A Manager’s Guide to Employment Law

Course #5535E/QAS5535E

Course Material

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Author’s Biography

Renee C. Nash, J.D. is an accomplished teacher and author. She spent 14 years as Adjunct Professor of Law, McGeorge School of Law, in Sacramento, California, where her specialties included employment law. She was consistently rated by students as one of the school’s top teachers. Her other teaching duties included serving as an instructor for the College of Administrative Law and America’s Legal Seminars. She has written a number of training materials for various professionals, including attorneys, accountants and corporate executives. She formerly served as legal counsel to the California Newspaper Publishers Association, corporate counsel to McClatchy Newspapers, Inc. and general counsel to News & Review Publishing, Inc. She has published books and educational materials in the areas of advertising law, employment law, first amendment law and many others. She earned her B.A. from the University of California and her J.D. from McGeorge School of Law, where she graduated “With Great Distinction.”
# A Manager’s Guide to Employment Law
*(Course #5535E/QAS5535E)*

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Glossary

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Chapter 1: Introduction and Overview

I. Overview

The U.S. Department of Labor administers and enforces more than 180 federal laws. These mandates and the regulations that implement them cover many workplace activities for about 10 million employers and 125 million workers. That does not include the thousands of other state and local laws that affect employers of every size in the United States. Given the breadth and complexity of this subject, it is IMPOSSIBLE to provide anyone with an in depth guide to the legal issues affecting managers.

This course is designed instead to introduce managers to the most comprehensive and important federal employment laws and to give practical advice on how to manage in light of those laws. Specific state laws are mentioned from time to time where appropriate. Remember, however, that the focus of this course is on federal law, meaning that there may be other laws in certain areas that cover your business depending on the jurisdiction, or jurisdictions, in which it operates.

This course is also not designed to give specific advice in dealing with any particular employment law question. Specific questions should always be directed to competent legal counsel. Nevertheless, this course should prove useful to persons who manage employees on a regular basis in recognizing potential problem areas and providing practical ways to address employee issues in the workplace.

A. REQUIREMENTS THAT APPLY TO MOST EMPLOYERS

1. Wages and Hours of Work

The Fair Labor Standards Act (FLSA) prescribes minimum wage and overtime pay standards as well as recordkeeping and child labor standards for most private and public employment, including work conducted in the home. The Wage and Hour Division of the Employment Standards Administration (ESA) administers this Act.

The minimum wage and overtime provisions of the FLSA require the following from employers of covered employees who are not otherwise exempt:

- Employers must pay covered employees a minimum wage of not less than $7.25 an hour (effective July 24, 2009). Employers may pay employees on a piece-rate basis and, under some circumstances, may consider tips as part of wages.

- Youth under 20 years of age may be paid a minimum wage of not less than $4.25 an hour during the first 90 consecutive calendar days of employment with an employer. Employers may not displace any employee to hire someone at the youth minimum wage.

- Although the Act does not place a limit on the total hours which may be worked by an employee who is at least 16 years old, it does require that covered employees, unless otherwise exempt, be paid not less than one and one-half times their regular rates of pay for all hours worked in excess of 40 in a workweek.
In addition, the FLSA sets forth special rules for working out of the home. For example, in certain manufacturing industries, the employer must first obtain a certification permitting homework from the Wage and Hour Division of the Department of Labor.

2. Safety and Health Standards

The Occupational Safety and Health Act (OSH) administered by the Department of Labor's Occupational Safety and Health Administration (OSHA), regulates safety and health conditions in most private industry workplaces (except those in industries, such as transportation and mining, that are regulated under other statutes). OSHA sets safety and health standards by regulation:

- Safety standards cover hazards such as falls, explosions, fires, and cave-ins, as well as machine and vehicle operation and maintenance, etc.

- Health standards regulate exposure to a variety of health hazards through engineering controls, the use of personal protective equipment (e.g., respirators or hearing protection), and work practices.

Employers covered by the OSH Act are required to maintain safe and healthful workplaces. These employers must become familiar with job safety and health standards applicable to their establishments, comply with the standards, and eliminate hazardous conditions to the extent possible. Employees must comply with all rules and regulations that apply to their own actions and practices.

Where OSHA has not set forth a specific standard, employers are responsible for complying with the OSH Act's "general duty" clause [Section 5(a)(1)], which states that each employer "shall furnish…a place of employment which is free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."

Specific safety and health standards developed by OSHA supersede the more general safety and health regulations originally issued under the Walsh-Healey Act, the Service Contract Act, the Contract Work Hours and Safety Standards Act, and the Arts and Humanities Act.

States operating under OSHA-approved state plans enforce safety and health standards in their respective states, while OSHA is responsible for enforcement in the remaining states.

A detailed discussion of OSH is beyond the scope of this course. A brief discussion is provided in Chapter 13.

3. Health Benefits and Retirement Standards

The Employee Retirement Income Security Act (ERISA) governs certain activities of most employers who have pension or welfare benefit plans. This Act preempts many state laws in this area. The Employee Benefits Security Administration (EBSA) administers ERISA. A brief discussion of ERISA is provided in Chapter 13.
ERISA covered pension plans must meet a wide range of fiduciary and reporting and disclosure requirements. EBSA's regulations define what constitutes plan assets, what is adequate consideration for the sale of plan assets, and the effects of control by participants over the assets in their plans, among other things.

Under ERISA, welfare benefit plans also must meet a wide range of fiduciary, reporting and disclosure requirements. The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) enacted provisions for disclosure and notification requirements for the continuation of health care. These provisions cover group health plans of employers with 20 or more employees on a typical business day in the previous calendar year. COBRA gives separated participants and beneficiaries an election to maintain coverage under the employer's health plan at their own expense for a limited period of time.

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) added several provisions to ERISA which are designed to provide participants and beneficiaries of group health plans with improved portability and continuity of health insurance coverage. These provisions are also designed to improve access to insurance and protect against discrimination on the basis of health status. Moreover, HIPAA requires that health insurance coverage be renewable for small employers in certain circumstances.

The statute also provides an insurance mechanism to protect certain types of retirement benefits by requiring that employers pay annual pension benefit insurance premiums to the Pension Benefit Guaranty Corporation, which is associated with the Department of Labor.

4. Other Workplace Standards

- The Family and Medical Leave Act (FMLA) requires employers of 50 or more employees (and all public agencies) to provide up to 12 weeks of unpaid, job-protected leave to eligible employees for the birth and care of a child, for placement with the employee of a child for adoption or foster care, or for the serious illness of the employee or an immediate family member. ESA's Wage and Hour Division administers this Act. The FMLA is discussed in detail in Chapter 3.

- Veterans' reemployment rights are protected for National Guard and Reserve members who are called to active duty. The Uniformed Services Employment and Reemployment Rights Act (USERRA) addresses the rights and responsibilities of individuals and their employers, and the Veterans' Employment and Training Service administers this Act. This Act is discussed in detail in Chapter 11.

- The Worker Adjustment and Retraining Notification Act (WARN) provides for early warning to employees of proposed layoffs or plant closings. The Employment and Training Administration can provide information on WARN, but since it does not have administrative or enforcement authority under WARN, it cannot provide specific advice or guidance with respect to individual situations.

- The Employee Polygraph Protection Act (EPPA) prohibits most uses of lie detectors by employers on their employees and job applicants. ESA's Wage and Hour Division administers this Act.
B. REQUIREMENTS THAT APPLY TO EMPLOYERS WHO RECEIVE FEDERAL CONTRACTS, GRANTS OR FINANCIAL ASSISTANCE

Non-discrimination and affirmative action requirements for federal contractors are set forth under Executive Order 11246, Section 503 of the Rehabilitation Act, and the Vietnam Era Veterans’ Readjustment Assistance Act (38 USC 4212). These laws prohibit discrimination and require affirmative action with regard to race, color, religion, sex, national origin, and status as a qualified individual with a disability or a protected veteran. ESA’s Office of Federal Contract Compliance Programs (OFCCP) administers these laws.

Various laws determine wage, hour, and fringe benefit standards for employees of federal contractors. These laws include: the Davis-Bacon and Related Acts (for construction); the Contract Work Hours and Safety Standards Act; the McNamara-O-Hara Service Contract Act (for services); and the Walsh-Healey Public Contracts Act (for manufacturing). ESA’s Wage and Hour Division determines the required wage and benefit rates and enforces these statutes.

These Acts also authorize issuance of safety and health standards to covered contractors, unless specific standards issued by the Occupational Safety and Health Administration (OSHA) supersede them.

C. EMPLOYMENT DISCRIMINATION

One of the most common illegal grounds is a discharge in violation of one of many state and federal anti-discrimination laws. These laws protect persons on the basis of their membership in one of various so-called “protected classes,” including the following:

- Race;
- Religion;
- National Origin;
- Gender;
- Color;
- Marital Status;
- Sexual Orientation;
- Age; and
- Disability.

The major federal statutes governing employment discrimination are Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act and the Americans with Disabilities Act. Each of these are discussed in detail. Remember, however, that for the most part, these laws protect employees in more than the decision to merely hire and
fire. They protect employees in all of the terms and conditions of employment, including, but not limited to, hiring, wages and benefits, promotion and discharge.

Supervisors can inadvertently find themselves in violation in any number of ways, including asking applicants apparently innocent questions and in not following up on complaints by employees of harassment by a co-worker or a supervisor.

D. EMPLOYEE PRIVACY

The law of employee privacy is a quickly developing one. The area includes topics such as drug and alcohol screening, search of employee workspaces, and video and audio surveillance of employees. These issues are discussed in Chapter 10.

E. INDEPENDENT CONTRACTORS

Businesses often use workers they classify as “independent contractors” rather than as employees. This is sometimes done in an attempt to avoid the costs of hiring an employee, such as workers’ compensation coverage, employment taxes and the like. While some workers are correctly classified as independent contractors, many businesses risk large fines and penalties for misclassifying workers. This area of the law can be confusing and is further complicated by the fact that different government agencies employ different tests to determine whether a worker is an employee or an independent contractor. As a result, a business needs to be very careful before classifying any worker as an independent contractor. This topic is discussed in detail in Chapter 14.
CHAPTER 1 – REVIEW QUESTIONS

There are no review questions associated with this chapter.
Chapter 2: The Fair Labor Standards Act

I. Overview

The Fair Labor Standards Act was enacted in 1938 as part of a package of reforms proposed by President Franklin D. Roosevelt. Its basic requirements are:

- The payment of a minimum wage for each hour of work;
- Overtime pay for time worked over 40 hours in a workweek;
- Restrictions on the employment of children; and
- Record-keeping by employers.

<table>
<thead>
<tr>
<th>Do’s and Don’ts of the FLSA</th>
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<tr>
<td>✓ Do make sure everyone classified as “exempt” meets the new requirements;</td>
</tr>
<tr>
<td>✓ Do ensure that all employees are paid at least the applicable minimum wage;</td>
</tr>
<tr>
<td>✓ Do comply with the FLSA’s record-keeping requirements;</td>
</tr>
<tr>
<td>✓ Don’t avoid overtime by classifying employees as “salaried”; and</td>
</tr>
<tr>
<td>✓ Don’t violate federal child labor laws.</td>
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The FLSA has been amended on many occasions since its original passage in 1938. Currently, workers covered by the FLSA are entitled to the minimum wage of $7.25 per hour and overtime pay at a rate of not less than one and one-half times their regular rate of pay after 40 hours of work in a workweek. Various minimum wage exceptions apply under specific circumstances to disabled workers, full-time students, persons under 20 in their first 90 days of employment, tipped employees and student-learners.

Special rules also apply to state and local government employment involving fire protection and law enforcement activities, volunteer services, and compensatory time off (instead of cash overtime pay). Employers are required to keep records on wages, hours, and other items that are generally maintained as an ordinary business practice.

