain the following information:

- 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
- A statement as to whether the planned employment action is expected to be permanent or temporary in nature. If the entire plant is to be closed, the notice must make this clear
- The expected date of the first separation and anticipated schedules for making further separations
- A schedule listing the job titles of the positions affected and the number of affected employees in each job classification
- An indication as to whether or not bumping rights exist for the affected employees
- The name of each union representing affected employees and the name and address of the chief elected officer of each union. It is recommended that the notice include information regarding the local union, regional union and national union representatives.

Penalties

WARN provides that if an employer fails to provide an adequate WARN notice at least 60 days in advance of the mass layoff or plant closing, the penalty is a \$500 per day civil fine (which is capped at a total of \$30,000 [\$500 x 60 days of violation]) plus back pay and benefits to all affected employees for the difference between the 60-day WARN notice to which the employees were entitled and the amount of the notice actually received. An employer that violates WARN also may be liable for the cost of medical expenses incurred during the employment loss that would have been covered under an employee benefit plan if the employment loss had not occurred. Attorneys' fees also may be (and likely will be) awarded to successful

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employee-plaintiffs. Pre-judgment and post-judgment interest also may be available to successful employee-plaintiffs. Penalties under applicable state and/or local laws can vary considerably from the penalties provided under WARN.

Note that if an employer is found to have violated WARN, there is a possibility of reducing the amount of the employer's liability under WARN if the employer 1) can demonstrate to the court that its violation of WARN was in good faith; and 2) that the employer has reasonable grounds for believing that the act or omission was not a violation of WARN. In such circumstances, the court has the discretion to reduce the employer's liability under WARN.

Exceptions and Special Circumstances

There are a variety of special circumstances under WARN that may affect an employer's responsibility or ability to provide a full 60-day WARN notice. Among the circumstances recognized in the regulations as exceptions allowing for less than 60 days' advance notice of a plant closing or mass layoff are the unforeseeable business circumstance exception, the faltering company exception and the natural disaster exception. Be advised that the employer bears the burden of proving each and every element of these exceptions, and that burden is a heavy one.

If any of these WARN exceptions apply, the employer must still give as much notice as it reasonably can to the union, non-represented employees and state and local government officials. The regulations recognize that this may, in some circumstances, be notice after the fact. The employer also must provide a brief statement of the reason for reducing the notice period in addition to the other elements required to be provided in a WARN notice. The statement should be sufficiently clear as to such reasons because courts will review the adequacy of the statement in relation to the circumstances. Again, state and/or local laws may provide for significantly different requirements.

Unforeseeable Business Circumstance Exception

WARN provides that an unforeseeable business circumstance is one that is sudden, dramatic, unexpected and the result of an action or condition outside an employer's control. The regulations provide that a principal client's sudden and unexpected termination of a major contract or an unanticipated and dramatic economic downturn might each be considered a business circumstance that is not reasonably foreseeable. The regulations also point out that a strike at a major supplier of the employer or a government-ordered closing of an employment site that occurs without prior notice may also be considered unforeseeable business circumstances. This list is not all-inclusive. Other situations may qualify as unforeseeable business circumstances. For example, the Department of Labor implied via guidance that layoffs due to the COVID-19 pandemic may fall under the unforeseeable business circumstance exception depending on the employer's particular business circumstances.

When an employer invokes a WARN exception and claims an inability to provide the required 60-day notice due to unforeseen business circumstances, the employer must:

- give as much notice as is practicable under the circumstances; and
- include a brief statement of the reason for giving less than 60 days' notice along with all the other required elements of a WARN notice.

The test for determining whether a business circumstance is not reasonably foreseeable focuses on an employer's business judgment. The regulations provide that an employer must exercise such commercially

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reasonable business judgment as would a similarly situated employer in predicting the demands of its particular market.

Faltering Company Exception

The WARN regulations also provide an exception in the case of financially faltering companies. This exception only applies to plant closings: it does not apply to mass layoffs. Also, the regulations provide that the actions of an employer relying upon the “faltering company exception” will be reviewed in a company-wide context. Accordingly, a company with access to capital markets or with cash reserves may not avail itself of this exception by looking solely at the financial condition of the facility, operating unit or site to be closed. The regulations provide that this exception should be narrowly construed. To qualify for this exception, an employer must show that it was actively seeking financing or refinancing or additional business through commercially reasonable methods. The employer must be able to identify the specific actions taken to obtain capital or business.

In addition, there must have been a realistic opportunity to obtain the financing or business sought, and the financing or business that was sought must have been sufficient, if obtained, to have enabled the employer to avoid or postpone the shutdown. In this regard, the employer must be able to objectively demonstrate that the amount of capital or the volume of new business sought would have enabled it to keep the facility, operating unit, or site open for a reasonable period of time. Finally, the employer must reasonably and in good faith have believed that giving the WARN notice would have prevented the employer from obtaining the needed capital or business. The employer must be able to objectively demonstrate that it reasonably thought that a potential major customer or financing source would have been unwilling to provide new business or capital if WARN notice were given.

Natural Disaster Exception

The WARN regulations provide that an employer will not have to provide a full 60-day advance notice if a plant closing or mass layoff occurs due to any form of natural disaster. The regulations identify floods, earthquakes, droughts, storms, tidal waves, or similar effects of nature as examples of natural disasters under this exception. To qualify, an employer must be able to demonstrate that the plant closing or mass layoff was a direct result of the natural disaster. If the plant closing or mass layoff occurs as an indirect result of a natural disaster, the exception may not apply; however, the unforeseeable business circumstance exception may be applicable. The Department of Labor did not specify whether the COVID-19 pandemic qualifies as a natural disaster under the WARN Act.

Other Special Circumstances

A number of special circumstances can arise with respect to WARN issues. For example, other special circumstances under WARN include temporary projects, transfers between facilities, the sale of a business, strikes and lockouts, temporary workers, bankruptcy, liability of individuals (e.g., officers and/or owners, etc.), creditors and/or shareholders, and situations in which an employer can provide a contingent or conditional WARN notice. The WARN requirements may be quite different if one of these special circumstances exists. In these situations, employers should contact legal counsel to discuss the matter and the related WARN issues.

State and Local Laws

Again, be aware that many states (and perhaps some municipalities) have local laws or ordinances that provide additional requirements (including notice requirements) in plant closings or mass layoff situations. These laws, often referred to as mini-WARN Acts, are structured similarly but may impose different requirements on employers conducting business in each particular jurisdiction. Some of these requirements differ markedly from WARN requirements. For example, some states have passed laws that provide substantially lower coverage thresholds than WARN thresholds. At least one state requires 90 days' advance written notice under its state law version of WARN. Accordingly, state and local laws should always be checked to determine whether the state or locality at issue maintains additional requirements regarding advance notice to employees affected by a reduction in force or other employment action.

Several states passed additional legislation or executive orders altering their mini-WARN Acts in response to the COVID-19 pandemic. Many states' mini-WARN Acts include an unforeseeable business exception similar to that of the federal WARN Act. An employer that conducts business in multiple states should contact legal counsel in each jurisdiction to better assess its obligations under each state's mini-WARN Act.

This chapter was edited by Daniel Dorson, Associate.

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Miscellaneous Employment Laws

There are certain provisions of law that do not fit into the larger areas of discussion of Indiana and federal law addressed elsewhere in this book. However, despite the less prominent nature of these statutes, employers often face frequent questions concerning these laws.

Tobacco Use Away from Work

Indiana employers are prohibited from discriminating against employees regarding employment, or terms and conditions of employment, because of an employee's off-duty use of tobacco products (I.C. 22-5-4 *et seq.*).

Consequently, an employer may not require, as a condition of employment, an employee or prospective employee to refrain from using tobacco products outside the course of the employee's or prospective employee's employment. In addition, an employer may not discriminate against any employee with respect to compensation, benefits, or terms and conditions of employment based upon an employee's use of tobacco products outside the course of that employee's employment.

Any employee or prospective employee who believes that his employer has violated the above prohibition is entitled to file a lawsuit against the employer to enforce this law.

Churches, religious organizations, and schools or businesses conducted by a church or religious organization are not required to comply with this law.

Tobacco Use at Work

While an employer cannot discriminate against employees for off-duty tobacco use, it must prohibit smoking within most Indiana workplaces and within eight feet of any public entrance to such facility (IC 7.1-5-12 *et seq.*). A "place of employment" under this law is defined as any enclosed area of a structure where employees work, but not including a private vehicle. Under this law, employers must affirmatively do all of the following:

- Post a sign at any public entrance which states, "State Law Prohibits Smoking Within 8 Feet of This Entrance" or other similar language
- Remove indoor ashtrays and similar smoking paraphernalia from prohibited smoking areas
- Clearly communicate with employees that smoking is prohibited indoors as well as where it is specifically permitted outdoors

Penalties for failure to abide by the provisions of the law include injunctions against employers and civil infractions with fines up to \$10,000 for repeat offenders.

Keep in mind that a local ordinance may be more restrictive than the state ban. In such a case, the local ordinance supersedes the state law, and the ordinance should be followed. Businesses may want to visit the Department of Health's web site, Breathe Easy Indiana (www.breatheindiana.com), to obtain a free toolkit

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containing no smoking posters, brochures, coasters, and window and door decals. The Indiana Chamber also offers window clings and laminated posters for \$15 (or \$11.25 for Chamber members) reading, "State law prohibits smoking within 8 feet of this entrance."

Employers that may be eligible for exclusion under this law include bars, taverns, casinos, off-track betting facilities, cigar bars, hookah bars, tobacco retail shops, private clubs and some home-based businesses that employ family members.

The law does not address the use of electronic or e-cigarettes. Thus, employers can still create policies for those types of products.

The law includes an anti-retaliation provision making it unlawful for an employer and/or any of its agents (e.g., owners, managers, supervisors) to terminate, refuse to hire, or in any other manner retaliate against an individual for either reporting violations of the law or exercising any right under the law.

This law is enforced by the Indiana Alcohol and Tobacco Commission, but also may be enforced by state and local health departments, certain hospitals, the division of fire and building safety established within the department of homeland security, and law enforcement officers in cooperation with the Commission. Inspections by any of these entities to ensure compliance are expressly permitted, and enforcement of the law may be through a civil lawsuit brought by any of the above entities. Any agent of an employer found in violation of the new law commits a Class B infraction. Repeat offenders – those with at least three prior unrelated infractions under the new law – commit a Class A infraction.

If an employer is subject to a collective-bargaining agreement, smoking restrictions must be bargained with the employees' union. For a more detailed discussion of collective bargaining issues, see Chapter 20, "National Labor Relations Act."

Jury Duty and Subpoenas

An employer may not deprive an employee of employment or employment benefits or otherwise threaten the employee because of the employee's receipt of a summons, response to it, service on a jury, or attendance in court for prospective jury service. An employer commits a Class B Misdemeanor if it violates this provision. An employee discharged as a result of the receipt of a summons, responding to a summons, serving on a jury, or attending court for prospective jury service may bring a civil action within 90 days of the discharge for recovery of lost wages and reinstatement, and if successful, may be awarded reasonable attorneys' fees (I.C. 35-44.1-2-11 and I.C. 34-28-4-1).

However, this is not the only remedy an employee who has been discharged for serving on a jury can pursue. An employee can also pursue a wrongful discharge claim alleging the termination violated public policy, thus creating an exception to at will employment in Indiana. See *Call v. Scott Brass, Inc.*, 553 N.E.2d 1225 (Ind. App. 1990). An employee would have up to two years to bring such a wrongful discharge claim. See also, Chapter 1, "Employment-At-Will," for more discussion regarding exceptions to at-will employment.

Finally, no Indiana law requires an employer to pay employees for their time away from work for jury duty. Many, however, pay employees the difference between their jury duty pay and their regular pay rate. An employer may not, however, require or request an employee to use annual leave, vacation leave, or sick time for time spent on jury duty (I.C. 33-28-5-24.3).