The FLSA child labor provisions are designed to protect the educational opportunities of youth and prohibit their employment in jobs and under conditions detrimental to their health or safety. The child labor provisions include some restrictions on hours of work for persons under 16 years of age and lists of hazardous occupations too dangerous for young workers to perform.

Wages required by the FLSA are due on the regular payday for the pay period covered. Deductions made from wages for such items as cash or merchandise shortages, employer-required uniforms, and tools of the trade, are not legal if they reduce the
wages of employees below the minimum wage or reduce the amount of overtime pay due under the FLSA.

The FLSA applies to enterprises with employees who engage in interstate commerce, produce goods for interstate commerce, or handle, sell or work on goods or materials that have been moved in or produced for interstate commerce. For most firms, a test of not less than $500,000 in annual dollar volume of business applies (i.e., the Act does not cover enterprises with less than this amount of business).

However, the Act does cover the following regardless of their dollar volume of business: hospitals; institutions primarily engaged in the care of the sick, aged, mentally ill or disabled who reside on the premises; schools for children who are mentally or physically disabled or gifted; preschools, elementary and secondary schools and institutions of higher education; and federal, state and local government agencies.

Employees of firms that do not meet the $500,000 annual dollar volume test may be covered in any workweek when they are individually engaged in interstate commerce, the production of goods for interstate commerce, or an activity that is closely related and directly essential to the production of such goods.

The Act covers domestic service workers, such as day workers, housekeepers, chauffeurs, cooks, or full-time babysitters, if they receive at least $1,700 (2009) in cash wages from one employer in a calendar year, or if they work a total of more than eight hours a week for one or more employers.

Caution!

It is prudent for employers of all sizes to assume they are covered by the provisions of the FLSA unless they are absolutely certain they are not. The costs associated with non-compliance are simply too high to assume otherwise.

An enterprise that was covered by the Act on March 31, 1990, and that ceased to be covered because of the increase in the annual dollar volume test to $500,000, as required under the 1989 amendments to the Act, continues to be subject to the overtime pay, child labor and record-keeping requirements of the Act. Remember also that state law affects the obligations of employers to pay overtime, minimum wages and many other workplace conditions. It is therefore prudent for all employers, regardless of size, to assume that they are covered by the provisions of the FLSA.

Also remember that in order for the FLSA to apply, there must be an employment relationship between an "employer" and an "employee." The issue of worker classification is discussed in detail in Chapter 14. The FLSA also contains some exemptions from these basic rules. Some apply to specific types of businesses and others to specific kinds of work.

Employers must keep records on wages, hours and other information as set forth in the Department of Labor’s regulations. Most of this data is the type that employers generally maintain in ordinary business practice.
The Act prohibits performance of certain types of work in an employee’s home unless the employer has obtained prior certification from the Department of Labor. Restrictions apply in the manufacture of knitted outerwear, gloves and mittens, buttons and buckles, handkerchiefs, embroideries, and jewelry (where safety and health hazards are not involved). Employers wishing to employ home workers in these industries are required to provide written assurances to the Department of Labor that they will comply with the Act's wage and other requirements, among other things.

The Act generally prohibits manufacture of women’s apparel (and jewelry under hazardous conditions) in the home except under special certificates that may be issued when the employee cannot adjust to factory work because of age or disability (physical or mental), or must care for a disabled individual in the home.

It is a violation of the Act to fire or in any other manner discriminate against an employee for filing a complaint or for participating in a legal proceeding under the Act. The Act also prohibits the shipment of goods in interstate commerce that were produced in violation of the minimum wage, overtime pay, child labor, or special minimum wage provisions.

II. Minimum Wage

The following table details the rate at which the federal minimum wage has risen since its inception in 1930. Employers should be aware that a number of states have their own minimum wage laws, many of which are greater than the federal minimum. An employer in one of those states is therefore subject to the highest mandated rate. A state-by-state guide of current state minimum wage laws is presented at the end of the chapter.


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<th>Effective Date</th>
<th>1938 Act</th>
<th>1961 Amendments</th>
<th>1966 Amendments</th>
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<tr>
<td>October 24, 1938</td>
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<tr>
<td>October 24, 1939</td>
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<tr>
<td>October 24, 1945</td>
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<td>January 25, 1950</td>
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<td>March 1, 1956</td>
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<td>$1.00 $1.00</td>
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<td>February 1, 1968</td>
<td>$1.60</td>
<td>$1.60</td>
<td>$1.15 $1.15</td>
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</table>

1 The 1938 Act was applicable generally to employees engaged in interstate commerce or in the production of goods for interstate commerce.
2 The 1961 Amendments extended coverage primarily to employees in large retail and service enterprises as well as to local transit, construction, and gasoline service station employees.
3 The 1966 Amendments extended coverage to State and local government employees of hospitals, nursing homes, and schools, and to laundries, drycleaners, and large hotels, motels, restaurants, and farms. Subsequent amendments extended coverage to the remaining Federal, State and local government employees who were not protected in 1966, to certain workers in retail and service trades previously exempted, and to certain domestic workers in private household employment.
A. BASIC MINIMUM WAGE PROVISIONS

The FLSA requires employers of covered employees who are not otherwise exempt to pay these employees a minimum wage of not less than $7.25 an hour as of July 24, 2009. If, however, a state has adopted its own minimum wage, an employer operating in that state must pay the higher of the two minimum wages. A survey of some state minimum wages is provided in a chart at the end of this chapter.

The regular rate of pay cannot be less than the minimum wage. The regular rate includes all remuneration for employment except certain payments excluded by the Act itself. Payments which are not part of the regular rate include all of the following:

- Pay for expenses incurred on the employer's behalf;
- Premium payments for overtime work or the true premiums paid for work on Saturdays, Sundays, and holidays;
- Discretionary bonuses;
- Gifts and payments in the nature of gifts on special occasions; and
- Payments for occasional periods when no work is performed due to vacation, holidays, or illness.

---

4 Grandfather clause - Employees who do not meet the tests for individual coverage, and whose employers were covered by the FLSA on March 31, 1990, and fail to meet the increased annual dollar volume (ADV) test for enterprise coverage, must continue to receive at least $3.35 an hour.

5 A subminimum wage -- $4.25 an hour -- is established for employees under 20 years of age during their first 90 consecutive calendar days of employment with an employer.
Example.

Roger owns a hamburger stand that is subject to the provisions of the FLSA. He employs seven people, each of whom are paid the minimum wage. Roger provides each of his employees with a $100 bonus at Christmas. Roger may not use the value of the bonus to reduce the hourly rate paid to his employees below the minimum amount.

Where non-cash payments are made to employees in the form of goods or the use of employer facilities, the reasonable cost to the employer or fair value of such goods or facilities must be included in the regular rate.

Collective Bargaining Agreements (CBAs) are agreements between employers and representatives of their employees (e.g., unions) which address the wages, hours and other conditions of employment. Generally, an employee, or a union on behalf of an employee, may not waive his or her rights under the FLSA by agreement or contract, including what hours must be counted as hours worked.

When an employer bases payments on a periodic basis other than by the hour, each employee’s actual hourly rate must be at least the minimum mandated by federal law (or state law where the state minimum wage is higher).

Example.

The accounting firm of Johnson & Baker is interviewing Lonnie for the position of receptionist. The firm tells Lonnie that the rate of pay for the position is $550 per week. Because a reception is a non-exempt position (one for which overtime must be paid), the actual rate of pay for the position is $550 divided by the number of hours in a workweek, 40, or $13.75. This exceeds the federal minimum wage and the minimum wage of each state. All of Lonnie’s overtime will be calculated on the basis of that hourly rate, not the weekly rate.

B. ITEMS NOT COVERED

The FLSA mandates a minimum wage for hours actually worked; it does not, on the other hand, mandate payment for time off, whether it is due to illness or vacation. For example, the FLSA does not require any of the following:

- Vacation pay;
- Holiday pay;
- Sick pay;
- Premium pay for holiday work, night work or weekend work; or
- Severance pay.
Example.

The firm of Simmons & Rogers provides its employees with eight paid sick days per year and one week of paid vacation for every five years of employment. The firm of Cheap & Cheaper offers its employees two days of paid sick leave per year and no paid vacation time (the firm’s motto is that people should vacation after they retire). While the policies of Cheap & Cheaper are austere and may make it difficult for them to attract good employees, they are certainly legal.

The FLSA also does not require employers to give raises. So long as wages keep up with the minimum wage, there is no legal obligation for employers to provide a raise. As a practical matter, however, market forces make such occurrences a virtual reality.

Employers may pay employees on a “piece rate” basis, as long as they receive at least the equivalent of the required minimum hourly wage rate. Employers of tipped employees (i.e., those who customarily and regularly receive more than $30 a month in tips) may consider such tips as part of their wages, but employers must pay a direct wage of at least $2.13 per hour if they claim a tip credit. They must also meet certain other conditions.

The Act also permits the employment of certain individuals at wage rates below the statutory minimum wage under certificates issued by the Department of Labor:

- Student learners (vocational education students);
- Full-time students in retail or service establishments, agriculture, or institutions of higher education; and
- Individuals whose earning or productive capacities for the work to be performed are impaired by physical or mental disabilities, including those related to age or injury.

The FLSA does not limit either the number of hours in a day or the number of days in a week that an employer may require an employee to work, as long as the employee is at least 16 years old. Similarly, the Act does not limit the number of hours of overtime that may be scheduled. However, the FLSA requires employers to pay covered employees not less than one and one-half times their regular rates of pay for all hours worked in excess of 40 in a workweek, unless the employees are otherwise exempt.

C. CALCULATING NUMBER OF HOURS WORKED

Employers are liable for the payment of wages for each hour worked. In some cases, this can occur even when the employee has not actually performed any work.

1. Suffer or Permit to Work

The FLSA defines the term "employ" to include the words "suffer or permit to work". Suffer or permit to work means that if an employer requires or allows employees to work, the time spent is generally hours worked. Thus, time spent doing work not requested by the employer, but still allowed, is generally hours worked, since the employer knows or
has reason to believe that the employees are continuing to work and the employer is benefiting from the work being done. This time is commonly referred to as "working off the clock."

**Example.**

*Phyllis is a dedicated secretary. Her boss, Marvin, typically leaves work every night at 5:30 p.m. Although she is scheduled to leave at 6:00 p.m. and always clocks out right on time, Marvin knows that Phyllis stays late when there is extra work to do. Although she does not record her hours, Marvin is legally obligated to pay Phyllis for the work she performs after she has clocked out. If, on the other hand, Phyllis left with Marvin and then, unknown to her employer, snuck back later at night to work, Marvin would not be obligated to pay her for that time.*

2. **Waiting for Work**

Time which an employee is required to be at work or allowed to work for his or her employer is hours worked. A person hired to do nothing or to do nothing but wait for something to do or something to happen is still working. The Supreme Court has stated that employees subject to the FLSA must be paid for all the time spent in "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer of his business."

**Example.**

*Bennie, a clerk, is required to be at work at 8:30 a.m. in case his employer is busy. When business is slow, Bennie is required to wait until 9 a.m. to "clock in" and begin work. Whether or not he actually clocks in, Bennie is entitled to compensation for the period between 8:30 and 9:00 a.m. because he is required by his employer to be present during that time, which limits the things that he can do during that period."

3. **Place of Work**

Hours worked include all the time during which an employee is required or allowed to perform work for an employer, regardless of where the work is done, whether on the employer's premises, at a designated work place, at home or at some other location.

4. **Employer Oversight**

It is the duty of management to exercise control and see that work is not performed if the employer does not want it to be performed. An employer cannot sit back and accept the benefits of an employee’s work without considering the time spent to be hours worked. Merely making a rule against such work is not enough. The employer has the power to enforce the rule and must make every effort to do so. Employees generally may not volunteer to perform work without the employer having to count the time as hours worked.
5. Travel Time in Employer Vehicles

Time spent in home-to-work travel by an employee in an employer-provided vehicle, or in activities performed by an employee that are incidental to the use of the vehicle for commuting, is not "hours worked" and, therefore, does not have to be paid. This provision applies only if the travel is within the normal commuting area for the employer's business and the use of the vehicle is subject to an agreement between the employer and the employee or the employee's representative.

6. Overtime Pay

An employer who requires or permits an employee to work overtime is generally required to pay the employee premium pay for such overtime work. Employees covered by the FLSA must receive overtime pay for hours worked in excess of 40 in a workweek of at least one and one-half times their regular rates of pay. The FLSA does not require overtime pay for work on Saturdays, Sundays, holidays, or regular days of rest.

Extra pay for working weekends or nights is a matter of agreement between the employer and the employee (or the employee's representative). The FLSA does not require extra pay for weekend or night work or double time pay.

D. SUBMINIMUM WAGE

The FLSA provides for the employment of certain individuals at wage rates below the minimum wage. These individuals include student-learners (vocational education students), as well as full-time students employed by retail or service establishments, agriculture, or institutions of higher education. Also included are individuals whose earning or productive capacity is impaired by a physical or mental disability, including those related to age or injury, for the work to be performed.

Employment at less than the minimum wage is designed to prevent the loss of employment opportunities for these individuals. Certificates issued by the Department of Labor’s Wage & Hour Division are required for this type of employment.

The youth minimum wage is authorized by the FLSA, which allows employers to pay employees under 20 years of age a lower wage for 90 calendar days after they are first employed. Any wage rate above $4.25 an hour may be paid to eligible workers during this 90-day period, as long as their employment does not displace other workers.

III. Recordkeeping Requirements

A. POSTING

Employers must display an official poster outlining the provisions of the Act, available at no cost from local offices of the Wage and Hour Division and toll-free, by calling 1-866-4USWage (1-866-487-9243).
B. REQUIRED RECORDS

Every covered employer must keep certain records for each non-exempt worker. The Act requires no particular form for the records, but does require that the records include certain identifying information about the employee and data about the hours worked and the wages earned. The law requires this information to be accurate. The following is a listing of the basic records that an employer must maintain:

- Employee's full name and social security number;
- Address, including zip code;
- Birth date, if younger than 19;
- Sex and occupation;
- Time and day of week when employee's workweek begins;
- Hours worked each day;
- Total hours worked each workweek;
- Basis on which employee's wages are paid (e.g., "$6 an hour", "$220 a week", "piecework");
- Regular hourly pay rate;
- Total daily or weekly straight-time earnings;
- Total overtime earnings for the workweek;
- All additions to or deductions from the employee's wages;
- Total wages paid each pay period; and
- Date of payment and the pay period covered by the payment.

C. TIME KEEPING

Employers may use any timekeeping method they choose. For example, they may use a time clock, have a timekeeper keep track of employee's work hours, or tell their workers to write their own times on the records. Any timekeeping plan is acceptable as long as it is complete and accurate.
The following is a sample timekeeping format employers may follow but are not required to do so:

**Employee Name: ______________________________**

<table>
<thead>
<tr>
<th>Day</th>
<th>Date</th>
<th>In</th>
<th>Out</th>
<th>Total Hours</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sunday</td>
<td>5/2</td>
<td>--</td>
<td>--</td>
<td>--</td>
</tr>
<tr>
<td>Monday</td>
<td>5/3</td>
<td>8:00 a.m.</td>
<td>12:02 p.m.</td>
<td>8</td>
</tr>
<tr>
<td></td>
<td></td>
<td>1:00 p.m.</td>
<td>5:03 p.m.</td>
<td></td>
</tr>
<tr>
<td>Tuesday</td>
<td>5/4</td>
<td>7:57 a.m.</td>
<td>11:59 a.m.</td>
<td>8</td>
</tr>
<tr>
<td></td>
<td></td>
<td>1:00 p.m.</td>
<td>5:00 p.m.</td>
<td></td>
</tr>
<tr>
<td>Wednesday</td>
<td>5/5</td>
<td>8:02 a.m.</td>
<td>12:10 p.m.</td>
<td>8</td>
</tr>
<tr>
<td></td>
<td></td>
<td>1:06 p.m.</td>
<td>5:05 p.m.</td>
<td></td>
</tr>
<tr>
<td>Thursday</td>
<td>5/6</td>
<td>--</td>
<td>--</td>
<td>--</td>
</tr>
<tr>
<td>Friday</td>
<td>5/7</td>
<td>--</td>
<td>--</td>
<td>--</td>
</tr>
<tr>
<td>Saturday</td>
<td>5/8</td>
<td>--</td>
<td>--</td>
<td>--</td>
</tr>
</tbody>
</table>

**Total Hours Worked:** 24

1. **Employees on Fixed Schedules**

Many employees work on a fixed schedule from which they seldom vary. The employer may keep a record showing the exact schedule of daily and weekly hours and merely indicate that the worker did follow the schedule. When a worker is on a job for a longer or shorter period of time than the schedule shows, the employer must record the number of hours the worker actually worked, on an exception basis.

2. **How Long Should Records Be Retained**

Each employer shall preserve for at least three years payroll records, collective bargaining agreements, sales and purchase records. Records on which wage computations are based should be retained for two years, i.e., time cards and piece work tickets, wage rate tables, work and time schedules, and records of additions to or deductions from wages. These records must be open for inspection by the Division’s representatives, who may ask the employer to make extensions, computations, or transcriptions. The records may be kept at the place of employment or in a central records office.

**IV. Basic Overtime Rules**

**A. COMPUTING OVERTIME PAY**

Overtime must be paid at a rate of at least one and one-half times the employee’s regular rate of pay for each hour worked in a workweek in excess of the maximum allowable in a given type of employment. The normal federal standard is 40 hours per week. Generally, the regular rate includes all payments made by the employer to or on behalf of the employee (except for certain statutory exclusions). The following examples are based on a maximum 40-hour workweek.
1. **Hourly Rate** (regular pay rate for an employee paid by the hour)

If more than 40 hours are worked, at least one and one-half times the regular rate for each hour over 40 is due.

**Example.**

An employee paid $8.00 an hour works 44 hours in a workweek. The employee is entitled to at least one and one-half times $8.00, or $12.00, for each hour over 40. Pay for the week would be $320 for the first 40 hours, plus $48.00 for the four hours of overtime – a total of $368.00.

2. **Piece Rate**

The regular rate of pay for an employee paid on a piecework basis is obtained by dividing the total weekly earnings by the total number of hours worked in that week. The employee is entitled to an additional one-half times this regular rate for each hour over 40, plus the full piecework earnings.

**Example.**

An employee paid on a piecework basis works 45 hours in a week and earns $315. The regular rate of pay for that week is $315 divided by 45, or $7.00 an hour. In addition to the straight-time pay, the employee is also entitled to $3.50 (half the regular rate) for each hour over 40 – an additional $17.50 for the 5 overtime hours -- for a total of $332.50.

Another way to compensate pieceworkers for overtime, if agreed to before the work is performed, is to pay one and one-half times the piece rate for each piece produced during the overtime hours. The piece rate must be the one actually paid during non-overtime hours and must be enough to yield at least the minimum wage per hour.

3. **Salary**

The regular rate for an employee paid a salary for a regular or specified number of hours a week is obtained by dividing the salary by the number of hours for which the salary is intended to compensate.

If, under the employment agreement, a salary sufficient to meet the minimum wage requirement in every workweek is paid as straight time for whatever number of hours are worked in a workweek, the regular rate is obtained by dividing the salary by the number of hours worked each week. To illustrate, suppose an employee's hours of work vary each week and the agreement with the employer is that the employee will be paid $420 a week for whatever number of hours of work are required. Under this agreement, the regular rate will vary in overtime weeks. If the employee works 50 hours, the regular rate is $8.40 ($420 divided by 50 hours). In addition to the salary, half the regular rate, or $4.20 is due for each of the 10 overtime hours, for a total of $462 for the week. If the employee works 60 hours, the regular rate is $7.00 ($420 divided by 60 hours). In that case, an additional $3.50 is due for each of the 20 overtime hours, for a total of $490 for the week. In no case may the regular rate be less than the minimum wage required by FLSA.
If a salary is paid on other than a weekly basis, the weekly pay must be determined in order to compute the regular rate and overtime pay. If the salary is for a half month, it must be multiplied by 24 and the product divided by 52 weeks to get the weekly equivalent. A monthly salary should be multiplied by 12 and the product divided by 52.

Note also that a number of states have their own rules which may make employers liable for overtime under state law even where it would not be required under federal law. California, for example, generally requires overtime for hours worked in excess of 8 hours in a day even where the employee did not exceed 40 hours in the workweek.

V. Exemptions from Overtime

A. BACKGROUND

The FLSA generally requires covered employers to pay employees at least the federal minimum wage for all hours worked, and overtime premium pay of time-and-one-half the regular rate of pay for all hours worked over 40 in a single workweek. However, the FLSA includes a number of exemptions from the minimum wage and overtime requirements. Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for “any employee employed in a bona fide executive, administrative, or professional capacity * * * or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedure Act * * *").” 6 A number of states arguably have more stringent exemption standards than those provided by federal law. The FLSA does not preempt any such stricter state standards. If a state or local law establishes a higher standard than the provisions of the FLSA, the higher standard applies.

Congress has never defined the terms “executive,” “administrative,” “professional,” or “outside salesman.” Although section 13(a)(1) was included in the original FLSA enacted in 1938, specific references to the exemptions in the legislative history are scant. The legislative history indicates that the section 13(a)(1) exemptions were premised on the belief that the workers exempted typically earned salaries well above the minimum wage, and they were presumed to enjoy other compensatory privileges such as above average fringe benefits and better opportunities for advancement, setting them apart from the nonexempt workers entitled to overtime pay.

Further, the type of work they performed was difficult to standardize to any time frame and could not be easily spread to other workers after 40 hours in a week, making compliance with the overtime provisions difficult and generally precluding the potential job expansion intended by the FLSA’s time-and-a-half overtime premium.

Pursuant to Congress’ specific grant of rulemaking authority, the Department of Labor has issued implementing regulations defining the scope of the section 13(a)(1) exemptions. Federal regulations generally require each of three tests to be met for the exemption to apply:

---

• The employee must be paid a predetermined and fixed salary that is not subject to reductions because of variations in the quality or quantity of work performed (the “salary basis test”);

• The amount of salary paid must meet minimum specified amounts (the “salary level test”); and

• The employee's job duties must primarily involve executive, administrative or professional duties as defined by the regulations (the “duties tests”).

Under section 13(a)(1) of the FLSA and its implementing regulations, employees cannot be classified as exempt from the minimum wage and overtime requirements unless they are guaranteed a minimum weekly salary and perform certain required job duties. Until 2004, the minimum salary level was only $155 per week (an amount set in 1975 and left the same for 30 years). Until 2004, the duties test had not been updated since 1949. The recent changes, while long overdue, may result in employers needing to reclassify some workers from exempt to non-exempt.

Caution!

*It is imperative for managers with exempt employees to revisit their status in light of the 2004 rule changes to make sure none of those workers are entitled to overtime.*

The standard duties tests adopted in the new regulation are equally or more protective than the short duties tests previously applicable to workers who earn between $23,660 and $100,000 per year. The final “highly compensated” test might result in 107,000 employees who earn $100,000 or more per year losing overtime protection.

**B. CATEGORICAL EXEMPTIONS**

The major categories of exempt individuals are the following:

• Executive;

• Administrative;

• Professional;

• Outside sales people;

• Computer employees; and

• Certain highly compensated workers.