Protection of Employees Who Report Their Employer's Violations of Law

Federal Whistle-blower Law

In 2002, Congress passed the Sarbanes-Oxley Act (SOX) in the wake of several high-profile accounting scandals at large publicly traded companies. The goal of SOX was to rein in questionable or illegal accounting practices. To that end, SOX makes it illegal for an employer to retaliate against employees who whistle-blow about corporate fraud or financial irregularities. SOX applies to all publicly traded companies that are registered with the SEC. Private companies, if they are wholly owned subsidiaries of a publicly traded company, may also be covered. Individual employees of companies that are subject to SOX may be held liable under the Act.

SOX protects two types of employee activity:

1. Providing of information or assistance in an investigation of conduct the employee reasonably believes is unlawful; and
2. Participation such as testimony, filing or other assistance in a legal proceeding involving SOX.

The information or assistance in an investigation can be to a law enforcement agency or a federal regulatory agency or even in the form of a report made to a person with supervisory authority over the employee or a manager who has the authority to conduct an investigation within the corporation. Importantly, an employee need not prove that illegal or fraudulent activity occurred, just that he or she reasonably believed the reported activity violated federal laws relating to fraud against shareholders.

Like other forms of retaliation, any adverse action taken with respect to the whistle-blower may trigger liability. SOX specifically identifies adverse actions as including discharge, demotion, suspension, threatening behavior, harassment or other discrimination with respect to the terms and conditions of employment. As with other retaliation claims, the employee must also show some nexus between the employee's report and the subsequent adverse employment action. The employee's report, though, need not be the sole reason for the adverse employment action. Indeed, the employee need only show that his or her report was a "contributing factor" in the adverse employment decision. Importantly, the employer has a higher burden than in Title VII retaliation cases of establishing a legitimate reason for the adverse employment action. Under SOX, the employer must show by "clear and convincing evidence" that it would have taken the same adverse action even in the absence of the complainant's protected activity.

Claims under SOX must be brought before the Occupational Safety and Health Administration (OSHA) within 180 days of the adverse employment action. OSHA informs the employer of the administrative complaint and conducts an investigation within 60 days. OSHA must then issue written findings. The parties can then appeal OSHA's findings by asking for a hearing before an administrative law judge and can appeal the ALJ's decision to the administrative review board. Finally, after all these administrative procedures have been exhausted, either party can appeal to a federal circuit court of appeals.

Penalties for violating the whistle-blower retaliation provisions include both civil and potential criminal penalties to the employer. Criminal penalties of up to ten years in prison apply only to the provision of truthful information relating to the commission of a federal offense to a law enforcement officer. Civil penalties include make-whole remedies such as back pay with interest as well as compensation for any other damages the employee suffered as a result of the retaliation, including attorney's fees and litigation costs.

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Reinstatement to the employee's former job held before the unlawful retaliation or that he or she would have been qualified had the adverse action not occurred is also possible. OSHA can order reinstatement on an "interim" basis prior to any administrative hearing. In certain cases, the employee may recover additional damages for injury to the employee's reputation.

Employers covered by SOX must train and educate managers regarding the anti-retaliation provisions of SOX. Further, covered employers should establish a complaint-reporting mechanism that includes multiple reporting avenues for employees to lodge whistleblowing complaints. This means establishing hotlines or ways in which employees can report financial improprieties anonymously and with reassurances of no retaliation. Companies should also be prepared to conduct prompt, thorough investigations into any reports received from employees and to take appropriate remedial action should any reports be found to have merit (18 U.S.C.A. Section 1514A, 18 U.S.C.A. Section 1513[e], 29 C.F.R. Section 1980.100 *et seq.*).

Indiana Whistle-blower Law

Long before SOX, Indiana provided limited statutory protections for whistle-blowing employees (I.C. 22-5-3-3). Specifically, employees of private employers that are under public contract may report, in writing, violations of law or misuse of public resources concerning the execution of the public contract. The employee must first report the violation of law or misuse of public resources to his or her private employer, unless the employer actually is committing the violation or misuse of public resources. In that case, the employee may report the violation or misuse of public resources, in writing, to either his or her employer or to the appropriate official or public agency involved.

If an employee makes such a report, he or she may not be dismissed from employment; have salary increases or employment-related benefits withheld; be transferred or reassigned; be denied a promotion that the employee would have otherwise received; or be demoted.

Courts construing this statute have done so narrowly. To date, no claimant employee has been found to have adequately followed the statutory requirements to support a claim. Courts have most strictly construed the violation of law notification requirement. See *Ellis v. CCA of Tennessee LLC*, 650 F.3d. 640, 651 (7th Cir. 2011), holding the requirements of the statute not sufficiently met when plaintiff did not identify what laws were violated. See also *Eschoff v. BAE Systems Controls Inc.*, 2017 WL 2080936 (Cause No. 1:16-CV-12 RLM, 5/15/17 N.D. Ind.), denying claim on basis that employee failed to adequately indicate what violation of law occurred.

The employee has an affirmative obligation to make a reasonable attempt to ascertain the accuracy of information furnished and may be subject to disciplinary actions, including suspension or dismissal, for knowingly furnishing false information. However, any employee disciplined for making such a report, and fired because it is alleged to be a false report, is entitled to process an appeal of the disciplinary action as a civil action in court (I.C. 22-5-3-3).

Protection of State Agency Employees Who Are Volunteer Firefighters

Indiana law provides that state agency employees cannot be disciplined because they are absent from work due to volunteer firefighting activities, so long as they have given written notice to their supervisor that they are volunteer firefighters and provide written proof from the head of the fire company that their absence

was due to emergency service. Consequently, if an employee reports to his or her employer that he or she will need to be absent from work to engage in volunteer firefighting activities, the employer must not terminate the employee. However, volunteer firefighters who have already reported to work may be required by their employer to secure authorization from their supervisor before leaving their workstation for firefighting activity (I.C. 4-15-10-7).

Indiana Gun Law and Workplace Violence Policies

State law allows most employees in Indiana to bring a loaded firearm onto their employer's property as long as those weapons are kept out of plain sight in a locked vehicle (I.C. 34-28-7-2). This law went into effect on July 1, 2010. Employers exempted from this include the following:

- Schools
- Childcare centers
- Domestic violence shelters
- Prisons
- Public utilities
- Group homes
- Employers that use or store sufficient quantities of certain chemicals

This law allows individuals who believe that their weapon-carrying rights have been infringed by an employer to bring a civil action against the employer. A successful litigant can be awarded their actual damages, court costs, and attorneys' fees, and an injunction against further violations. While under this law, school corporations may still prohibit employees from bringing guns with them to the school parking lot, a new law effective July 1, 2014, inhibits the ability of schools to keep others from transporting guns onto school parking lots. I.C. 35-47-9-1 allows any person who may legally possess a firearm to possess that firearm in his vehicle while transporting another person to or from a school or a school function.

As a result of the 2010 law, some employers began requiring employees to disclose whether or not they were bringing guns with them in their locked vehicles to work or assigning them to specific parking areas. In response, the Indiana legislature passed an addendum to the gun law effective July 1, 2011 (I.C. 34-28-8-6). It prohibits employers from requiring employees or applicants to divulge any information about their ownership, use, possession or transportation of guns and ammunition. It also prohibits employers from conditioning employment, or any rights, benefits, privileges or opportunities offered by the employer on an employee relinquishing his or her rights related to gun ownership, possession, storage, transportation or use. The only exception to this is that employers can request disclosure of information if it concerns the possession or use of firearms or ammunition that is used in fulfilling an individual's employment duties (e.g., police officers and security guards). In addition, the Indiana legislature added a provision allowing for not only actual damages but also attorney's fees and punitive damages against individuals who knowingly or willfully violate this law. In light of this double-barreled legislative shotgun approach, employers must revisit and revise their firearms policies and work rules to ensure compliance with this law. Further, employers who are investigating threats of workplace violence should consult counsel before questioning individuals about whether or not they are bringing guns to work (in their vehicles) or own guns.

Lactation Support Laws

Both federal and Indiana laws require Indiana employers to provide breaks for mothers to express breast milk or nurse their children at work. On the federal level, the Patient Protection and Affordable Care Act contains a provision amending the Fair Labor Standards Act to require employers to make certain provisions for lactating employees. The chart below compares the requirements of the state and federal laws. One of the significant substantive differences between the Indiana and federal laws is that while Indiana law only requires employers to allow time for expression of breast milk during regularly scheduled breaks, federal law requires a reasonable break time “each time employee has the need to do so,” which may exceed regularly scheduled breaks. Keep in mind that employers subject to both laws must comply with the portions of both laws that provide the greatest protection to employees.

	Indiana’s Lactation Support in the Workplace Act (I.C. 5-10-6-2 and I.C. 22-2-14-2)	Federal Law (Amendment to FLSA, 29 U.S.C. § 207[r])
How much break time?	<p><u>Private Employers</u>: Required only to allow time for the expression of breast milk during regularly scheduled breaks; there is no requirement to give employees additional break time</p> <p><u>Public Employers</u>: Must provide a “reasonable” break time; if possible, the break should run concurrently with pre-existing breaks</p>	“Reasonable break time” to express breast milk each time employee has need to do so
Where?	A private location other than a “toilet stall”	A place, other than a bathroom, shielded from view and free from intrusion from coworkers and the public
Storage requirements?	Employer must provide refrigerator or allow the employee to bring cooler or other device to store breast milk	None
Paid or unpaid?	<p><u>Private Employers</u>: Unpaid</p> <p><u>Public Employers</u>: Paid, but paid break should run concurrently with preexisting breaks, if possible</p>	Unpaid
For how long of a period?	As long as the mother wishes to express breast milk	For one year after child's birth
Applies to which employers?	Private employers with more than 25 employees, and all state and local government employers	All employers subject to the Fair Labor Standards Act (generally, all employers with one or more employees). Employers with less than 50 employees are not subject to the requirements if they "would impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business"

Protective Order and Employment Law

Indiana law prohibits employers in Indiana from firing an employee either for filing a petition for a protective order or for actions of the employee's abuser (I.C. 22-5-7-1 et seq.). While the goal of this law is to protect employees who are in abusive situations from also losing their jobs over it, this law has serious implications for Indiana employers trying to safeguard their overall workplace environment and the abused employee's coworkers. One provision of the law requires the employer to obtain the victim's consent before changing any condition of the work, such as the employee's shift or work location. However, courts do not construe this literally.¹ Still, in a situation in which an employer tries to reach a mutual agreement with the employee, the employer should carefully document this agreement.

In its current version, the law prohibits employers from firing workers but does not create a private right of action, nor does it impose any penalties. While no actual remedy is written into the current state law, employees could sue under the Civil Rights Act of 1964, alleging discrimination on the basis of sex, since women file for protective orders more often than men. Also, state legislators have indicated a desire to amend the statute to create both civil and criminal penalties for violations.

The Indiana Religious Freedom Restoration Act (IRFRA) and Its Impact on Employers

On March 25, 2015, Indiana Governor Mike Pence signed into law the Indiana Religious Freedom Restoration Act (IRFRA), which created quite a bit of national controversy based on concerns that the statute would be used to discriminate against individuals, particularly on the basis of sexual orientation. Subsequent to this, the Act was amended to prevent IRFRA from being used as a lawful means to discriminate. In its current form, IRFRA does not authorize most employers to discriminate on the basis of race, color, religion, ancestry, age, national origin, disability, sex, sexual orientation, gender identity or military service. This is the case even if an employer raises a religious objection.

While most employers are not allowed under IRFRA to discriminate on the basis of any of these categories, IRFRA does allow churches and other tax-exempt, non-profit religious organizations or societies, including affiliated schools, to do so. As such, churches and related entities may refuse to hire individuals if doing so conflicts with their religious beliefs and is not "on the basis of" the individual's protected status. Hence, the protection provided to religious employers by IRFRA is arguably more expansive than Title VII's ministerial exception, which is rooted in the Establishment Clause and the Free Exercise Clause in the First Amendment to the United States Constitution and bars the government from interfering with a religious employer's decision to hire or fire ministers.

What IRFRA Means for Employees' Rights

With the amendment to the original law, IRFRA now prevents most employers from using it as a defense in lawsuits when an individual alleges he was discriminated against because of his race, color, religion, ancestry, age, national origin, disability, sex, sexual orientation, gender identity or military service. However, the prohibition on using IRFRA as a defense applies only to "providers" (which includes employers).

¹ *Lovato v. Wal-Mart Stores, Inc.*, No. 4:16-CV-84-PPS, 2019 WL 3059836, at *10 (N.D. Ind. July 11, 2019).

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Because the Act's religious freedom protections also apply to individuals, an employee could assert a claim or defense in a civil lawsuit regardless of whether the government is a party to the litigation that the employer has interfered with a constitutionally protected right, which is free exercise of religion, while employers cannot. Although an employee cannot file an independent discrimination suit against the employer under IRFRA, an individual may file suit under Title VII, the U.S. Constitution, or the Indiana Constitution, and can point to IRFRA as justification for refusing to do her job. Thus, IRFRA can bolster an employee's religious discrimination claim. For example, an employee who was terminated for failing to do her job and now seeks unemployment benefits may point to religious freedom protected under IRFRA to undercut the employer's defense that she was terminated for "just cause."

As a result of the widespread media coverage IRFRA garnered, employers could face an increase in requests for religious accommodations even though accommodations are already available to employees of companies with 15 or more workers under Title VII. Traditionally, most religious accommodation requests have dealt with dress codes or exemptions from working on the Sabbath. However, IRFRA may incentivize workers to raise religious objections to a wider array of responsibilities. Accordingly, employers should be prepared to respond to religious accommodation requests and seek counsel if needed (I.C. 34-13-9 *et seq.*).

COVID-19

The COVID-19 pandemic prompted new legislation and executive orders and implicated existing laws that affect employers.

Indiana Executive Orders

Governor Eric Holcomb issued a series of executive orders throughout the COVID-19 pandemic, many of which impacted employers. For example, Executive Order 20-26, Roadmap to Reopen Indiana, required all Indiana employers to "develop a plan to implement measures and institute safeguards to ensure a safe environment..." On June 30, 2021, Governor Holcomb rescinded all such orders and replaced them with much more limited requirements via Executive Order 21-17; he rescinded the last of these on March 3, 2022, via Executive Order 22-09.

Health and Safety

I.C. 34-30-32 provides civil tort immunity for damages arising from COVID-19 except for an act or omission that constitutes gross negligence or willful or wanton misconduct (including fraud and intentionally tortious acts). Similarly, federal OSHA's General Duty Clause, which codifies the spirit of that law, has led employers to take common-sense precautions to comply with the requirement "to furnish to each of [their] employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to [their] employees" (29 USC § 654[a][1]).

Employee Leave

The federal Families First Coronavirus Response Act (FFCRA) has now expired. It previously required private employers with fewer than 500 employees and some governmental employers to provide paid leave to employees with a qualifying COVID-19-related reason.

Enhanced Unemployment Benefits

The enhanced unemployment benefits for employees during the pandemic conditions have now expired. For a time, employees were able to collect unemployment benefits for an expanded list of reasons and collect higher benefit amounts for longer periods of time than before the pandemic.

This chapter was edited by Ryan J. Funk, Partner.

Chapter 23

Alcohol and Other Drugs in the Workplace

Drug-free Workplace Programs and Drug Testing

Drug and alcohol abuse in the workplace is more prevalent than many employers realize. According to the Substance Abuse & Mental Health Services Administration's (SAMHSA) National Survey on Drug Use and Health, there are over 28 million illicit drug users age 12 and older in this country. Employer efforts to curb drug and alcohol use in the workplace can improve efficiency, performance, and productivity, reduce tardiness and absenteeism, and ultimately, save lives.

Over the years, both state and federal lawmakers have increasingly made the workplace the focus of attempts to control alcohol and drug abuse. Recognizing the opportunities available in the workplace that frequently are not available in other settings, the legislature has encouraged employers to undertake efforts to combat drug and alcohol use by employees and to promote programs that seek to help individuals overcome drug and alcohol dependency.

At the same time, however, drug-free/alcohol-free workplace programs — and particularly their drug testing provisions — are increasingly the subject of lawsuits alleging negligence, invasion of privacy, breach of contract, and discrimination, among other claims. Public employers also must consider constitutional issues that can impact their testing procedures. As a result, implementing a testing program is not a simple process. Testing policies must comply with relevant legal requirements that can vary in their application to particular workplaces. This chapter provides guidance in developing lawful workplace policies and summarizes the legal landscape concerning alcohol and other drug use, drug testing and related employee privacy issues.

Federal Legislation

Drug-free Workplace Act

The Drug-free Workplace Act applies to all employers who have a federal contract in an amount greater than \$100,000 or are recipients of federal grants in any amount. The act requires the covered employer to certify to the government agency that the employer will provide a drug-free workplace. This certification requires the employer to create and enforce a written plan that provides for a drug-free workplace.

The act specifically requires each covered employer to:

- publish and distribute a policy statement to all covered employees informing them that the unlawful manufacture, distribution, dispensation, possession or use of a controlled substance is prohibited in the covered workplace and specifying the actions that will be taken against employees who violate the policy;

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- establish a drug-free awareness program to inform employees about:
 - dangers of drug abuse in the workplace;
 - the company's policy of maintaining a drug-free workplace;
 - available drug counseling, rehabilitation or employee assistance programs; and
 - penalties that may be imposed for drug-abuse violations occurring in the workplace.
- notify employees that, as a condition of employment on a federal contract or grant, the employee must abide by the terms of the notice and must notify the company of any criminal drug statute conviction for a violation occurring in the workplace no later than five days after the conviction;
- notify the contracting federal agency within 10 days after receiving notice of an employee conviction;
- impose a sanction on an employee who is convicted or require the employee to participate satisfactorily in a drug-abuse assistance or rehabilitation program within 30 days after receiving notice of the conviction; and
- make a good-faith effort to continue to maintain a drug-free workplace by implementing the above actions.

Individuals subject to the Drug-free Workplace Act must agree not to engage in the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance in the performance of the contract. Notably, the act does *not* require:

- drug screening or drug testing;
- drug counseling, rehabilitation or employee assistance as part of a fringe benefit package;
- the maintaining of a drug-free environment on a corporate-wide basis: the act only covers the sites where government contract work will be performed; or
- monitoring of off-site conduct: the act does not require a contractor to discipline an employee arrested for and/or convicted of a drug-related crime occurring off premises if the violation did not occur during working time.

An employer violates the Drug-free Workplace Act if it:

- violates any of the act's requirements, which are set forth above;
- has such a number of its employees convicted of criminal drug statute violations occurring in the workplace as to indicate that it has failed to make a good-faith effort to provide a drug-free workplace; or
- submits a false certificate for a grant or fails to comply with its grant certification.

Penalties for non-compliance include:

- suspension of contract or grant payments;
- termination of the contract or grant for default; and
- debarment of the contractor or grantee for a period of up to five years, depending on the seriousness of the cause.

For more information about the Drug-free Workplace Act, visit the Department of Labor's web site at <https://webapps.dol.gov/elaws/drugfree.htm>.

Department of Transportation Alcohol and Other Drug Testing Programs

The Omnibus Transportation Employee Testing Act declares that both drug and alcohol abuse pose significant dangers to the health and safety of the nation and that greater efforts must be expended to eliminate substance abuse by individuals who operate aircraft, trains, trucks, and buses.

As a result of the Act, the Department of Transportation (DOT) and several of its operating administrations have issued rules and regulations governing who must conduct drug and alcohol tests, how to conduct those tests, and what procedures to use when testing. These regulations cover all transportation employers, employees in certain “safety sensitive” transportation and other positions, and service agents.

The Act mandates testing in various positions that require the possession of a commercial driver’s license and/or are defined as “safety sensitive.” These types of tests are explained in the following sections.

The DOT regulations also require that employers implement a policy on the misuse of alcohol and controlled substances, including the distribution of educational materials that explain the DOT requirements and the employer’s policies and procedures for meeting the DOT requirements. In most cases, employers are not required to provide rehabilitation for drivers who fail alcohol or drug tests, but the need for a rehabilitation program may be a mandatory subject of collective bargaining.

For employers seeking additional information as to whether they are covered by this act, visit www.transportation.gov/odapc/am-i-covered.

Pre-employment Testing

Prior to the first time a driver or other covered employee performs safety-sensitive functions for an employer, the employee must undergo testing for alcohol and controlled substances, unless certain limited exceptions apply.

Post-Accident Testing

Employers are required to conduct alcohol and controlled substances tests of any driver involved in a commercial motor vehicle accident if the accident involved:

- loss of human life;
- a citation for a moving traffic violation, if the accident also involved bodily injury to any person who, as a result of the injury, receives medical treatment away from the accident scene; or
- disabling damage to one or more motor vehicles.

Testing must be completed as soon as practical and within a specified number of hours after the accident.

Random Testing

Each year, covered employers must randomly test a specified percentage of their average number of driver positions for alcohol and a specified percentage of the average number of driver positions for controlled substances. These percentages are determined by the Administrator of the Federal Highway Administration (or the equivalent official of another DOT subdivision responsible for regulating a specific industry).

Reasonable Suspicion

Employers must also require a covered employee to undergo testing where the employer has reasonable suspicion to believe that the employee is under the influence of a prohibited substance or has otherwise violated the employer's DOT policy. The employer's determination that reasonable suspicion exists must be based on a trained supervisor's or company official's specific, contemporaneous, expressible observations concerning the appearance, behavior, speech or body odors of the employee.

Return-to-Duty Testing

Any covered employee who has misused drugs or alcohol may not return to duty until he or she has submitted to drug and alcohol testing.

Follow-up Testing

Any covered employee identified as needing assistance in resolving problems associated with the misuse of alcohol or use of controlled substances must be subject to unannounced follow-up alcohol and drug tests by the employer. Such testing must consist of at least six tests in the first 12 months following the employee's return to duty.

Retention of Records

Covered employers must maintain records of their alcohol misuse and controlled substances use prevention program as provided by the DOT regulations.

Americans with Disabilities Act

The Americans with Disabilities Act (ADA) applies to employers with 15 or more employees. Although the 2008 amendments to the ADA have changed its scope and application in some ways, it remains largely unchanged with respect to workplace drug and alcohol concerns. (For a general discussion of the ADA, see Chapter 6, "Disability Discrimination.")

Drugs

It is not a violation of the ADA for an employer to refuse to hire, to discipline or to discharge an individual due to that individual's current illegal drug use. The employer is not required to prove that the current illegal drug use had any effect on job performance. Instead, the employer only has to show that its action was motivated by the individual's current illegal use of drugs.

However, individuals who are successfully rehabilitated and no longer engaging in the illegal use of drugs, who currently are participating in a supervised rehabilitation program and not using drugs, or who are erroneously regarded as engaging in the illegal use of drugs may be considered individuals with a disability.

The ADA prohibits pre-employment medical examinations unless a job offer has been made and the medical examination is job related. Tests for the presence of illegal drugs are not considered to be prohibited medical examinations. Therefore, it is not a violation of the ADA for an employer to test applicants or employees for the presence of illegal drugs. However, the use of drugs taken under the supervision of a

licensed health-care professional is not illegal, so an applicant or employee should be given the opportunity to disclose any such current drug use that could result in a positive test. In the absence of a satisfactory explanation, the employer is generally free to refuse to hire, to discipline or to discharge the individual.