To meet the exemption, an employee must meet all of the requirements in a particular category.
1. **Executive Exemption**

To qualify for the executive employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary basis at a rate not less than $455 per week;
- The employee’s primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- The employee must have the authority to hire or fire other employees, or the employee’s suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

2. **Administrative Exemption**

To qualify for the administrative employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis at a rate not less than $455 per week;
- The employee’s primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- The employee’s primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

3. **Professional Exemption**

To qualify for the “learned professional” employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis at a rate not less than $455 per week;
- The employee’s primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a field of science or learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.
To qualify for the “creative professional” employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis at a rate not less than $455 per week; and
- The employee’s primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

4. Computer Employee Exemption

To qualify for the computer employee exemption, the following tests must be met:

- The employee must be compensated either on a salary or fee basis at a rate not less than $455 per week or, if compensated on an hourly basis, at a rate not less than $27.63 an hour;
- The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below;
- The employee’s primary duty must consist of:
  - The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
  - The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
  - The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
  - A combination of the aforementioned duties, the performance of which requires the same level of skills.

5. Outside Sales Exemption

To qualify for the outside sales employee exemption, all of the following tests must be met:

- The employee’s primary duty must be making sales, or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
- The employee must be customarily and regularly engaged away from the employer’s place or places of business.
6. Highly Compensated Employees

Highly compensated employees performing office or non-manual work and paid total annual compensation of $110,000 for 2009 and 2010 or more (which must include at least $455 per week paid on a salary or fee basis) are exempt from the FLSA if they customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee identified in the standard tests for exemption.

7. Note on Blue Collar Workers

The exemptions provided by FLSA Section 13(a)(1) apply only to “white collar” employees. The exemptions do not apply to manual laborers or other “blue collar” workers who perform work involving repetitive operations with their hands, physical skill and energy. FLSA-covered, non-management employees in production, maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers are entitled to minimum wage and overtime premium pay under the FLSA, and are not exempt no matter how highly paid they might be.

8. Police, Fire Fighters, Paramedics & Other First Responders

The exemptions also do not apply to police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, correctional officers, parole or probation officers, park rangers, fire fighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees, regardless of rank or pay level, who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; or other similar work.

9. Other Laws & Collective Bargaining Agreements

The FLSA provides minimum standards that may be exceeded, but cannot be waived or reduced. Employers must comply, for example, with any federal, state or municipal laws, regulations or ordinances establishing a higher minimum wage or lower maximum workweek than those established under the FLSA. Similarly, employers may, on their own initiative or under a collective bargaining agreement, provide a higher wage, shorter workweek, or higher overtime premium than provided under the FLSA. While collective bargaining agreements cannot waive or reduce FLSA protections, nothing in the FLSA or the Part 541 regulation relieves employers from their contractual obligations under such bargaining agreements.
Caution!

Fitting an employee into an exempt category does have its potential risks for employers. Managers who keep tabs of their exempt employee’s hours, deduct wages for time off of work, i.e. for a 2-hour lunch, risk becoming liable for unpaid overtime. If a worker is exempt, they must be treated as exempt. Employers cannot have it both ways. If an employer docks pay for an exempt employee who works less than eight hours in a day, that worker might be entitled to overtime for hours worked in excess of eight in a day.

The following charts show the new federal requirements for exempt status and compare them to those that were in effect until late 2004.

Table 2-2. Comparing the Tests for Executive Employees

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>$250 per week</td>
<td>$455 per week</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Whose primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof; and Includes the customary and regular direction of the work of two or more other employees therein.</td>
<td>Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof; Who customarily and regularly directs the work of two or more other employees; and Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.</td>
<td></td>
</tr>
</tbody>
</table>
### Table 2-3. Comparing the Tests for Administrative Employees

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Duties</td>
<td>Whose primary duty consists of the performance of office or non-manual work directly related to management policies or general business operations of the employer or the employer’s customers; and Which includes work requiring the exercise of discretion and independent judgment.</td>
<td>Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers; and Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.</td>
</tr>
</tbody>
</table>

### Table 2-4. Comparing the Tests for Professional Employees

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Duties</td>
<td>Whose primary duty consists of the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study; and Which includes work requiring the consistent exercise of discretion and judgment; or Whose primary duty consists of the performance of work requiring invention, imagination, or talent in a recognized field of artistic endeavor.</td>
<td>Whose primary duty is the performance of work requiring knowledge of an advanced type (defined as work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment) in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or Whose primary duty is the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.</td>
</tr>
</tbody>
</table>
### Table 2-5. Comparing the Tests for Computer Employees

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>$250 per week or, if paid hourly, 6½ x $4.25 (i.e., $27.63 an hour)</td>
<td>$455 per week or $27.63 an hour</td>
</tr>
</tbody>
</table>

**Salary Level**

Primary duty of performing work that requires theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, and software engineering, and employed and engaged in these activities as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer software field, as provided in § 541.303, which includes work requiring the consistent exercise of discretion and judgment.

**Duties**

§ 541.303(b): Whose primary duty consists of one or more of the following:

1. The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
2. The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
3. The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
4. A combination of the aforementioned duties, the performance of which requires the same level of skills.

Computer systems analysts, computer programmers, software engineers or other similarly skilled workers in the computer field are eligible for exemption, but only if the employee’s primary duty consists of:

1. The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
2. The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
3. The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
4. A combination of the aforementioned duties, the performance of which requires the same level of skills.
Table 2-6. Comparing the Tests for Outside Sales Employees

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No minimum salary required</td>
<td>No minimum salary required</td>
</tr>
<tr>
<td>Duties</td>
<td>Who is employed for the purpose of and who is customarily and regularly engaged away from the employer’s place or places of business in making sales; or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and Who does not devote more than 20 percent of the hours worked in the workweek by nonexempt employees of the employer to activities that are not incidental to and in conjunction with the employee’s own outside sales or solicitations.</td>
<td>Whose primary duty is making sales or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and Who is customarily and regularly engaged away from the employer’s place or places of business in performing such primary duty.</td>
</tr>
</tbody>
</table>

VI. Other FLSA Provisions

A. EQUAL PAY ACT

Included within the FLSA, the Equal Pay Act prohibits sex-based wage differentials between men and women employed in the same establishment who perform jobs requiring equal effort, skill, and responsibility. These provisions are enforced by the Equal Employment Opportunity Commission (EEOC). This provision is discussed in more detail in Chapter 9.

B. HAZARD PAY

Hazard pay means additional pay for performing hazardous duty or work involving physical hardship. Work duty that causes extreme physical discomfort and distress which is not adequately alleviated by protective devices is deemed to impose a physical hardship. The FLSA does not address the subject of hazard pay, except to require that it be included as part of a federal employee's regular rate of pay in computing the employee's overtime pay.

C. GARNISHMENT

Wage garnishment is a legal procedure in which a person’s earnings are required by court order to be withheld by an employer for the payment of a debt such as child support. Title III of the Consumer Credit Protection Act (CCPA) prohibits an employer
from discharging an employee whose earnings have been subject to garnishment for any one debt, regardless of the number of levies made or proceedings brought to collect it.

Title III protects employees from being discharged by their employers because their wages have been garnished for any one debt and limits the amount of employees' earnings that may be garnished in any one week. It does not, however, protect an employee from discharge if the employee's earnings have been subject to garnishment for a second or subsequent debts.

Title III applies to all individuals who receive personal earnings and to their employers. Personal earnings include wages, salaries, commissions, bonuses, and income from a pension or retirement program, but does not ordinarily include tips.

D. COMMISSION

A sales commission is a sum of money paid to an employee upon completion of a task, usually selling a certain amount of goods or services. Employers sometimes use sales commissions as incentives to increase worker productivity. A commission may be paid in addition to a salary or instead of a salary. The FLSA does not require the payment of commissions.

E. TIPS

A tipped employee engages in an occupation in which he or she customarily and regularly receives more than $30 per month in tips. An employer of a tipped employee is only required to pay $2.13 per hour in direct wages if that amount combined with the tips received at least equals the federal minimum wage. If the employee's tips combined with the employer's direct wages of at least $2.13 per hour do not equal the federal minimum hourly wage, the employer must make up the difference. Many states, however, require higher direct wage amounts for tipped employees.

Any employee working in an occupation in which he or she regularly receives more than $30 a month in tips is considered a tipped employee.

F. INDUSTRIAL HOMEWORK

Under the FLSA, industrial homework means the production by any covered person in a home, apartment, or room in a residential establishment, of goods for an employer who permits or authorizes such production, regardless of the source (whether obtained from an employer or elsewhere) of the materials used by the homeworker in producing these items.

The performance of certain types of industrial homework is prohibited under the FLSA unless the employer has obtained prior certification from the Department of Labor. Restrictions apply in the manufacture of knitted outerwear, gloves and mittens, buttons and buckles, handkerchiefs, embroideries, and jewelry, if there are no safety and health hazards. The manufacture of women's apparel (and jewelry under hazardous conditions) is generally prohibited. All individually covered homework is subject to the FLSA's minimum wage, overtime and recordkeeping requirements. Employers must provide workers with handbooks to record time, expenses, and pay information.
G. LAST PAYCHECK

Employers are not required by federal law to give former employees their final paycheck immediately. Some states, however, may require immediate payment.

H. MERIT PAY

Merit pay, also known as pay-for-performance, is defined as a raise in pay based on a set of criteria set by the employer. This usually involves the employer conducting a review meeting with the employee to discuss the employee's work performance during a certain time period. Merit pay is a matter between an employer and an employee (or the employee's representative). The FLSA does not require or address the issue of merit pay.

I. SEVERANCE PAY

Severance pay is often granted to employees upon termination of employment. It is usually based on length of employment for which an employee is eligible upon termination. There is no requirement in the FLSA for severance pay. Severance pay is a matter of agreement between an employer and an employee (or the employee's representative).

J. EMPLOYMENT TAXES

The Department of Labor does not have jurisdiction over taxing employee's wages or providing W-2 forms to employees. The IRS has authority over these issues.

VII. Child Labor

The child labor provisions of the Fair Labor Standards Act (FLSA) are designed to protect the educational opportunities of youths and to prohibit their employment in jobs and under conditions detrimental to their health and well-being.

In nonagricultural work, the child labor provisions apply to enterprises with employees engaging in interstate commerce, producing goods for interstate commerce, or handling, selling or working on goods or materials that have been moved in or produced for interstate commerce. For most firms, an annual dollar volume of business test of not less than $500,000 applies.

The Act covers the following employers regardless of their dollar volume of business: hospitals; institutions primarily engaged in the care of the sick, aged, mentally ill or disabled who reside on the premises; schools for children who are mentally or physically disabled or gifted; preschools, elementary and secondary schools and institutions of higher education; and federal, state and local government agencies.

Employees of firms that do not meet the $500,000 annual dollar volume test may be covered in any workweek in which they are individually engaged in interstate commerce, the production of goods for interstate commerce, or an activity that is closely related and directly essential to the production of such goods.
An enterprise that was covered by the Act on March 31, 1990, and is no longer covered because of the increase in the annual dollar volume test to $500,000 under the 1989 amendments to the Act, remains subject to the Act's child labor provisions.

While 16 is the minimum age for most nonfarm work, youths aged 14 and 15 may work outside of school hours in certain occupations under certain conditions. They may, at any age: deliver newspapers; perform in radio, television, movies, or theatrical productions; work for their parents in their solely owned non-farm businesses (except in mining, manufacturing, or in any other occupation declared hazardous by the Secretary); or gather evergreens and make evergreen wreaths.

The child labor provisions include restrictions on hours of work and occupations for youths under age 16. These provisions also set forth 17 hazardous occupations orders for jobs that the Secretary has declared too dangerous for those under age 18 to perform.

The Act prohibits the interstate shipment of goods produced in violation of the child labor provisions. It is also a violation of the Act to fire or in any other manner discriminate against an employee for filing a complaint or for participating in a legal proceeding under the Act.

A. PERMISSIBLE JOBS

The permissible jobs and hours of work, by age, in nonfarm work are as follows:

- Youths age 18 or older are not subject to restrictions on jobs or hours;
- Youths age 16 and 17 may perform any job not declared hazardous by the Secretary, and are not subject to restrictions on hours;
- Youths age 14 and 15 may work outside school hours in various nonmanufacturing, nonmining, nonhazardous jobs under the following conditions: no more than three hours on a school day, 18 hours in a school week, eight hours on a non-school day, or 40 hours in a non-school week. In addition, they may not begin work before 7 a.m. nor work after 7 p.m., except from June 1 through Labor Day, when evening hours are extended until 9 p.m. Those enrolled in an approved Work Experience and Career Exploration Program (WECEP) may work up to 23 hours in school weeks and three hours on school days (including during school hours).

By regulation, employers must keep records of the dates of birth of employees under age 19, their daily starting and quitting times, their daily and weekly hours of work, and their occupations. Employers may protect themselves from unintentional violation of the child labor provisions by keeping on file an employment or age certificate for each young worker to show that the youth is the minimum age for the job. Certificates issued under most state laws are acceptable for this purpose.

The FLSA prohibits employers from engaging in oppressive child labor, as defined by the Act. The FLSA also gives an employee the right to file a complaint with the Wage and Hour Division and testify or in other ways cooperate with an investigation or legal proceeding without being fired or discriminated against in any other manner.
Child Labor:

An employee must be at least 16 years old to work in most non-farm jobs and at least 18 to work in non-farm jobs declared hazardous by the Secretary of Labor. Youths 14 and 15 years old may work outside school hours in various non-manufacturing, non-mining, non-hazardous jobs under the following conditions:

No more than –
• 3 hours on a school day or 18 hours in a school week;
• 8 hours on a non-school day or 40 hours in a non-school week.

Also, work may not begin before 7 a.m. or end after 7 p.m., except from June 1 through Labor Day, when evening hours are extended to 9 p.m. Different rules apply in agricultural employment.

B. PENALTIES

Employers are subject to a civil money penalty of up to $11,000 per worker for each violation of the child labor provisions. When a civil money penalty is assessed, employers have the right to file an exception to the determination within 15 days of receipt of the notice of such penalty. When an exception is filed, it is referred to an administrative law judge for a hearing and determination as to whether the penalty is appropriate. Either party may appeal the decision of the administrative law judge to the Secretary of Labor. If an exception is not timely filed, the penalty becomes final.

The Act also provides for a criminal fine of up to $10,000 upon conviction for a willful violation. For a second conviction for a willful violation, the Act provides for a fine of not more than $10,000 and imprisonment for up to six months, or both. The Secretary may also bring suit to obtain injunctions to restrain persons from violating the Act.

C. RELATIONSHIP TO STATE, LOCAL AND OTHER FEDERAL LAWS

Many states have child labor laws. When both this Act and a state law apply, the law setting the higher standards must be observed.

VIII. Enforcement of the FLSA

The Department of Labor's Wage and Hour Division (Wage and Hour) enforces the FLSA for employees of private businesses and state and local governments, and federal employees of the Library of Congress, U.S. Postal Service, Postal Rate Commission, and the Tennessee Valley Authority. The U. S. Office of Personnel Management enforces the FLSA for other federal employees, and the U.S. Congress for congressional employees.
Wage and Hour's enforcement of the FLSA is done by investigators stationed across the United States. As Wage and Hour's authorized representatives, they conduct investigations and gather data on wages, hours worked and other employment conditions or practices, in order to determine compliance with the law. Where violations are found, investigators may recommend changes in employment practices to bring an employer into compliance.

It is a violation of the FLSA to fire, or in any other manner, discriminate against an employee for filing a complaint or for participating in a legal proceeding under this law.

A. INVESTIGATIONS

The Wage and Hour Division conducts investigations for a number of reasons. Many investigations are initiated by complaints. All complaints are confidential; the name of the complainant and the nature of the complaint are not disclosable. The only exception is when it is necessary to reveal a complainant's identity, with his or her permission, to pursue an allegation.

In addition to complaints, Wage and Hour selects certain types of businesses or industries for investigations. Occasionally, a number of businesses in a specific industry or geographic area will be examined. In either situation, the objective is to assure compliance with the law in those businesses, industries, or localities. An investigation consists of the following steps:

- A conference between the Wage and Hour representative and representative(s) of the business, during which the Wage and Hour representative will explain the investigation process;

- Examination of records to determine what laws or exemptions apply to the business and its employees. These records include, for example, those showing the annual dollar volume of the business, the manufacture, handling or selling of goods moved in interstate commerce, and work on government contracts;

- Examination of time and payroll records;

- Private interviews with certain employees. The purpose of these interviews is to verify the time and payroll records, to identify a worker's duties in sufficient detail to determine what exemptions, if any, apply and to determine if young workers are legally employed. Interviews are normally conducted on the employer's premises; and

- When all the fact-finding steps have been completed, the employer and/or the employer's representative will be told whether violations have occurred and, if so, what the violations are and how to correct them. If back wages are owed, the employer will be asked to pay the back wages and the employer may be asked to compute the amounts due.
B. RECOVERY OF BACK WAGES

The following are methods that the FLSA provides for recovering unpaid minimum and/or overtime wages:

- Wage and Hour may supervise payment of back wages;
- The Secretary of Labor may bring suit for back wages and an equal amount as liquidated damages;
- An employee may file a private suit for back pay and an equal amount as liquidated damages, plus attorney's fees and court costs; or
- The Secretary of Labor may obtain an injunction to restrain any person from violating the FLSA, including the unlawful withholding of proper minimum wage and overtime pay.

An employee may not bring suit if he or she has been paid back wages under the supervision of Wage and Hour or if the Secretary of Labor has already filed suit to recover the wages.

A 2-year statute of limitations applies to the recovery of back pay, except in the case of a willful violation, in which case a 3-year statute applies. In other words, unless the violations are willful, back wages may only be recovered within two years of when the violations occurred.

C. PENALTIES

Employers who willfully or repeatedly violate the minimum wage or overtime pay requirements are subject to a civil money penalty of up to $1,000 for each such violation.

Violators of the child labor provisions are subject to a civil money penalty of up to $10,000 for each young worker who was illegally employed. Willful violations of the FLSA may result in criminal prosecution and the violator fined up to $10,000. A second conviction may result in imprisonment.
### Table 2-7. Exemptions from Overtime and Minimum Wage

<table>
<thead>
<tr>
<th>Exemptions from Both Minimum Wage and Overtime Pay</th>
<th>Exemptions from Overtime Pay Only</th>
<th>Partial Exemptions from Overtime Pay</th>
</tr>
</thead>
<tbody>
<tr>
<td>Executive, administrative, and professional employees (including teachers and academic administrative personnel in elementary and secondary schools), outside sales employees, and employees in certain computer-related occupations (as defined in Department of Labor regulations); Employees of certain seasonal amusement or recreational establishments, employees of certain small newspapers, seamen employed on foreign vessels, employees engaged in fishing operations, and employees engaged in newspaper delivery; Farm workers employed by anyone who used no more than 500 &quot;man-days&quot; of farm labor in any calendar quarter of the preceding calendar year; Casual babysitters and persons employed as companions to the elderly or infirm.</td>
<td>Certain commissioned employees of retail or service establishments; auto, truck, trailer, farm implement, boat, or aircraft salesworkers, or parts-clerks and mechanics servicing autos, trucks, or farm implements, who are employed by nonmanufacturing establishments primarily engaged in selling these items to ultimate purchasers; Employees of railroads and air carriers, taxi drivers, certain employees of motor carriers, seamen on American vessels, and local delivery employees paid on approved trip rate plans; Announcers, news editors, and chief engineers of certain nonmetropolitan broadcasting stations; Domestic service workers living in the employer's residence; Employees of motion picture theaters; and Farmworkers.</td>
<td>Partial overtime pay exemptions apply to employees engaged in certain operations on agricultural commodities and to employees of certain bulk petroleum distributors. Hospitals and residential care establishments may adopt, by agreement with their employees, a 14-day work period instead of the usual 7-day workweek, if the employees are paid at least time and one-half their regular rates for hours worked over 8 in a day or 80 in a 14-day work period, whichever is the greater number of overtime hours. Employees who lack a high school diploma, or who have not attained the educational level of the 8th grade, can be required to spend up to 10 hours in a workweek engaged in remedial reading or training in other basic skills without receiving time and one-half overtime pay for these hours. However, the employees must receive their normal wages for hours spent in such training and the training must not be job specific.</td>
</tr>
</tbody>
</table>
IX. State Minimum Wage Laws: January 1, 2010

The following provides a sampling of minimum wage laws by some states. Remember, employers in a state that has its own minimum wage must comply with highest applicable rate. The following rates apply to nonsupervisory, nonfarm jobs.

The overtime premium rate is one and one-half times the employee's regular rate, unless otherwise specified. Like the federal wage and hour law, state law often exempts particular occupations or industries from the minimum labor standard generally applied to covered employment. Particular exemptions are not identified in this table. Readers are encouraged to consult the laws of particular states in determining whether the state's minimum wage applies to a particular employment.

Table 2-8. Minimum Wage by State

<table>
<thead>
<tr>
<th>State</th>
<th>Minimum Cash Wage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alaska</td>
<td>$7.75</td>
</tr>
<tr>
<td>Arizona</td>
<td>$7.25</td>
</tr>
<tr>
<td>Arkansas</td>
<td>$6.25</td>
</tr>
<tr>
<td>California</td>
<td>$8.00</td>
</tr>
<tr>
<td>Connecticut</td>
<td>$8.25</td>
</tr>
<tr>
<td>Delaware</td>
<td>$7.25</td>
</tr>
<tr>
<td>District of Columbia</td>
<td>$8.25</td>
</tr>
<tr>
<td>Florida</td>
<td>$7.25</td>
</tr>
<tr>
<td>Hawaii</td>
<td>$7.25</td>
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<tr>
<td>Idaho</td>
<td>$7.25</td>
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<tr>
<td>Illinois</td>
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<tr>
<td>Indiana</td>
<td>$7.25</td>
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<tr>
<td>Iowa</td>
<td>$7.25</td>
</tr>
<tr>
<td>Kentucky</td>
<td>$7.25</td>
</tr>
<tr>
<td>Maine</td>
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<td>Maryland</td>
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<td>Massachusetts</td>
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<td>Michigan</td>
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<td>Missouri</td>
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<tr>
<td>New Jersey</td>
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<tr>
<td>New York</td>
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<tr>
<td>North Carolina</td>
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<tr>
<td>Ohio</td>
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</tr>
<tr>
<td>Oregon</td>
<td>$8.40</td>
</tr>
<tr>
<td>Texas</td>
<td>$7.25</td>
</tr>
<tr>
<td>Virginia</td>
<td>$7.25</td>
</tr>
</tbody>
</table>
CHAPTER 2 – REVIEW QUESTIONS

The following questions are designed to ensure that you have a complete understanding of the information presented in the assignment. They do not need to be submitted in order to receive CPE credit. They are included as an additional tool to enhance your learning experience.

We recommend that you answer each review question and then compare your response to the suggested solution before answering the final exam questions related to this assignment.