Over the last several years, a number of U.S. jurisdictions outside Indiana have enacted laws that decriminalize, to varying degrees, the possession and use of marijuana. With increasing frequency, Indiana employers have been confronted with positive drug-test results that the employee attributes to the use of marijuana (or other illegal substances) that they claim to have consumed lawfully in a different jurisdiction (or consumed in Indiana pursuant to a prescription that was issued lawfully in a different jurisdiction). It is important for Indiana employers to remember that marijuana use and possession remains a crime under both Indiana and federal law. Accordingly, it is not a violation of the ADA to take adverse action against an applicant or employee because that individual tests positive for marijuana use, regardless of when, where, or how the marijuana was consumed.

In 2017, Indiana “legalized” the possession and use of certain narrowly defined substances containing cannabidiol (commonly referred to as CBD oil) for the treatment of certain forms of epilepsy, subject to certain registration and prescription requirements. Indiana’s law has no express provisions protecting or otherwise impacting employment for an individual who uses or possesses CBD oil, nor does (or can) Indiana law override federal law regarding controlled substances. Most forms of CBD oil are unlawful under federal law, meaning employers generally remain free under the ADA and other federal employment regulations to discipline or discharge employees who possess, use, or test positive for such substances.

However, Indiana’s law is relatively new, frequently misunderstood, and fairly complex. Indeed, in the months following its enactment, the state’s law enforcement agencies responsible for enforcing the statute made inconsistent enforcement efforts and expressed confusion about their own procedures. Accordingly, employers should monitor developments in this area of the law and should consider consulting with counsel to manage both the legal and employee-relations issues associated with any specific instances of CBD oil in the workplace.

Alcohol

Unlike individuals who currently engage in unlawful drug use, individuals who currently abuse alcohol may be protected by the disability and reasonable accommodation provisions of the ADA. However, an employer may prohibit employees from being under the influence or using alcohol while at work. Also, an employer may refuse to hire or may discipline or terminate an individual whose current alcohol use adversely affects job performance. The employer can also require employees who abuse or are dependent upon alcohol to maintain the same job performance standards as all other employees and may discipline or terminate employees for failure to maintain job performance, for excessive absenteeism, or for tardiness.

Efforts to Prohibit Drug and Alcohol Use in the Workplace

Employers may have a policy prohibiting the use of illegal drugs or alcohol and/or requiring employees not to be under the influence of illegal drugs or alcohol at the workplace. Also, employers can require that employees who have drug or alcohol dependencies maintain the same standards of job performance and behavior as all other employees, even if the unsatisfactory job performance is related to the employee’s use of illegal drugs or alcohol.

Family and Medical Leave Act (FMLA)

The Family and Medical Leave Act (FMLA) requires covered employers to offer leaves of absence to eligible employees for certain medical and other reasons. The FMLA generally covers employers who have employed 50 or more employees in the current or preceding calendar year. (For a general discussion of the FMLA, see Chapter 18, “Family and Medical Leave Act.”) The FMLA mandates that an eligible employee may take an unpaid leave of absence of up to 12 workweeks in a 12-month period for, among other reasons, a serious health condition of the employee that makes him or her unable to perform the functions of the job; or the care of a spouse, child, or parent who has a serious health condition.

The Department of Labor has promulgated rules under the FMLA. These rules provide that treatment for substance abuse may qualify as a serious health condition. Eligible employees may take FMLA leave for appropriate treatment for their own substance abuse programs or to provide necessary care for qualifying relatives who are receiving alcohol or other drug treatment by a health care provider or on referral by a health care provider.

An employee’s “self-referral” to a treatment program may not trigger FMLA leave rights. Moreover, absences due to the actual use of alcohol or other drugs (i.e., without treatment) do not qualify for FMLA leave. An employee’s right to protected FMLA leave does not insulate him or her from disciplinary measures — up to and including termination — for violation of an employer’s established (and previously communicated) nondiscriminatory alcohol or other drug use policy.

The FMLA does not modify or affect the ADA, state worker’s compensation laws, or drug-free workplace acts. Generally, an employer’s drug-free workplace policy may be lawfully enforced with respect to an employee on FMLA leave who has engaged in conduct violating the policy if it has been widely and previously communicated to employees and provides for adverse employment action under specified circumstances. In addition, in most instances, employers can require a fitness-for-duty certification from an employee returning from leave for a serious health condition, even if the leave is for substance abuse, if the requirement is applied uniformly and the employee receives proper notice. However, collective bargaining agreements may supersede such requirements.

Federal Rehabilitation Act

This federal law prohibits discrimination on the basis of disability in programs conducted by federal agencies, in programs receiving federal financial assistance, in federal employment, and in the employment practices of federal contractors. Covered employers include those that are either a prime contractor or a subcontractor with the federal government that provide goods or non-personal services in an amount in excess of \$10,000 annually, and employers who are recipients of federal monies or grants, including hospitals, colleges, etc.

The anti-discrimination provisions of the Federal Rehabilitation Act parallel the Americans with Disabilities Act (ADA) and establish the same exemptions and protection regarding drug and alcohol use.

Health Insurance Portability and Accountability Act (HIPAA)

The Health Insurance Portability and Accountability Act (HIPAA) protects the privacy of certain individual health information. Specifically, HIPAA prohibits covered entities such as drug testing laboratories from releasing an employee’s drug test results to an employer unless the employee has expressly consented in

writing to the release. Such a release must contain a detailed description of the health information requested and the manner in which the health information will be used and disclosed. The release must include an expiration date and be executed by the employee. Furthermore, any disclosure must be limited to the information necessary to carry out the purpose of the disclosure. As a general rule, employers can require employees to execute any HIPAA authorizations that a testing facility requires to release information to the employer.

HIPAA rules do not require employers and service agents in a DOT alcohol and drug testing program to obtain written employee authorization to disclose drug testing information required by DOT's drug testing rules. In fact, use or disclosure of the DOT drug testing information without a consent or authorization from the employee is required by the Omnibus Transportation Employees Testing Act of 1991 and DOT agency drug testing regulations, unless otherwise stipulated by DOT rules.

DOT takes the position that its required drug testing information differs significantly from health information covered by HIPAA rules. DOT's drug testing program is concerned only with employees' compliance with DOT safety regulations and not with preventive, diagnostic, therapeutic, rehabilitative, maintenance, or palliative care or the past, present, or future physical or mental health condition of an individual. According to DOT, even if DOT drug testing information is viewed as protected health information under HIPAA, it is not necessary under its rules to obtain employee written authorization where federal law requires the use or disclosure of otherwise protected health information.

The U.S. Department of Health and Human Services, which promulgates HIPAA standards, agrees with DOT's position. Consequently, an employer or service agent in the DOT program may disclose information without the employee's authorization.

Fair Credit Reporting Act (FCRA)

The Fair Credit Reporting Act (FCRA), as amended by the Fair and Accurate Credit Transactions Act of 2003 (FACT Act), prevents unreasonable invasion of the privacy of a consumer by restricting dissemination of consumer credit reports. The term "consumer credit report" includes any communication from a consumer reporting agency that serves as a factor in establishing a person's eligibility for employment purposes, including hiring, promotion, reassignment or retention as an employee. Some employees have challenged drug testing under FCRA by arguing that drug test results are consumer reports. Although most courts have rejected these arguments, there is some authority suggesting that certain medical-type reports could be covered by the FCRA. Therefore, employers should be careful to preserve the confidentiality of drug testing reports, distributing them only to those employees and agents with a genuine need to know.

National Labor Relations Act (NLRA)

The National Labor Relations Act (NLRA) requires employers to bargain with employee representatives (unions) concerning mandatory subjects of bargaining. The National Labor Relations Board (NLRB) has determined that a substance testing policy for union-represented employees is a mandatory subject of bargaining.

The NLRB would consider an employer's unilateral implementation of a testing program without first meeting its obligation to bargain to be an unlawful, unilateral change in working conditions. The NLRB may, as a remedy, order rescission of the testing program and reinstatement of any employee discharged pursuant to the testing program.

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However, even where the employer is obligated to give notice and bargain with the union regarding drug or alcohol testing, the NLRA does not require that the employer and union reach agreement. Rather, they must bargain in good faith. Generally, if the employer and union bargain to an impasse, the employer is permitted to implement unilaterally the terms of the final offer it made to the union prior to the impasse, unless there is a provision in the current collective-bargaining agreement that relieves the union from bargaining about a proposed drug or alcohol program during the life of the agreement. (Counsel should be consulted for further advice.)

Example: A general management rights clause that reserves to management the right to implement reasonable work rules would not constitute a prior waiver of the right of the union to bargain about the implementation of a drug testing program.

The NLRB does not consider drug testing of job applicants to be a mandatory subject of bargaining. Therefore, even unionized employers are free to unilaterally adopt a substance testing program for employment applicants.

Indiana State Provisions

Indiana Civil Rights Act (Protection to Disabled Individuals)

The anti-discrimination provisions of the Indiana statute parallel the ADA. (For a discussion of Indiana's laws regarding disability discrimination, see Chapter 6, "Disability Discrimination.")

Employers may adopt reasonable policies and procedures, including drug testing, to ensure that individuals are not engaging in the illegal use of drugs.

Worker's Compensation Act

An employee's alcohol or drug impairment can be raised by the employer as a defense in a worker's compensation claim. However, a finding that an employee was intoxicated or under the influence of illegal drugs at the time of the accident does not, standing alone, mandate the denial of worker's compensation benefits. The employer must prove that the employee's injury or death was due to or caused by the substance-abuse-induced impairment.

Unemployment Compensation Act

Discharge for Alcohol or Other Drug Abuse

Indiana unemployment compensation (UC) law provides that an employee who is discharged for "just cause" is disqualified from receiving unemployment compensation benefits. Just cause includes, among other things, reporting to work under the influence of alcohol or other drugs, consuming alcohol or other drugs on the employer's premises during working hours, or knowingly violating a reasonable and uniformly enforced work rule. "Under the influence" is defined as being synonymous with intoxication and requires an individual to have impaired condition of thought and action and loss of normal control of his or her faculties

to a marked degree due to the substance abuse. The mere fact that an employee receives a positive result on a drug or alcohol screen, in itself, does not establish that the individual was under the influence.

Also, under Indiana UC law, an individual may be discharged for gross misconduct for alcohol or other drug abuse. Gross misconduct is defined for UC purposes as a felony or Class A misdemeanor committed in connection with work, but only if the misdemeanor or felony is admitted by the individual or has resulted in a conviction.

Indiana's UC system is administered by the Department of Workforce Development. Effective July 1, 2014, Indiana amended its UC law to state that benefits are to be distributed "without regard to a burden of proof." The extent to which this provision will impact the manner in which the Department analyzes cases where a claimant has been discharged in connection with drugs or alcohol remains uncertain. Historically, though, the employer carried the burden of proving that an employee was under the influence. As described below, this can be a demanding burden both as written and in practice. More recent Department guidance, however, provides that once an employer properly admits evidence of a positive drug test result, the claimant carries the burden of proving those results are inaccurate.

Denial of Benefits for Positive Substance Test Result

Under Indiana's UC law, an employer can announce a drug testing rule that may include a drug/alcohol screen. A knowing violation of an employer's reasonable rule that is uniformly enforced also will constitute discharge for just cause. The Department of Workforce Development and Indiana courts have long held that, for an employer to satisfy its burden that the rule is reasonable and uniformly enforced, it must be in writing. Violating such a rule constitutes cause for denial of certain unemployment compensation benefits.

An employer can demonstrate just cause for discharge related to drug or alcohol use through other methods as well, several of which require the employer to introduce test results into evidence. The Department's Policy 2017-02 governs the evidentiary standards for drug and alcohol test results in unemployment benefit disputes and is available at www.in.gov/dwd/2482.htm, as are many other useful Department policies.

Indiana Drug Dealer Liability Act

Employers and others may bring a civil action against illegal drug dealers or distributors for damages caused by an individual's use of an illegal drug. Damages may include: economic damages, including costs of treatment and rehabilitation, lost productivity, accidents, and absenteeism; non-economic damages; punitive damages; attorneys' fees; and costs to bring suit.

Governor's Executive Order for Promotion of a Drug-free Indiana

Executive Order 90-5 for the Promotion of a Drug-free Indiana states that the use of illegal drugs is a major threat to the health and well-being of the state of Indiana in that it causes, among other things, workplace problems such as increased absenteeism, increased health care costs and more job-related accidents. The order applies to all private legal entities receiving a grant or contract funds from any agency, commission, or board of the state government in excess of \$25,000. To comply with the order, the grantees

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and contractors are required to certify with an application for funding that they will provide drug-free workplaces by:

- publishing a statement notifying all employees that the unlawful manufacture, sale, distribution, or possession of a controlled substance is prohibited and will lead to specified sanctions;
- establishing a drug-free awareness program that informs employees about the dangers of drugs in the workplace, the availability of treatment programs, and the company's anti-drug policy and penalties;
- providing each employee with a copy of the drug-free workplace statement; and
- notifying each employee in the drug-free workplace that compliance with the statement is a condition of the employee's employment. To remain in compliance, the employee must notify the employer within five days of any conviction for a drug violation in the workplace. Upon receiving such notice, the employer has 10 days to notify the contracting government agency of the conviction. Upon receipt of notice of an employee's conviction, the company has 30 days to take disciplinary action or send the employee for treatment.

The order also requires, among other things, that grants and contracts issued by state government agencies, commissions, or boards contain a stipulation that failure to meet the drug-free workplace requirement constitutes a breach of contract. The Indiana Housing Finance Authority must require that all mutual housing association contracts include a requirement that all officers of the mutual housing association remain free of any drug-felony conviction and that all contractors developing housing with the assistance of the Low Income Housing Trust Fund remain free of any drug-felony conviction.

Individuals or companies that have a contract with, or receive a grant from, the state of Indiana are required to maintain a drug-free workplace. For all grants or contracts awarded, the following drug-free workplace criteria apply:

- A drug-free workplace certification must be included in the contractual documents for a contract or a grant in excess of \$25,000. This certification outlines the state's requirements for providing a drug-free workplace and is to be signed and adhered to by the contractor or grantee.
- A drug-free workplace clause with provisions for maintaining a drug-free workplace also must be included in the contractual documents for all contracts or grants, including those over \$25,000.

The Indiana legislature established the Commission to Combat Drug Abuse within the Indiana Criminal Justice Institute to improve the coordination of alcohol and other drug abuse prevention efforts at both the state and local levels to ensure that comprehensive alcohol and other drug abuse programs are available throughout Indiana.

Types of Substance Testing

Under Indiana law, private employers are not restricted from engaging in any form of drug testing. The ADA, OSHA, and other federal laws, however, create limits for alcohol testing.

Pre-employment Screening of Applicants

Pre-employment drug testing has become the most common and accepted form of drug testing. Assuming all proper test procedures are followed, pre-employment testing poses little to no legal risk in the private sector. Virtually all private employers can require an applicant, as a condition of hiring, to pass a

pre-employment drug screen. Unless alcohol testing is explicitly required by law, pre-employment alcohol screens generally are impermissible under the ADA. Public employers, however, must satisfy constitutional concerns as to both alcohol and drug testing. While there is no bright-line rule, public employers generally can only require pre-employment screens for certain safety-sensitive positions.

The benefit of pre-employment substance testing is not only in the detection of applicants who test positive for drug use, but also in the deterrence of substance abusing applicants who often drop out of the selection process rather than undergo testing.

Periodic Testing

Periodic testing (with notice) usually occurs in connection with annual physical examinations, physical examinations upon return from layoffs or extended illnesses, or any other predetermined interval. Although employers are allowed to test for unlawful use of drugs under the Americans with Disabilities Act, any further physical examination must be either voluntary or job related and consistent with business necessity. As with pre-employment screenings, periodic alcohol testing generally is not allowed (unless it is specifically required by an applicable law).

Random Drug Testing

Under a random testing policy, an employer can require employees to submit to drug testing at any time for good reason, bad reason or no reason at all (except, of course, an illegal reason, such as a discriminatory reason). Unions and civil rights organizations have expressed strong opposition to random drug testing policies. Opponents of random testing argue that such policies are ripe for abuse because supervisors biased against an employee may invoke random testing as a tool for harassment.

Although there are no legal restrictions in Indiana against random drug testing for employees of private employers, it is still prudent to reserve random testing only for:

- those employees who are in positions critical to safety or the protection of life, property or security; and
- circumstances where employees to be tested are selected in a truly random manner, and all employees have an equal chance of being selected.

Public employers generally cannot implement random/unannounced drug testing due to Constitutional restrictions. Private employers generally cannot implement random/unannounced alcohol testing.

Reasonable Suspicion Testing

Under a reasonable suspicion policy, testing is limited to employees who the employer reasonably suspects are using alcohol or other drugs on the job or are reporting to work in an impaired condition. Before requiring testing for a given employee, the employer should be able to articulate a reasonable basis for believing that the employee is using alcohol or other drugs or reporting to work under the influence of alcohol or other drugs. This may include direct observation of use or possession; observation of alcohol on the breath; inability to respond to questions appropriately; patterns of abnormal or erratic behavior; arrests or convictions for drug-related offenses; and physical symptoms of alcohol or drug influence, such as staggering, glassy eyes, etc.

Post-accident Testing

In 2018, the U.S. Occupational Safety and Health Administration (OSHA) issued a memorandum revising its position on post-incident testing. OSHA's new position does not include a "reasonable suspicion" requirement for post-incident testing. According to OSHA, post-incident testing to evaluate the root cause of a workplace incident that harmed or could have harmed employees is lawful if the employer tests all employees whose conduct could have contributed to the incident, not just employees who reported injuries. A practice of testing only employees who report injuries may discourage employees from reporting injuries, which OSHA wants to avoid. For example, if a forklift operator collides with a pedestrian and injures the pedestrian, the employer should test both the forklift operator and the pedestrian. Accordingly, an employer's post-incident testing policy should state that all employees whose conduct may have contributed to a workplace incident will be subject to testing.

Treatment Follow-up

Employees returning to work following treatment for substance abuse may be subject to follow-up testing at specified or random intervals to ensure that the employee is continuing to refrain from alcohol or other drug use. Importantly, the EEOC requires that the schedule and duration of such follow-up testing be both limited and specifically tailored to each individual employee's circumstances.

Developing a Drug-free Workplace Policy

The Substance Abuse & Mental Health Services Administration (SAMHSA) advocates the adoption of drug-free workplace policies and programs, including health promotion and wellness. This division of the U.S. Department of Health & Human Services provides numerous resources to assist employers in the planning process of a workplace drug abuse program, available at www.samhsa.gov/workplace.

Employers should consider coordinating the development of substance abuse programs with a "task force" responsible for providing guidance on a variety of issues raised by substance abuse policies. The task force should represent several departments including human resources, production, safety and security.

Key issues to be addressed by the task force should include:

- substance abuse policy statements;
- drug testing;
- confidentiality;
- supervisory training regarding the dangers and symptoms of substance abuse, treatment and disciplinary alternatives;
- counseling and treatment options;
- union notice and collective bargaining (unionized workforce);
- requirements under the Drug-free Workplace Act and other federal laws such as the Americans with Disabilities Act, Family and Medical Leave Act, and Occupational Safety and Health Act;
- requirements under federal, state and local disability statutes; and
- health care cost reduction.

If an employer elects to adopt a drug-free workplace policy after consideration of the key issues, additional considerations include the following:

- The draft policy should be reviewed by supervisors. Their input is critical because they will be the ones who enforce the plan. The supervisors' role under the plan should be clearly stated.
- All employees should receive a written copy of the policy and sign a statement acknowledging they have read and understood the policy. This signed statement by the employees should be placed in their personnel files.
- If opportunities for rehabilitation are a part of the policy, care must be taken clearly to identify those employees who would qualify for the rehabilitation option. Also, the policy should make it clear that rehabilitation cannot go on forever without results. The policy should contain a last chance provision stating that an employee will be discharged if the employee drops out of a program or fails to solve the problem by an established date.
- An employee educational/awareness program should be incorporated as a part of the drug-free workplace policy.
- The drug-free workplace policy should be presented in a medical and safety context (i.e., drug screening will help improve the health of employees and help ensure a safer workplace).
- The drug-free workplace policy, and the possibility of testing, should be included in appropriate employment documents and contracts.
- Employees should be given advance notice of the effective date of the drug-free workplace policy and that drug testing will be a routine part of their employment.
- The policy should emphasize that results of drug/alcohol screening tests will be confidential and disclosed only on a need-to-know basis.
- Of course, it is also highly advisable to seek review by legal counsel prior to implementing any testing policy.

A sample drug-free workplace policy is shown on the following pages.

Sample Drug-Free Workplace Policy (For Non-Public Indiana Employers)

Purpose

By law, the manufacture, use, possession, sale, dispensation or distribution of certain drugs and other substances – called controlled substances – is restricted. The company and union mutually agree that controlled substances and alcohol abuse can present a serious problem, particularly in the workplace. Substance abuse affects employee productivity, safety and behavior. This policy is implemented to address that issue.

Applicants for Employment

All applicants for employment will be required to submit to a controlled substance screening test. Applicants testing positive will be rejected for employment.

Voluntary Identification

Any employee who voluntarily identifies himself/herself to the company as having a drug or alcohol problem will not be subject to discipline solely for volunteering that fact. The company will work with employees through the use of rehabilitation programs in an effort to assist in eliminating dependence on drugs or alcohol. However, if an employee who volunteers such information and goes through a rehabilitation program subsequently continues to have drug or alcohol use problems, he or she may be subject to disciplinary action including termination.

Employee Testing

The company may require an employee to undergo a drug or alcohol test in conjunction with any of the following:

- Investigation of workplace accidents or unsafe practices.
- Investigation of possible employee impairment on the job.
- Investigation of possible use or presence of drugs or alcohol in an employee's system.
- Investigation of possible presence of unauthorized drugs or alcohol in the workplace.
- As part of or follow-up to a program of rehabilitation.
- As part of a program for testing employees in positions that present risks to public safety or the safety of fellow workers.

Refusal to Take a Test

If an employee refuses to undergo a drug or alcohol test after a Company request based on one of the reasons specified above, he/she will be subject to discipline up to and including discharge.

Drug Testing Procedure

Any drug test given to an employee will be in accordance with the following procedures:

- The employee will be tested immediately (whether before, during or after a work period).
- The company will pay costs associated with the test.
- The company will provide transportation for the employee if the test is conducted at a location other than the workplace.
- The time an employee is engaged in a testing procedure will be considered work time for purposes of compensation and benefits.
- Any test will be conducted in a manner reasonably calculated to prevent substitution or interference with the collection of a reliable sample.
- Any sample will be labeled in a manner that reasonably prevents the possibility of mistaken identification.
- Any sample that will be stored or transported to a place of testing will be done so in a manner that reasonably prevents possible contamination.
- Scientifically accepted analytical methods or procedures will be used to test the sample and will include a confirmation test, if a positive test results, by gas chromatography, gas chromatography-mass spectrometry, or another reliable analytical method before the test results are used as a basis for any action. Any confirmation test will be performed by a clinical laboratory.
- Any test sample that produces a positive result on a confirmation test will be preserved by the clinical laboratory for a period of 90 days.
- Any employee who tests positive after a confirmation test will be entitled to have a part of the sample retested at his/her own expense within 10 days after notification of the test results by the company.