1. The Fair Labor Standards Act’s only provision is the requirement that employees be paid overtime for hours worked in excess of 40 in a week.
   a) true
   b) false

2. The current federal minimum wage is $5.15 per hour.
   a) true
   b) false

3. Which of the following is mandated by the Fair Labor Standards Act:
   a) the payment of overtime for certain excess hours in a day
   b) paid vacation for employees who have been with the same employer for at least five years
   c) paid sick leave for full-time employees
   d) Christmas bonuses

4. What limits does the FLSA place on an employer’s ability to require employees to work overtime:
   a) employers may only mandate overtime in accordance with the provisions of a collective bargaining agreement
   b) employers may request but may not mandate overtime except in limited circumstances
   c) the FLSA places no limits on an employer’s ability to mandate overtime
   d) employer’s can mandate overtime so long as the employee is not asked to work more than 20 percent of their normal scheduled hours

5. Under the FLSA, which of the following is an example of time worked for which the employee is entitled to be paid:
   a) time spent in the employee break room while the employee waits for equipment essential for his job to be fixed
   b) time spent reading a personal magazine because there are no customers to wait on in a department store
   c) time spent on a mandated report at home
   d) all of the above
6. The FLSA mandates that employers pay a premium for work done at night and on weekends.
   
a) true  
b) false

7. Employers may use any system they choose to record the hours worked by employees.
   
a) true  
b) false

8. Overtime must be paid at a rate of at least two times the employee’s regular rate of pay for each hour worked in a workweek in excess of 40 hours.
   
a) true  
b) false

9. The only requirement to qualify for the executive employee exemption is that an employee’s primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise.
   
a) true  
b) false

10. To meet the overtime exemption as a “highly compensated employee,” an individual’s annual salary for 2009 must be:

   a) $55,000  
b) $110,000  
c) $125,000  
d) $250,000

11. Under which of the following circumstances does the FLSA require that employees be given extra compensation or so-called “hazard pay”:

   a) for any occupations deemed inherently hazardous by the Occupational Safety and Health Administration  
b) it is never mandated by the FLSA  
c) whenever an employee is asked to do something above and beyond their normal job duties and entails additional risk to health or safety  
d) for work that the employee otherwise refuses to perform

12. The FLSA does not mandate severance pay.

   a) true  
b) false
13. Under federal law, how old does a child need to be to hold most non-agricultural jobs:
   a) there is no federal law governing child labor
   b) 16
   c) 17
   d) 18

14. The penalty for violating federal child labor provisions can be up to:
   a) $5,500
   b) $11,000
   c) $25,000
   d) $50,000
CHAPTER 2 – SOLUTIONS AND SUGGESTED RESPONSES

1. A: True is incorrect. That is just one of the key provisions of the FLSA.

   **B: False is correct.** The FLSA contains several significant provisions in addition to the overtime requirement, including the payment of a minimum wage, restriction on the employment of children and record-keeping requirements for employers.

   (See page 2-1 of course material.)

2. A: True is incorrect. This rate went into effect in 1997 but was supplanted in 2009 by the current rate of $7.25.

   **B: False is correct.** The current rate, effective in 2009, is $7.25 per hour.

   (See page 2-4 of course material.)

3. **A: Correct.** With a few exceptions, the FLSA mandates overtime pay in the amount of 1.5 times the employee’s regular rate of pay for hours worked in excess of eight in a day.

   B: Incorrect. Federal law does not mandate paid time off for either vacations or sick leave.

   C: Incorrect. There is no federal requirement that employees be given paid sick leave. Certain eligible employees may, however, be eligible for unpaid leave under the Family Medical Leave Act.

   D: Incorrect. Bonuses and other types of payments beyond the basic minimum wage and overtime requirements are not mandated by federal law. This also includes severance pay. Employers who offer these and other payments do so either by choice or pursuant to a collective bargaining agreement.

   (See page 2-5 of course material.)
4. A: Incorrect. A collective bargaining agreement likely has provisions relating to overtime but is not required in order for an employer to mandate it. Most employees are not subject to such agreements and employers may require overtime as they see fit.

B: Incorrect. Employers have a right to mandate overtime under the FLSA.

**C: Correct.** There is no limitation on the total number of hours an employee may work or on an employer’s ability to require overtime other than the basic requirement that employees receive overtime as specified in the Act.

D: Incorrect. There is no such limitation in the amount of overtime that can be mandated.

(See page 2-6 of course material.)

5. A: Incorrect. Time spent “waiting for work” is time for which the employee must be compensated. In this case, he is waiting for his equipment on the employer’s premises and he is entitled to be paid. However, this is not the most correct answer.

B: Incorrect. The fact that there is no work to do does not mean compensation is not required as the employee must remain on the employee premises. However, this is not the most correct answer.

C: Incorrect. Time spent working is paid time even if the work is not done on the employer’s premises. However, this is not the best answer.

**D: Correct.** All of the above are examples of compensable work for purposes of the FLSA. Hours worked includes time waiting for work and does not depend on where the work is actually performed.

(See page 2-7 of course material.)

6. A: True is incorrect. The FLSA does not mandate such extra pay.

**B: False is correct.** Extra pay for working weekends or nights is a matter of agreement between the employer and the employee (or the employee’s representative). The FLSA does not require extra pay for weekend or night work or double time pay.

(See page 2-8 of the course material.)
7. **A: True is correct.** Every covered employer must keep certain records for each non-exempt worker, including hours worked. Employers may use any timekeeping method they choose. For example, they may use a time clock, have a timekeeper keep track of employee’s work hours, or tell their workers to write their own times on the records. Any timekeeping plan is acceptable as long as it is complete and accurate.

**B: False is incorrect.** The FLSA does not mandate how such records must be kept.

(See page 2-9 of course material.)

8. **A: True is incorrect.** The overtime rate is one and one-half the employee’s regular rate of pay.

**B: False is correct.** Overtime must be paid at a rate of at least one and one-half times the employee's regular rate of pay for each hour worked in a workweek in excess of the maximum allowable in a given type of employment. The normal federal standard is 40 hours per week.

(See page 2-10 of course material.)

9. **A: True is incorrect.** That is just one of the requirements an employee must meet to qualify for the executive exemption from overtime.

**B: False is correct.** To qualify for the executive exemption from overtime, an employee must be compensated on a salary basis at a rate not less than $455 per week, the employee’s primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise, the employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent, and the employee must have the authority to hire or fire other employees, or the employee’s suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

(See page 2-14 of course material.)

10. **A: Incorrect.** The actual amount is $110,000.

**B: Correct.** Federal law generally requires employees to be paid overtime when eligible unless they are “exempt.” One exemption is for highly compensated employees, defined as those making at least $110,000 per year.

**C: Incorrect.** The actual minimum salary to be considered highly compensated is only $110,000.

**D: Incorrect.** The minimum salary to qualify for the highly compensated employee exemption is $110,000 per year.

(See page 2-16 of course material.)
11. A: Incorrect. Even jobs that entail additional risk to safety or health do not entitle workers to hazard pay pursuant to state law.

**B: Correct.** There is nothing in the FLSA or other federal law that mandates hazard pay or other premium pay based on the danger associated with performing certain tasks.

C: Incorrect. There is no such requirement under federal law.

D: Incorrect. Employers can mandate such work without providing any premium.

(See page 2-20 of course material.)

12. **A: True is correct.** Severance pay is often granted to employees upon termination of employment. It is usually based on length of employment for which an employee is eligible upon termination. There is no requirement in the FLSA for severance pay.

B: False is incorrect. It is provided at the discretion of the employer or as part of a contractual agreement only.

(See page 2-22 of course material.)

13. A: Incorrect. The Fair Labor Standards Act has significant rules and limitations governing child labor, including age limits for certain types of jobs.

**B: Correct.** The minimum age for most non-farm jobs is 16 years old.

C: Incorrect. The minimum age is only 16.

D: Incorrect. The minimum age is only 16.

(See page 2-24 of course material.)

14. A: Incorrect. The maximum penalty is actually twice this amount.

**B: Correct.** Civil penalties can be imposed of up to $11,000 per violation of the child labor laws. This is in addition to other remedies, including criminal penalties in extreme cases.

C: Incorrect. While the total penalties can be that high cumulatively, the per violation penalty is up to $11,000.

D: Incorrect. The maximum per violation penalty is $11,000.

(See pages 2-24 of course material.)
Chapter 3: Family and Medical Leave Act

I. History and Overview of the FMLA Legislation

A. HISTORY

Prior to 1993, the United States had no national family and medical leave legislation (although the Pregnancy Discrimination Act of 1979 does require firms that offered temporary disability programs to cover pregnancy like any other disability). Some employees had access to leave through union contracts, employer policies, or state statutes, but coverage provided under these provisions was rarely as comprehensive as coverage provided under the FMLA. Many employees had no family or medical leave coverage prior to the FMLA.

### FMLA Do’s and Don’ts

- Know whether your company is covered by the FMLA;
- Maintain group health coverage for eligible employees on an FMLA leave;
- Understand how applicable state law affects your employee’s rights to leave; and
- Don’t deny leave to persons covered by the FMLA.

The FMLA, which was passed by Congress and went into effect in August 1993, requires certain covered establishments with 50 or more employees to provide up to 12 weeks of unpaid, job-protected leave per year to eligible employees who need leave to care for a newborn, newly adopted or newly placed foster child; a child, spouse, or parent who has a serious health condition; or the employee’s own serious health condition, including maternity-related disability and prenatal care.

In November 2008, the Department of Labor announced the adoption of new regulations that made some of the first major changes to implementation of the law since its passage. These took effect January 16, 2009. In particular, these new rules define how families of wounded service members will be able to take unpaid leave to care for them.

Significant changes included:

- Allowing employers to require “fitness-for-duty” evaluations for workers who took FMLA leave and are returning to jobs that could endanger themselves or others;
- Allowing businesses to exclude from perfect attendance awards employees who took FMLA time;
- Stopping employers from charging FMLA time to employees who come back to work but can only do "light" duty;
- Prohibiting an employee’s direct supervisor from getting an employee's medical information when a medical certification is needed under FMLA; and
Forcing workers to tell employers in advance when they want FMLA time. Current regulations allow employees to tell employers up to two days after not showing up for work that they are using FMLA. Employees will now have to follow their employer's regular rules for informing them about missing work "absent unusual circumstances."

The new regulations also defined for the first time how the families of military can use the FMLA.

Congress voted in 2007 to expand the Family and Medical Leave Act to include six months of leave for military families when a service member gets hurt. Unlike nonmilitary families, in which only spouses, children and parents can take FMLA time, grandparents, aunts, uncles and first cousins will be able to use unpaid leave time, officials said.

Lawmakers also allowed family members of National Guard and Reserve personnel called up to active duty or deployment to use unpaid leave time for "any qualifying exigency," which under the new regulations can include childcare and school activities, post-deployment activities and military events. The military family leave has been in effect since President George W. Bush signed it into law at the beginning of 2008. Its significant provisions include allowing family members of wounded military personnel to take up to six months of unpaid leave in a 12-month period to care for their relatives during the recovery process and letting families of National Guard members and the reserves use up to 12 weeks of "qualifying exigency leave" to manage the members' affairs while they are on active duty.

As with many federal employment laws, states often have their own counterparts. If your state has its own family or medical leave act, employers must follow both laws.

**B. COVERED EMPLOYERS**

The Family and Medical Leave Act (FMLA) applies to public agencies, including state, local and federal employers, local education agencies (schools), as well as private-sector employers with a minimum number of employees. The law covers employers with 50 or more employees in 20 or more workweeks in the current or preceding calendar year. If a company has multiple locations, employers are covered if they have 50 or more employees at a single worksite or within 75 miles.¹

1. **Counting Employees**

Any employee whose name appears on the employer's payroll will be considered employed each working day of the calendar week, and must be counted whether or not any compensation is received for the week. However, the FMLA applies only to employees who are employed within any State of the United States, the District of Columbia or any Territory or possession of the United States. Employees who are employed outside these areas are not counted for purposes of determining employer coverage or employee eligibility.