Employee Assistance Programs

Many employers have adopted employee assistance programs (EAPs) to provide treatment and counseling for employees' alcohol and other drug-related problems. The goal of an EAP can be both rehabilitation and prevention. However, the decision to seek diagnosis and accept treatment for alcohol or other drug abuse is primarily the individual employee's responsibility.

An EAP should encourage employees with personal alcohol or other drug abuse problems to request confidential assistance. Employees should be able to seek help under the EAP without the approval, or even the knowledge, of their supervisor.

An employee's voluntary request for assistance through the EAP should not prevent disciplinary action for violation of the company's alcohol and other drug-abuse policy. Employees who undergo voluntary counseling or treatment pursuant to the EAP and who continue to work must be required to meet all established standards of conduct and job performance.

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When evaluating outside EAP consulting firms, the employer should insist on EAP staff with both professional training and expertise in alcohol and other drug abuse counseling and treatment. The employer also should insist that the EAP develop a written follow-up, after-care plan for every referral. The follow-up plan should span at least six months, preferably two years, for every employee treated for substance abuse.

Where to Obtain More Information

Additional information regarding substance-abuse programs and alcohol and drug testing can be obtained from the following organizations:

Substance Abuse & Mental Health Services Administration

5600 Fishers Lane
Rockville, MD 20857
(877) 726-4727
SAMHSAInfo@samhsa.hhs.gov
www.samhsa.gov

Institute for a Drug-Free Workplace

10701 Parkridge Boulevard, Suite 300
Reston, VA 20191
(703) 391-7222

Indiana Prevention Resource Center Indiana University

501 Morton St., Suite 110
Bloomington, IN 47404
(800) 346-3077
(812) 855-1237
<https://iprc.iu.edu>

This chapter was edited by Grayson F. Harbour, Associate.

Chapter 24

Workplace Harassment

Overview

Workplace harassment based on sex, race, ethnicity, national origin, religion, age, disability, or pregnancy or childbirth is a form of unlawful discrimination prohibited by federal and Indiana law (Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*; the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*; the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, and the Indiana Civil Rights Law, Indiana Code § 22-9-1-1, *et seq.*). Some local ordinances and state laws explicitly extend protections to other statuses, including sexual orientation and gender identity, and in 2020, the U.S. Supreme Court held that Title VII's protection of sex extends to sexual orientation and gender identity.

Because sexual harassment remains challenging in legal and human terms, professional, mature workplace behavior, top-down, and human resources best practices make good business sense. Publish EEO/anti-harassment statements. Educate all with supervisory responsibilities that it is their responsibility to maintain a workplace free of unlawful harassment. Supervisor training is a business necessity. Its cost is typically less than the cost of defending a single charge. Emphasize all unlawful harassment, not just sexual, and encourage respectful behavior in all aspects of employment. Make sure all employees know the employer's policy, reporting procedures, and expectation for respectful, professional behavior.

The true costs of failure to take preventive action cannot be measured solely by the economic impact of compensatory and punitive damages, back pay, lost benefits, and attorneys' fees and costs. The loss in terms of morale, time, productivity, and reputation is immeasurable. Simply put, failure to educate supervisors and failure to make employees aware of the employer's policies, procedures, and compliance commitment hurts the employer's bottom line.

Tangible Job Loss (Sometimes Referred to as Quid-Pro-Quo) Harassment

This type of harassment occurs when a supervisor subjects a subordinate to a sexually hostile environment and the employee suffers a tangible job loss. A "tangible job loss" must be a substantial change in employment status, such as refusal to hire, discharge, failure to promote, reassignment with an adverse impact on responsibilities, opportunities for promotion, etc., or a significant change in benefits.

Only supervisors have the power to affect the terms and conditions of an individual's employment. Therefore, an employer is strictly liable for a supervisor's misconduct, whether or not the employer knew about the conduct. Training, policies, procedures, or past practices are not defenses. Strict liability means that if the jury believes the accuser, the employer is defenseless. (See the "Who Is A Supervisor?" discussion below.) This type of harassment often arises when an initially welcome, mutual sexual or personal relationship goes south.

As part of risk management, many employers have personal relationship policies that prohibit those with supervisory authority from engaging in personal/sexual relationships. Before implementing such a policy, management must consider the pros and cons and must confirm commitment to enforcement.

Hostile Environment Harassment

Hostile or abusive environment harassment interferes with an employee's work performance even though the employee has no tangible job loss. It occurs when an employer creates or condones offensive, unwelcome behavior related to sex, race, ethnicity, national origin, religion, age, disability, or pregnancy or childbirth. A coworker, supervisor, customers, clients, vendors, contractors, and even members of the public can create liability for which the employer of the target of the behavior (not the employer of the offender) is 100% legally liable.

It is impossible to list all sexually related behavior that subjects employers to liability, but the following are some examples:

- Displays of sexually related objects, pictures, images, or language — online and offline
- Demeaning or degrading gender-based references
- Sexually degrading terms used to describe females (or males) ranging from less severe ("babe," "broad," etc.) to egregious ("whore," "slut," etc.)
- Continued or repeated sexually related jokes, language, or conduct (flirting, leering, suggestive looks, comments about a person's body or sexual behavior, etc.)
- Physical contact (squeezing, hugging, pinching, kissing, rubbing, sexual intercourse, etc.)
- Communicating with the opposite sex with hostility, anger or aggression, or making demeaning comments about the competency or behavior of their gender
- Comments, name-calling, or questions consistently targeted at only females (or males), even if the content is not sexual (comments attributing poor performance to PMS, menopause, etc.)
- Emails, texts, blogs, tweets, or other social media containing inappropriate comments or visuals

The following may create a hostile workplace, based on other protected statuses:

- Addressing employees of color in racially or ethnically derogatory terms
- Displaying derogatory racial, ethnic, religious, age, or disability graffiti, notes, or signs that go uninvestigated or for which perpetrators go unpunished
- Treating African American, Latino, Asian, Middle-Easterners, or anyone of color in a less dignified or professional manner than Caucasian employees. For example:
 - assigning menial tasks or difficult work that Caucasians in similar positions are not required to perform;
 - failing to inform minority employees of or bypassing them for promotional opportunities; or
 - assigning work opportunities based on race or national origin (e.g., African American employees are assigned all African American clients or a route in an African American neighborhood).
- Permitting customers, clients, patients, students, or others to refer to minorities as "spics," "niggers," "wet backs," "Yids," "Kikes," "greasers," or other ethnic or racial slurs

- Exposing minorities to nooses, burning crosses, swastikas, or hate messages
- Making offensive remarks or jokes about religion or urging or requiring participation in religious activities
- Imposing one's own religion on another by, for example, discussing with a coworker prospects for salvation, questioning the coworker's religious beliefs, or suggesting the coworker "talk with God"
- Referring to someone as a "cripple" or a "retard," excluding someone because of his or her HIV-positive status, telling "moron" or "Helen Keller" jokes, or asking a coworker to disclose details about a medical condition

There is no magic formula for determining what kind or how often such behavior must occur to create an "unlawful" hostile work environment. While the legal standard is "severe" or "pervasive," any degree or frequency of behavior based on protected status may result in a charge of harassment. If the behavior is severe, low frequency (even a single occurrence) may be enough.

Conduct must be both subjectively and objectively offensive; that is:

- a reasonable person would find the conduct offensive, and
- the actual target found the conduct offensive.

To avoid or minimize liability, employers must:

1. take steps to eliminate such conduct from the workplace;
2. maintain a work environment free from harassment, intimidation, or insult;
3. encourage all employees to report concerns; and
4. require all supervisors to recognize inappropriate behavior and report concerns.

Lukewarm responses to inappropriate conduct and policies that exist only on paper do not suffice. If inappropriate behavior occurs, appropriate and sufficient discipline of the offender must occur. Simply speaking with the offender or requiring an apology is typically an ineffective response. While all inappropriate conduct does not warrant discharge, documented corrective action (from coaching to suspension to discharge) is essential to show the employer took appropriate steps to address the misconduct.

Note: Continue to pay attention to allegations of bullying. This will remain a hot legal topic for the next decade. States continue to introduce "healthy workplace" bills that make it an unlawful employment practice to subject an employee to abusive work conduct or to permit an abusive work environment. The definitions of "abusive conduct" and "abusive work environment" closely parallel those of Title VII without the references to protected classes. Since 2003, at least 31 states have introduced the Healthy Workplace Act. Tennessee has enacted it, and several other states have passed similar laws regarding abusive conduct in the workplace. For example, California passed a state law mandating supervisor training in "abusive conduct" for employers with 50 or more workers. Indiana has not enacted the Healthy Workplace Act or any similar law that prohibits bullying. When bullying touches upon statuses protected by federal or Indiana law, Title VII, the ADA, the ADEA or the Indiana Civil Rights Act may provide remedies through their anti-harassment provisions.

Employer Liability for a Hostile Environment

Employers are at substantial risk if offensive behavior is commonplace, and supervisors do little or nothing to stop it. All supervisors must recognize inappropriate conduct and take steps to prevent it if possible or correct it if too late to prevent it. Significantly, there is one hostile environment liability standard for the conduct of supervisors and another for the conduct of non-supervisors; the standard for supervisors is a stricter one.

Non-Supervisory Employees and Non-Employees

An employer is liable for a hostile environment created by its non-supervisory employees or non-employees (customers, visitors, clients, vendors, contractors, etc.) if supervisors:

- knew or should have known of the offensive behavior; and
- failed to take prompt and appropriate corrective action.

Without an explicit written policy against harassment that is clearly and regularly communicated to employees and contains a reasonably accessible procedure by which employees may report concerns (typically to human resources) who act on those concerns, the courts will presume that the employer had knowledge of the behavior. Additionally, if the offensive behavior is widespread and commonly known by non-supervisors, courts will conclude that supervisors should have known about it.

On the other hand, employers that take prompt, appropriate corrective action upon knowledge of the behavior will avoid liability for the non-supervisor's harassment, irrespective of its severity or pervasiveness.

Supervisory Employees

If a supervisor's conduct is at issue, an employee need not prove the employer's knowledge (or lack of knowledge) of the hostile environment. To avoid liability for a hostile environment created by a supervisor (or anyone in the supervisor's chain of command), the employer must show that:

- it reasonably acted to prevent and to correct the harassing behavior; and
- the employee unreasonably failed to take advantage of the employer's preventive and corrective actions or otherwise failed to avoid harm.

The line between liability for the misconduct of a supervisor for creating a hostile environment and for engaging in quid pro quo sexual harassment is quite thin. Unless the affected employee fails to report, or to timely report, the conduct or refuses to cooperate with the employer's investigation, the employer will have no defense to a supervisor-created hostile environment. The only difference in sexual harassment in which the employee suffers a tangible job loss and sexual harassment in which the employee does not is that the employer does have a defense if there is not a tangible loss, but the defense depends on the employee's failure to act, not only on the employer's good faith actions. Significantly, the employer can be liable even if it took every conceivable preventive and corrective action (including discharging the alleged harasser) if the employer cannot show failure on the alleged harassed employee's part. However, prompt, appropriate corrective action will typically prevent legal action or limit damages if there is legal action. Most simply want to come to work and not be annoyed or bothered.

The bottom line: Supervisors' behavior must be above reproach. Avoiding even the appearance of impropriety must be the standard. Supervisors must model appropriate behavior and monitor, correct, and/or report others' inappropriate behavior. Knowledge to a single supervisor is knowledge to the employer.

Who Is a Supervisor?

In 2012, the U.S. Supreme Court was asked to clarify the definition of “supervisor” in *Vance v. Ball State University*, involving Maetta Vance, a full-time catering assistant for BSU’s dining services. In 2013, the U.S. Supreme Court followed the Seventh Circuit’s definition of supervisor holding that to be a supervisor, an employee must have the authority to take a tangible job action, such as to hire, discharge, demote, transfer, and/or administer discipline.

Remember: An individual’s title is not controlling in the determination of supervisory status; the individual’s duties and responsibilities are. So, beware: If someone in your organization looks like a supervisor, walks like a supervisor, and talks like a supervisor, the individual probably is a supervisor — no matter whether you call that employee a “team leader,” a “coordinator,” or a “jack of all trades.”

Sexual Harassment

More than 55 years after Title VII became law, sexual harassment still remains the most challenging form of unlawful harassment. In late 2017, the #MeToo movement spread virally on social media, aimed at raising awareness of sexual harassment in the workplace. The EEOC responded by reconvening its Select Task Force on the Study of Harassment in the Workplace to “lead the fight against workplace harassment and to promote solutions to prevent it.”

Social media, coupled with poor judgment, has inflated the challenges and potential liability stemming from such conduct. People’s ideas of what behaviors are offensive or constitute “sexual harassment” vary greatly and do not necessarily align with the letter (or spirit) of the law. The generally accepted legal definition broadly defines sexual harassment as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

- submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment;
- submission to, or rejection of, such conduct by an individual is used as the basis for employment decisions affecting such an individual; and
- the conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive work environment.

Realistically, however, all sexually charged or gender-based workplace behavior creates potential liability. The conduct of people outside the workplace may also create liability for the employer. While the severity and frequency of conduct and comments are legally relevant, an employer’s goal should be to not have an agency, judge, or jury determining whether the conduct is just crude, rude, unprofessional, etc., or is unlawful. Because claims are often based on perceptions of what is “sexual harassment,” maintaining a work environment with no or low tolerance for sexually charged behavior and language should be the goal.

Same-sex Harassment

In *Oncale v. Sundowner Offshore Services, Inc.*, 118 S.Ct. 998 (1998), the U.S. Supreme Court held that same-sex claims of sexual harassment are actionable. *Oncale* involved a male oil rigger who was

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taunted and physically assaulted by male coworkers and his supervisor. The Court made clear that in same-sex harassment cases, just like opposite-sex sexual harassment cases, the “inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target.... The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships that are not fully captured by single recitation of the words used or the physical acts performed.”

Additionally, behavior that otherwise demeans another person because of the person’s lack of conformance to the stereotypical traits or behaviors associated with males or females can be unlawful. The Seventh Circuit addressed such a situation in *Milligan v. Board of Trustees of Southern Illinois*, 638 F.2d 378 (7th Cir. 2012). The case involved a student’s claim that a professor squeezed his buttocks, told him his hair made him look like a “very sexy lady,” told the student he would date him if he were a woman, and grabbed the student close to his genital area with his thumb and index finger. While the court found the professor had created a sexually hostile environment, because the employer promptly and adequately responded to the student’s complaints, the employer was not liable for the conduct.

The number of same-sex claims of sexual harassment (with the vast majority being male versus male) is significant. Therefore, prudent employers must treat all same-sex issues of any degree or frequency as a business risk by:

- taking them just as seriously as opposite-sex sexual harassment;
- investigating the concerns thoroughly; and
- acting promptly to take corrective action that will end the offensive conduct.

Good manners, common sense, and the law dictate as much.

Sexual Orientation and Gender Identity Harassment

Title VII does not list sexual orientation or gender identity as a protected class, but on June 15, 2020, the U.S. Supreme Court held that Title VII’s prohibition against sex discrimination extends to discrimination based on sexual orientation and gender identity. In a 6-3 decision, the Court said that Title VII’s message is simple: “[a]n individual’s homosexuality or transgender status is not relevant to employment decisions ... [and] it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”¹

The decision affirmed a position the EEOC had held since at least 2015, and it was consistent with earlier decisions from the Seventh Circuit Court of Appeals (whose decisions govern Indiana employers). See *Hively v. Ivy Tech Community College*, 853 F.3d 339 (7th Cir. 2017), holding that discrimination based on sexual orientation is a form of unlawful sex discrimination under Title VII. Courts in other circuits had held otherwise, making the question ripe for the Supreme Court’s review. As it explained earlier this year, however: “The answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.” If not already, employers now must prohibit discrimination – and harassment – against applicants and employees based on their sex, which includes their sexual orientation and gender identity.

¹ *Bostock v. Clayton County, Ga.*, 590 U.S. ___, 140 S. Ct. 1731 (2020).

Workplace Love and Liability

There are many legal perils of workplace relationships, including after-the-fact claims that the relationship was not welcome, as well as practical perils, including employee interactions changing for the worse when a relationship ends, actual or perceived favoritism negatively affecting others, and loss of management credibility when a relationship involves a supervisor.

To protect against these perils, consider personal relationship policies, and consider “love” or “consent” contracts.

Employers can and are well advised to implement policies for coworkers’ personal relationships, either strictly prohibiting such relationships or restricting them. Restrictions may include:

- requiring employees to report the existence of a personal relationship immediately so steps can be taken to eliminate or minimize liability;
- prohibiting supervisors from dating anyone in their direct or indirect chain of command; and
- providing for personnel reassignments and/or disciplinary action if employees violate the personal relationship policy.

In situations in which a supervisor is involved, consider “love” or “consent” contracts if they do not prohibit personal relationships. These contracts will, among other things:

- confirm that a personal relationship does (or does not) exist and that it is welcome and free of implicit or explicit coercion;
- acknowledge that a consensual, welcome personal relationship is ongoing; and
- require the two to notify management immediately if or when the personal relationship ends.

Consult counsel regarding additional appropriate provisions. These contracts do not constitute a waiver of EEO rights but go to the essence of “welcomeness” and must be carefully drafted.

An employee does not waive his/her right to protection from sexual harassment by engaging in a consensual sexual or social relationship, but the existence of one might be relevant in determining whether the conduct was unwelcome, “because of” gender, or subjectively offensive.’

–Kuntzman v. Wal Mart, 673 F. Supp. 2d 690,705 [N.D. Ind. 2009]

Significantly, employment decisions based on the existence of a voluntary personal relationship, not the employee’s sex, cannot form the basis for a Title VII sex discrimination claim. In *Benders v. Bellows & Bellows*, 515 F.3d 757 (7th Cir. 2008), the Court affirmed dismissal of the action where the employee alleged she was fired because her boss did not want his wife to learn of their personal relationship.

Age-based Harassment

Employees born in the Baby Boom Generation (1946 to 1964) and many non-Baby Boomers (age 40 and over) are protected from age-based discrimination and harassment under the Age Discrimination in Employment Act (ADEA). Yet many employers focus on sex, race, and ethnicity issues but ignore age issues. Employers must train supervisors, old and young alike, that their actions and words may subject their employer to legal liability. Indeed, much like sexual harassment law developed in the 1980s and 1990s, the

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aging of Baby Boomers has created a potential ADEA boom, especially considering that in 2018, in addition to Baby Boomers, employees born between 1965 and 1979 are protected from age discrimination.

Offensive comments and jokes based on age are not professional and, if sufficiently pervasive or severe, can constitute unlawful harassment or provide evidence that adverse employment decisions were based on age.

When evaluating claims of harassment (and discrimination) based on age, courts weigh alleged discriminatory remarks to determine whether they are simply “stray” comments with no discriminatory meaning, or whether they reflect discriminatory motive. The more remote the remarks are in relation to the employer’s adverse action, the less likely they reflect a discriminatory motive. But, where the remarks reveal a discriminatory state of mind and relate closely to the discriminatory behavior, they have greater evidentiary value. Wise employers will avoid arguing whether their supervisors’ phrases were harmless, stray remarks or evidence of age discrimination. Examples can include questions such as, “Aren’t you about ready to retire?” or referring to coworkers as “grandma,” “grandpa,” “old codger,” “old fart,” “techno-dino,” “fossil boy,” or any other age-related moniker. Examples also can include the now-trendy phrase, “OK, boomer.”

The bottom-line regarding supervisors’ age-based comments is: The degree of the remark’s offensiveness is irrelevant if it tends to show that the decision-maker had discriminatory intent or was motivated by assumptions or attitudes related to age in making adverse employment decisions as to older workers. Additionally, if such comments are sufficiently severe or pervasive, they will support a claim of harassment because of age. Train employees to understand that offensive age comments are no different than those based on sex, race, religion, etc., now.

Equal Employment Opportunity Policies: Emphasize Anti-harassment/Sexual Harassment

Equal employment opportunity policies must make clear the employer’s commitment to make employment opportunities available without regard to sex, race, ethnicity, national origin, religion, disability, pregnancy or childbirth, citizenship status, genetic information, or any other legally protected category. The policy must include an anti-harassment provision prohibiting harassment on the basis of all protected categories, not just sex. However, because of the special challenges related to sexual behavior, the policy should specifically address the issue of sexual harassment.

The anti-harassment policy and reporting procedure must:

- be effectively communicated (with proof of communication) to all employees so that both potential harassers and potential targets of harassment are fully aware of the policy, the established reporting procedures, and the potential discipline for violation of the policy;
- encourage employees to report concerns immediately;
- assure employees that reporting will have no adverse impact on their employment;
- stress that investigations of complaints will be designed to protect the parties’ privacy, to the extent possible;
- require supervisors to report to the appropriate personnel any comments, conduct, or reports of any comments or conduct that may violate the policy;
- identify alternative personnel (do not limit to the immediate supervisor) to whom employees can report concerns; and

- identify an alternative reporting mechanism (e.g., to the Board president) if the alleged harasser is the highest-level executive.

Supervisors must:

- know the policy and procedure and recognize inappropriate behavior;
- understand the rights of the accuser and the accused;
- refrain from discussing the facts and circumstances involved in an investigation with anyone other than those who need (not want) to know, remembering that what they say can make them pay; and
- live by the policy to set the example for all.

Although an effective complaint procedure can assist in the defense of harassment claims, its most significant benefit is that it encourages employees to come forward with concerns so that the issues may be resolved before agencies or courts become involved. This resolution benefits all.

With the increased liability for supervisors' behavior, employers must:

- have a systemic and proactive (rather than a discrete and reactive) approach to eliminating supervisors' inappropriate behavior;
- screen candidates for supervisory positions carefully;
- monitor supervisors' behavior closely and remain alert to the possibility of a supervisor's misconduct; and
- train supervisors about the legal, professional, and personal ramifications of inappropriate workplace behavior at least every two years.

Finally, review EEO policies and procedures thoroughly in orientation and periodically in employee meetings. Consider sending an annual letter from the top executive that reaffirms the employer's EEO commitment and encloses another copy of the policy.

Investigation of Complaints

Because courts closely scrutinize an employer's investigation, employers must conduct a fair and thorough investigation that, to the extent possible, protects the accusing and accused employees' privacy and reputational interests. The vital components of a complete investigation follow.

Written Complaint

Ask the person reporting to place the report in writing and sign and date it. Placing the report in writing is not mandatory, but it is strongly encouraged as it provides a basis to begin the investigation. Remember, though, the written document is only a starting point, and employers must immediately respond to all complaints regardless of whether in writing.

Explain that the report will be used as the basis for investigation. Ask the individual to be as specific as possible in terms of the person's conduct and comments, who else has information related to those, what he or she did in response to the behavior, and if he or she reported these matters to anyone else. If so, to whom? When? Who else was present?

Interview the Complainant

If the complainant does not want to place a statement in writing or after the written report has been carefully reviewed, interview the complainant. Plan for sufficient time to complete the interview. Don't short-circuit the process.

Review the investigation procedure with the employee. Ask the employee to explain in detail what happened. What was said or done? When? How often? Who else was present? What other information supports the report? The tough questions must be asked. Do not leave any question unanswered. Make sure all pertinent facts have been obtained to aid in evaluating all the circumstances.