¹ The 75-mile distance is measured by surface miles, using surface transportation over public streets, roads, highways and waterways, by the shortest route from the facility where the eligible employee needing leave is employed. Absent available surface transportation between worksites, the distance is measured by using the most frequently utilized mode of transportation (e.g., airline miles).
Example:

The accounting firm of Rogers, Rogers and Hornsby has offices in Kalamazoo, Michigan and Rochester, New York. The Kalamazoo office employs 55 people. The Rochester, New York office employs 45 people. Janice, an accountant in the Rochester office, wants to take leave to care for her dying mother. William, an accountant in the Kalamazoo office, wants to take leave to be with his wife and new son, who was born last week. Because Rochester and Kalamazoo are not within 75 miles of each other, the 45 employees in Rochester, including Janice, are not entitled to Family and Medical Leave Act benefits. Because he works in an office with 55 people, however, William is entitled to FMLA leave so long as he meets the other requirements of the Act, discussed below.

Employees on paid or unpaid leave, including FMLA leave, leaves of absence, disciplinary suspension, etc., are counted as long as the employer has a reasonable expectation that the employee will later return to active employment. If there is no employer/employee relationship (as when a employee is laid off, whether temporarily or permanently) such individual is not counted. Part-time employees, like full-time employees, are considered to be employed each working day of the calendar week, as long as they are maintained on the payroll.

An employee who does not begin to work for an employer until after the first working day of a calendar week, or who terminates employment before the last working day of a calendar week, is not considered employed on each working day of that calendar week.

2. Determining Number of Employees within 75 Miles of Worksite

In determining if an employee is "eligible" under FMLA, how is the determination made whether the employer employs 50 employees within 75 miles of the worksite where the employee needing leave is employed? Generally, a worksite can refer to either a single location or a group of contiguous locations. An employee's worksite under FMLA will ordinarily be the site the employee reports to or, if none, from which the employee's work is assigned.

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2 Structures which form a campus or industrial park, or separate facilities in proximity with one another, may be considered a single site of employment. On the other hand, there may be several single sites of employment within a single building, such as an office building, if separate employers conduct activities within the building. For example, an office building with 50 different businesses as tenants will contain 50 sites of employment. The offices of each employer will be considered separate sites of employment for purposes of FMLA. For employees with no fixed worksite, e.g., construction workers, transportation workers (e.g., truck drivers, seamen, pilots), salespersons, etc., the "worksite" is the site to which they are assigned as their home base, from which their work is assigned, or to which they report. For example, if a construction company headquartered in New Jersey opened a construction site in Ohio, and set up a mobile trailer on the construction site as the company's on-site office, the construction site in Ohio would be the worksite for any employees hired locally who report to the mobile trailer/company office daily for work assignments, etc. If that construction company also sent personnel such as job superintendents, foremen, engineers, an office manager, etc., from New Jersey to the job site in Ohio, those workers sent from New Jersey continue to have the headquarters in New Jersey as their "worksite." The workers who have New Jersey as their worksite would not be counted in determining eligibility of employees whose home base is the Ohio worksite, but would be counted in determining eligibility of employees whose home base is New Jersey.
Separate buildings or areas which are not directly connected or in immediate proximity are a single worksite if they are in reasonable geographic proximity, are used for the same purpose, and share the same staff and equipment. For example, if an employer manages a number of warehouses in a metropolitan area but regularly shifts or rotates the same employees from one building to another, the multiple warehouses would be a single worksite.

3. Maintaining Coverage

Once a private employer meets the 50 employees / 20 workweeks threshold, the employer remains covered until it reaches a future point where it no longer has employed 50 employees for 20 (nonconsecutive) workweeks in the current and preceding calendar year.

Example.

If an employer who met the 50 employees/20 workweeks test in the calendar year as of August 5, 2008, subsequently dropped below 50 employees before the end of 2008 and continued to employ fewer than 50 employees in all workweeks throughout calendar year 2009, the employer would continue to be covered throughout calendar year 2009 because it met the coverage criteria for 20 workweeks of the preceding (i.e., 2008) calendar year.

C. ELIGIBLE EMPLOYEES

Employees are eligible to take FMLA leave if they have: (1) worked for their employer for at least 12 months; (2) have worked for at least 1,250 hours over the previous 12 months; (3) work at a location where at least 50 employees are employed by the employer within 75 miles; and (4) work at a location in the United States or any territory or possession of the United States where at least 50 employees are employed by the employer within 75 miles. An individual must meet all of these criteria in order to be eligible.

Example.

Mick is a mailroom clerk for the accounting firm of Apple, Apple and Pie. He worked in the Houston, Texas office that employed 325 people and has been employed by the firm for six years. His mother is dying and he is asking for a family leave. During the preceding year, however, Mick has only worked 560 hours. Although he meets three out of the four criteria, he is ineligible for a family or medical leave.

1. 12 Month Period

The 12 months an employee must have been employed by the employer are not required to be consecutive months. If an employee is maintained on the payroll for any part of a week, including any periods of paid or unpaid leave (sick, vacation) during which other benefits or compensation are provided by the employer (e.g., workers' compensation, group health plan benefits, etc.), the week counts as a week of employment.
2. Minimum Hours of Service

Whether an employee has worked the minimum 1,250 hours of service is determined according to the principles established under the Fair Labor Standards Act (FLSA) for determining compensable hours of work. Any accurate accounting of actual hours worked under FLSA's principles may be used. In the event an employer does not maintain an accurate record of hours worked by an employee, including for employees who are exempt from FLSA's requirement that a record be kept of their hours worked (e.g., bona fide executive, administrative, and professional employees as defined in FLSA Regulations), the employer has the burden of showing that the employee has not worked the requisite hours.

In the event the employer is unable to meet this burden the employee is deemed to have met this test. An employer must be able to clearly demonstrate that such an employee did not work 1,250 hours during the previous 12 months in order to claim that the employee is not "eligible" for FMLA leave.

The determinations of whether an employee has worked for the employer for at least 1,250 hours in the past 12 months and has been employed by the employer for a total of at least 12 months must be made as of the date leave commences. If an employee notifies the employer of need for FMLA leave before the employee meets these eligibility criteria, the employer must either confirm the employee's eligibility based upon a projection that the employee will be eligible on the date leave would commence or must advise the employee when the eligibility requirement is met.

If the employer confirms eligibility at the time the notice for leave is received, the employer may not subsequently challenge the employee's eligibility. In the latter case, if the employer does not advise the employee whether the employee is eligible as soon as practicable (i.e., two business days absent extenuating circumstances) after the date employee eligibility is determined, the employee will have satisfied the notice requirements and the notice of leave is considered current and outstanding until the employer does advise.

If the employer fails to advise the employee whether the employee is eligible prior to the date the requested leave is to commence, the employee will be deemed eligible. The employer may not, then, deny the leave. Where the employee does not give notice of the need for leave more than two business days prior to commencing leave, the employee will be deemed to be eligible if the employer fails to advise the employee that the employee is not eligible within two business days of receiving the employee's notice.

3. Minimum Number of Employees

Whether 50 employees are employed within 75 miles to ascertain an employee's eligibility for FMLA benefits is determined when the employee gives notice of the need for leave. Whether the leave is to be taken at one time or on an intermittent or reduced leave schedule basis, once an employee is determined eligible in response to that notice of the need for leave, the employee's eligibility is not affected by any subsequent change in the number of employees employed at or within 75 miles of the employee's worksite, for that specific notice of the need for leave. Similarly, an employer may not terminate employee leave that has already started if the employee-count drops below 50.
Example.

The accounting firm of Kerry & Edwards employed 60 employees in August. However, the firm expects the number of employees to drop to 40 in December. The firm must grant FMLA benefits to an otherwise eligible employee who gives notice of the need for leave in August for a period of leave to begin in December.

II. Leave Requirements

The FMLA only requires unpaid leave. However, the law permits an employee to elect, or the employer to require the employee, to use accrued paid leave, such as vacation or sick leave, for some or all of the FMLA leave period. When paid leave is substituted for unpaid FMLA leave, it may be counted against the 12-week FMLA leave entitlement if the employee is properly notified of the designation when the leave begins.

A. ALLOWABLE LEAVES

Assuming an employer is covered by the FMLA and that an employee is eligible for leave, the employer must grant an eligible employee up to a total of 12 workweeks of unpaid leave during any 12-month period for one or more of the following reasons:

- For placement with the employee of a son or daughter for adoption or foster care;
- For the birth and care of the newborn child of the employee;
- To care for an immediate family member (spouse, child, or parent) with a serious health condition; or
- To take medical leave when the employee is unable to work because of a serious health condition.

B. BIRTH OR ADOPTION OF CHILD

1. Both Parents Eligible

The right to take leave under FMLA applies equally to male and female employees. A father, as well as a mother, can take family leave for the birth, placement for adoption or foster care of a child. Spouses employed by the same employer are jointly entitled to a combined total of 12 work-weeks of family leave for the birth and care of the newborn child, for placement of a child for adoption or foster care, and to care for a parent who has a serious health condition.

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3 Foster care is 24-hour care for children in substitution for, and away from, their parents or guardian. Such placement is made by or with the agreement of the State as a result of a voluntary agreement between the parent or guardian that the child be removed from the home, or pursuant to a judicial determination of the necessity for foster care, and involves agreement between the State and foster family that the foster family will take care of the child. Although foster care may be with relatives of the child, State action is involved in the removal of the child from parental custody.
Example.

*Bill and Mary, a husband and wife, are both employed by the accounting firm of Martinez, Lowe and Schilling. Immediately following the birth of their first child, Mary takes an 8-week leave to care for the baby. Upon Mary’s return to work, Bill is eligible to take up to 4 weeks of additional leave to care for the baby.*

2. Time Limits

Leave for birth and care, or placement for adoption or foster care must conclude within 12 months of the birth or placement. In addition, an employer can count leave taken due to pregnancy complications against the 12 weeks of FMLA leave for care of a child. Pregnancy disability leave or maternity leave for the birth of a child is also considered qualifying FMLA leave for a serious health condition and may be counted in the 12 weeks of leave so long as the employer properly notifies the employee in writing of the designation.

3. Leave Prior to Birth or Adoption

Circumstances may require that FMLA leave begin before the actual date of birth of a child. An expectant mother may take FMLA leave before the birth of the child for prenatal care or if her condition makes her unable to work.

Likewise, employers covered by FMLA are required to grant FMLA leave prior to the actual placement or adoption of a child if an absence from work is required for the placement for adoption or foster care to proceed. For example, the employee may be required to attend counseling sessions, appear in court, consult with his or her attorney or the doctor(s) representing the birth parent, or submit to a physical examination. The source of an adopted child (e.g., whether from a licensed placement agency or otherwise) is not a factor in determining eligibility for leave for this purpose.

C. SERIOUS HEALTH CONDITION

To be eligible for a leave under the FMLA, the eligible employee must either have a serious health condition themselves or be caring for an eligible family member with a serious health condition. For purposes of FMLA, “serious health condition” entitling an employee to FMLA leave means an illness, injury, impairment, or physical or mental condition that involves any of the following.