Ask if the employee has seen or heard anything that supports or contradicts his or her report. Ask the employee for any other relevant information, including any documentation such as emails, texts, social media posts, notes, a diary, cards, or pictures.

Do not rush the process. These interviews are often embarrassing and uncomfortable for all. Think about the questions and take detailed notes. Review notes with the employee for accuracy, make appropriate changes and ask the employee to sign the notes – preferably after they are organized and typed.

Explain that to investigate the matter fully, various witnesses may be interviewed, including the accused, the employee's supervisor, and the accused's supervisor.

Explain that the employee's name and information provided may need to be revealed during the course of the investigation, but stress that all information will be kept confidential to the greatest extent possible. Do not promise confidentiality. Other witnesses and the accused will be told the same.

Explain the employer's anti-retaliation policy and tell the employee to report to the appropriate person any perceived retaliatory behavior.

Tell the employee that he or she will receive feedback at the conclusion of the investigation and that if in the interim the employee has any other concerns, he or she is to contact the interviewer immediately and provide appropriate contact information.

After the interview, review all the employee's information, prepare a full statement of the facts and circumstances and all supporting information, and then ask the employee to review it carefully, revising or adding if needed, and then signing it.

Alerting the Employee's Supervisor or Others in Management

When the accused is a coworker, it may be appropriate to discuss the issue with the supervisor of the two employees. When the direct supervisor is the accused, it is appropriate to have the discussion with the accused's direct supervisor.

Interviewing Other Witnesses or Employees

Contact other employees identified as witnesses and interview them individually and privately. Explain the interview's purpose, advise them of the employer's anti-retaliation policy, and stress that the matter is confidential. Supervisors may be instructed not to discuss the matter with others. Non-supervisors, however, may not be prohibited from discussing the matter but can be encouraged to respect others' privacy during the investigation and requested not to make the information shared a topic of gossip.

Ask the witness if he or she has seen or heard anything that supports or contradicts the information provided. Ask the witness for any other relevant information.

Best Practice: Take detailed notes, review those notes with the witness for accuracy, and ask the witness to sign the notes. Later, type the notes in clear, organized fashion and have the employee sign. Explain that it may be necessary to reveal the information provided but that it will be treated confidentially to the greatest extent possible.

Tell the witness to contact you if he or she recalls any other pertinent information or has any concerns as a result of talking to you.

Confronting the Accused

Depending on the circumstances, either during or after the investigation of the claims, interview the accused. Explain that reports of inappropriate conduct and/or comments have been made and review the specific instances or general categories of conduct of which he or she has been accused. Depending on the circumstances, it may be appropriate to give the accused the name of the accuser at some point during the interview.

If the response is denial, ask if the accused can think of any unintentional conduct or offhand comments that might have seemed offensive to others. Ask if there is any reason anyone would make false accusations about his or her conduct or comments. Warn the individual not to engage in any retaliatory conduct against the person who may have made the complaint or anyone who participates in the investigation. Make clear such conduct will result in discharge.

After the interview, review all of the accused's information, prepare a full statement of the responses to the information and all supporting information, and then ask the accused to review it carefully, revising or adding if needed, and then signing it.

Concluding the Investigation

If the allegations of inappropriate behavior are unsupported:

- inform the accuser of the conclusion, reiterate the employer's position on harassment and retaliation, and provide a copy of the anti-harassment and anti-retaliation policies; and
- send a letter to the accused stating the conclusion but reminding him or her of the employer's anti-harassment and anti-retaliation policies and enclosing copies of the policies.

Note: In each of these circumstances, a meeting with another supervisory witness documented in a memo is an acceptable (and in some cases preferable) way of providing the feedback, although a carefully drafted letter or memo also may be appropriate.

If some or all of the reports of inappropriate behavior are true:

- inform the accused and impose the appropriate discipline (discharge, suspension, written warning, etc.), and if the employee is not discharged, provide a copy of the employer's anti-harassment

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and anti-retaliation policies and offer any other appropriate comments regarding future conduct and monitoring of the situation;

- inform the accuser, stating generally the results of the investigation and explaining that appropriate action has been taken, noting that if the employee has any further concerns, he or she should immediately report them; and
- follow up with the accuser at later dates to confirm that no further issues exist and document that follow-up.

If the results of the investigation were inconclusive or revealed inappropriate behavior, there are several courses of action that can be taken. Some options include the following.

- Inform both parties of the conclusion and reinforce the importance of the employer's anti-harassment policy. Note that the failure to reach a conclusion does not reflect a lack of concern about the issues raised or disbelief of the information provided but, instead, is the result of insufficient information to support either person's version of the facts. If the conclusion is that the accused's conduct or comments were inappropriate, improper, rude, disrespectful, etc., say so and advise him or her that such conduct or comments will not be tolerated. Discipline, if appropriate, should be noted in the letter to the accused.
- Encourage the accuser to report any future concerns.
- Remind the accused of the employer's anti-retaliation policy and that his or her conduct and comments must remain above reproach.
- Closely monitor events after the investigation to be on the lookout for any evidence of harassment, retaliation, or further inappropriate behavior.

If it is determined that inappropriate conduct has occurred, appropriate action may include:

- counseling, written discipline, suspension, or discharge of the accused, and/or
- transfer or reassignment of the accused and/or accuser. A transfer of the accuser typically should be his or her preference but may not in any case have a negative impact on the accuser, or it may well be deemed retaliatory. Courts are also critical of remedial steps that are "long on words and short on action."

Before determining the severity of the discipline to be administered, consider:

- the nature, severity, and frequency of the behavior (this is the most important consideration);
- discipline that has been administered to others for similar offenses;
- the offender's past employment record; and
- whether the offender was on notice of the inappropriateness of his or her conduct.

Attempt to diminish the workplace rumor mill by reminding employees that personnel matters are confidential and that all employees should respect one another's privacy.

If the investigation reveals that any supervisor knew of or should have known of the inappropriate behavior, consider discipline for failure to respond appropriately.

Finally, in all cases, remind the accused and the accuser of the employer's anti-retaliation policy and reporting procedures.

Class Actions

Employees can join together to bring (and have successfully maintained) class action suits against employers. The more severe or pervasive the inappropriate conduct or comments, the more likely that a number of employees may join in a class action. If an employer is found liable for creating a hostile environment in a class action, the Court will then determine damages on an individual basis. Each employee is entitled to the maximum amount of damages permitted under Title VII.

Related Tort Actions

The accuser (and sometimes the accused) can sue under various state law tort theories and receive unlimited compensatory and punitive damages.

Examples of tort actions include the following:

- Assault
- Battery
- Defamation (slander or libel)
- Invasion of privacy
- Intentional infliction of emotional distress
- Negligent hiring
- Negligent supervision
- Negligent retention
- False imprisonment
- Interference with a contractual or prospective business relationship and malicious prosecution

Under Indiana law, tort claims against an employer may be barred by the exclusive remedy provisions of the Worker's Compensation Act. Recovery against the employer may be possible if an employee can prove that the harassing employee acted upon the direct order of the employer, was an owner, and the employer had actual intent to cause harm; or if the employer has sufficient knowledge of the supervisor's dangerous misconduct and retains the employee. The employer may be able to avoid tort liability because of the Worker's Compensation Act, but the individual harasser does not have that defense.

Note: A sample anti-harassment policy is included on the following pages. Please consult with legal counsel before making changes as modifications may have a legal impact.

This chapter was edited by Grayson F. Harbour, Associate.

Sample Equal Employment Opportunity Policy

As legally required, Employer makes equal employment opportunities available to all without regard to race, sex (including sexual orientation and gender identity), age, color, religion, national origin, ancestry, disability, citizenship status, military status, genetic information, or any other legally protected category. This policy applies to applicants and employees and to all aspects of employment including hiring, promotion, demotion, treatment during employment, compensation, and termination of employment.

Reasonable Accommodation

Employer takes appropriate steps to provide reasonable accommodation upon request to qualified individuals with disabilities so long as doing so does not cause an undue hardship. Employer also takes appropriate steps to provide reasonable accommodation upon request to employees whose religious beliefs or restrictions create a conflict with Employer's policies, practices, or procedures so long as doing so does not cause an undue hardship. If you need accommodation, please provide a written description of your situation and needs to _____, and someone will contact you to discuss your request.

Anti-Harassment

Employer is further committed to providing a workplace free of inappropriate conduct because of the employee's race, sex (including sexual orientation and gender identity), age, color, religion, national origin, ancestry, disability, citizenship status, military status, genetic information, or any other legally protected category. To be unlawful, conduct must be so severe or pervasive that it unreasonably interferes with an employee's ability to work. Employer does not, however, condone or tolerate any inappropriate conduct based on an employee's race, sex, age, color, religion, national origin, ancestry, disability, citizenship status, military status, genetic information, or any other legally protected category.

Employer is committed to protecting employees from inappropriate conduct whether from other employees or non-employees such as visitors, vendors, suppliers, clients, guests, customers, contractors, or members of the public.

Examples of Inappropriate Conduct

Inappropriate conduct may include, among other things:

1. epithets, slurs, stereotyping, or threatening, intimidating or hostile acts that relate to race, sex, age, color, religion, national origin, ancestry, disability, citizenship status, military status, genetic information, or any other legally protected category; and
2. written or graphic material that denigrates or shows hostility or aversion toward an individual or group because of race, sex, age, color, religion, national origin, ancestry, disability, citizenship status, military status, genetic information, or any other legally protected category.

Specifically, Employer is committed to providing a workplace free of inappropriate conduct of a sexual nature. Such conduct may include a range of subtle and not so subtle behaviors and may involve individuals of the same or different gender. Such conduct also may include, among other things:

1. unsolicited and unwelcome comments or conduct of a sexual nature or that are demeaning to women or men as a group (for example, offensive or vulgar jokes, name-calling, comments about one's body or sex life, stereotyping based on a person's sex, touching, leering, ogling, patting, pinching, indecent exposure, physical gestures, or displaying sexually explicit photographs or objects that interfere with a reasonable person's work);
2. unsolicited and unwelcome demands or requests for sexual favors or social or sexual encounters;
3. an explicit or implicit promise of preferential treatment with regard to a person's employment in exchange for sexual favors or sexual activity; and
4. the use of an employee's or applicant's submission to or rejection of sexual conduct as the basis for making, influencing, or affecting an employment decision that has an impact upon the terms and conditions of the individual's employment (for example, hiring, firing, promotion, demotion, compensation, benefits, or working conditions).

Given the nature of this type of conduct and the serious effects such conduct can have on both the accuser and the accused, Employer treats alleged violations of this Policy seriously and, to the extent possible, confidentially. Employer expects all individuals to treat alleged violations in a responsible, respectful manner. Please help us maintain a comfortable work environment free from inappropriate and offensive conduct of any type irrespective of whether the conduct is unlawful.

Reporting Procedure

If you believe you or another is being subjected to behavior that is not consistent with these policies, you must immediately report these matters to _____. If for any reason you do not feel comfortable reporting your concerns to _____, you may report your concerns to _____. Additionally, any employee who believes a non-employee's behavior violates this policy must promptly report the non-employee's conduct through this Policy.

[Employer should provide an alternative reporting mechanism if the conduct involves the highest-level executive (such as to the Board president).]

Supervisors who become aware of any potential violation of this Policy must report the potential violation to the _____ or the _____. *[Same individuals identified in prior paragraph.]* Failure to report potential violations will result in discipline.

No action will be taken against any employee because he or she makes a good faith report of behavior believed to violate this Policy. Employer will investigate and take appropriate action as to all reports. Employer is committed to maintaining an environment free of discrimination and inappropriate conduct and to enforcing this Policy.

Violations of this Policy will not be tolerated and will result in discipline.

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