1. Incapacity of Treatment with Inpatient Care

Any period of incapacity or treatment connected with inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical-care facility, and any period of incapacity or subsequent treatment in connection with such inpatient care is considered a serious medical condition.
2. Continuing Treatment

Continuing treatment by a health care provider is also considered a serious medical condition where the treatment includes any period of incapacity (i.e., inability to work, attend school or perform other regular daily activities) due to:

- A health condition lasting more than three consecutive days, and any subsequent treatment or period of incapacity relating to the same condition, that also includes: (1) treatment two or more times by or under the supervision of a health care provider; or (2) one treatment by a health care provider with a continuing regimen of treatment; or

- Pregnancy or prenatal care. A visit to the health care provider is not necessary for each absence; or

- A chronic serious health condition that continues over an extended period of time, requires periodic visits to a health care provider, and may involve occasional episodes of incapacity (e.g., asthma, diabetes). A visit to a health care provider is not necessary for each absence; or

- A permanent or long-term condition for which treatment may not be effective (e.g., Alzheimer's, a severe stroke, terminal cancer). Only supervision by a health care provider is required, rather than active treatment; or

- Any absences to receive multiple treatments for restorative surgery or for a condition which would likely result in a period of incapacity of more than three days if not treated (e.g., chemotherapy or radiation treatments for cancer).

3. Condition for Which There Is Ineffective Treatment

The term “serious health condition” also covers a period of incapacity which is permanent or long term due to a condition for which treatment may not be effective. The employee or family member must be under the continuing supervision of, but need not be receiving active treatment by, a health care provider. Examples include Alzheimer's, a severe stroke, or the terminal stages of a disease.

4. Absence Due To Multiple Treatments

Any period of absence to receive multiple treatments (including any period of recovery therefrom) by a health care provider or by a provider of health care services under orders of, or on referral by, a health care provider, either for restorative surgery after an accident or other injury, or for a condition that would likely result in a period of incapacity of more than three consecutive calendar days in the absence of medical intervention or treatment, such as cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), kidney disease (dialysis) is also considered a serious medical condition under the FMLA.

5. Substance Abuse

FMLA leave is available for treatment for substance abuse provided certain conditions are met. However, treatment for substance abuse does not prevent an employer from
taking employment action against an employee. The employer may not take action against the employee because the employee has exercised his or her right to take FMLA leave for treatment. However, if the employer has an established policy, applied in a non-discriminatory manner that has been communicated to all employees, that provides under certain circumstances an employee may be terminated for substance abuse, pursuant to that policy the employee may be terminated whether or not the employee is presently taking FMLA leave.

Remember that other state laws may apply. For example, under California law, certain employers must grant employees time off to enter an alcohol or drug rehabilitation program. California Labor Code § 1025 provides:

> Every private employer regularly employing 25 or more employees shall reasonably accommodate any employee who wishes to voluntarily enter and participate in an alcohol or drug rehabilitation program, provided that this reasonable accommodation does not impose an undue hardship on the employer.

The law does not prohibit employers from refusing to hire, or discharging an employee who, because of the employee's current use of alcohol or drugs, is unable to perform his or her duties, or cannot perform the duties in a manner which would not endanger his or her health or safety or the health or safety of others.

Labor Code § 1026 requires covered employers to make reasonable efforts to safeguard the privacy of an employee who enrolls in an alcohol or drug rehabilitation program, including the fact that they have enrolled in such a program. The California law does not require the employer to provide time off with pay, although an eligible employee may use sick leave to which he or she is entitled.

An employee may also take FMLA leave to care for an immediate family member who is receiving treatment for substance abuse. The employer may not take action against an employee who is providing care for an immediate family member receiving treatment for substance abuse.

6. Relationship to Workers' Compensation

In some cases, workers' compensation leave can count against an employee's FMLA leave entitlement. FMLA leave and workers' compensation leave can run together, provided the reason for the absence is due to a qualifying serious illness or injury and the employer properly notifies the employee in writing that the leave will be counted as FMLA leave.

7. Excluded Conditions

FMLA does not cover routine physical examinations, eye examinations, or dental examinations. In addition, a regimen of continuing treatment that includes the taking of over-the-counter medications such as aspirin, antihistamines, or salves; or bed-rest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave.
Conditions for which cosmetic treatments are administered (such as most treatments for acne or plastic surgery) are not “serious health conditions” unless inpatient hospital care is required or unless complications develop. Ordinarily, unless complications arise, the common cold, the flu, ear aches, upset stomach, minor ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave. Restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions provided all the other conditions of this regulation are met.

D. CARING FOR FAMILY MEMBERS’ SERIOUS HEALTH CONDITIONS

1. Eligible Family Members

Eligible employees are entitled to leave to care for an immediate family member with a serious health condition. Spouse means a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized.

Parent means a biological parent or an individual who stands or stood in loco parentis to an employee when the employee was a son or daughter. This term does not include parents “in law.”

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 age 18, or age 18 or older and “incapable of self-care because of a mental or physical disability.”

For purposes of confirmation of family relationship, the employer may require the employee giving notice of the need for leave to provide reasonable documentation or statement of family relationship. This documentation may take the form of a simple statement from the employee, or a child's birth certificate, a court document, etc. The employer is entitled to examine documentation such as a birth certificate, etc., but the employee is entitled to the return of the official document submitted for this purpose.

2. Caring for Member of Family

The medical certification provision that an employee is “needed to care for” a family member encompasses both physical and psychological care. It includes situations where, for example, because of a serious health condition, the family member is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport himself or herself to the doctor, etc. The term also includes providing

4 An employee's spouse, children (son or daughter), and parents are immediate family members for purposes of FMLA. The term "parent" does not include a parent "in-law." The terms son or daughter do not include individuals age 18 or over unless they are "incapable of self-care" because of a mental or physical disability that limits one or more of the "major life activities" as those terms are defined in regulations issued by the Equal Employment Opportunity Commission (EEOC) under the Americans With Disabilities Act (ADA).

5 Persons who are "in loco parentis" include those with day-to-day responsibilities to care for and financially support a child or, in the case of an employee, who had such responsibility for the employee when the employee was a child. A biological or legal relationship is not necessary.
psychological comfort and reassurance which would be beneficial to a child, spouse or parent with a serious health condition who is receiving inpatient or home care.

The term also includes situations where the employee may be needed to fill in for others who are caring for the family member, or to make arrangements for changes in care, such as transfer to a nursing home.

3. Incapable of Self-Care

“Incapable of self-care” means that the individual requires active assistance or supervision to provide daily self-care in three or more of the “activities of daily living” (ADLs) or “instrumental activities of daily living” (IADLs). Activities of daily living include adaptive activities such as caring appropriately for one’s grooming and hygiene, bathing, dressing and eating. Instrumental activities of daily living include cooking, cleaning, shopping, taking public transportation, paying bills, maintaining a residence, using telephones and directories, using a post office, etc.

E. INTERMITTENT LEAVE

Under some circumstances, employees may take FMLA leave intermittently — which means taking leave in blocks of time, or by reducing their normal weekly or daily work schedule.

If FMLA leave is for birth and care or placement for adoption or foster care, use of intermittent leave is subject to the employer's approval. In addition, FMLA leave may be taken intermittently whenever medically necessary to care for a seriously ill family member, or because the employee is seriously ill and unable to work.

When intermittent leave is needed to care for an immediate family member or the employee's own illness, and is for planned medical treatment, the employee must try to schedule treatment so as not to unduly disrupt the employer's operation.

F. CALCULATING 12 WEEKS

"Eligible" employees are entitled to 12 weeks of leave for certain family and medical reasons during a 12-month period. Employers may select one of four options for determining the 12-month period:

- The calendar year;

- Any fixed 12-month "leave year" such as a fiscal year, a year required by State law, or a year starting on the employee's "anniversary" date;

- The 12-month period measured forward from the date any employee's first FMLA leave begins; or

- A "rolling" 12-month period measured backward from the date an employee uses FMLA leave.
III. Employer Obligations and Enforcement

It is unlawful for any employer to interfere with, restrain, or deny the exercise of any right provided by FMLA. It is also unlawful for an employer to discharge or discriminate against any individual for opposing any practice, or because of involvement in any proceeding, related to FMLA.

The Wage and Hour Division investigates complaints. If violations cannot be satisfactorily resolved, the U.S. Department of Labor may bring action in court to compel compliance. Individuals may also bring a private civil action against an employer for violations.

A. MAINTENANCE OF HEALTH BENEFITS

A covered employer is required to maintain group health insurance coverage for an employee on FMLA leave whenever such insurance was provided before the leave was taken and on the same terms as if the employee had continued to work. If applicable, arrangements will need to be made for employees to pay their share of health insurance premiums while on leave. In some instances, the employer may recover premiums it paid to maintain health coverage for an employee who fails to return to work from FMLA leave.

B. JOB RESTORATION

Upon return from FMLA leave, an employee must be restored to the employee's original job, or to an equivalent job with equivalent pay, benefits, and other terms and conditions of employment.

In addition, an employee's use of FMLA leave cannot result in the loss of any employment benefit that the employee earned or was entitled to before using FMLA leave, nor be counted against the employee under a "no fault" attendance policy.

Under specified and limited circumstances where restoration to employment will cause substantial and grievous economic injury to its operations, an employer may refuse to reinstate certain highly-paid "key" employees after using FMLA leave during which health coverage was maintained. In order to do so, the employer must:

- Notify the employee of his/her status as a "key" employee in response to the employee's notice of intent to take FMLA leave;
- Notify the employee as soon as the employer decides it will deny job restoration, and explain the reasons for this decision;
- Offer the employee a reasonable opportunity to return to work from FMLA leave after giving this notice; and
- Make a final determination as to whether reinstatement will be denied at the end of the leave period if the employee then requests restoration.

A "key" employee is a salaried "eligible" employee who is among the highest paid ten percent of employees within 75 miles of the work site.
C. NOTICE AND CERTIFICATION

Employees seeking to use FMLA leave are required to provide 30-day advance notice of the need to take FMLA leave when the need is foreseeable and such notice is practicable. Employers may also require employees to provide:

- Medical certification supporting the need for leave due to a serious health condition affecting the employee or an immediate family member;
- Second or third medical opinions (at the employer's expense) and periodic recertification; and
- Periodic reports during FMLA leave regarding the employee's status and intent to return to work.

If an employer fails to tell employees that the leave is FMLA leave, the employer generally may not count the time they have already been off against the 12 weeks of FMLA leave. Remember, the employee must be notified in writing that an absence is being designated as FMLA leave. If the employer was not aware of the reason for the leave, leave may be designated as FMLA leave retroactively only while the leave is in progress or within two business days of the employee's return to work.

Covered employers must also post a notice approved by the Secretary of Labor explaining rights and responsibilities under FMLA. An employer that willfully violates this posting requirement may be subject to a fine of up to $100 for each separate offense.

Also, covered employers must inform employees of their rights and responsibilities under FMLA, including giving specific written information on what is required of the employee and what might happen in certain circumstances, such as if the employee fails to return to work after FMLA leave.

IV. Summary of New FMLA Regulations

The law firm of McGuire Woods sent out an email newsletter that provides an excellent summary of the new FMLA regulations. The editorial comments contained herein are not mine. This firm summarizes the regs as follows:

A. EFFECTIVE DATE

The new regulations take effect on January 16, 2009, which is sixty (60) days from the date they were published.

B. COVERAGE

- **Eligible Employees.** As before, an eligible employee is an employee of a covered employer who: (1) has been employed by the employer for at least twelve months, (2) has been employed for at least 1,250 hours of service during the twelve-month period immediately preceding the start of leave, and (3) is employed at a work site that has fifty or more employees within a seventy-five mile radius. Under the new regulations, if an employee has a break in service that lasts seven years or less, the employee's service prior to the break must be
counted when determining if the employee has been employed for at least twelve months. Moreover, employment periods preceding a break in service of more than seven years must also be counted when the break is caused by the fulfillment of National Guard or Reserve military service obligations or "a written agreement, including a collective bargaining agreement, exists concerning the employer's intention to re-hire the employee after the break."

- **Serious Health Condition.** Although the six individual definitions of a "serious health condition" remain with no significant revisions, additional guidance is provided as to three. With respect to conditions involving more than three consecutive, full calendar days of incapacity plus two or more treatment visits to a healthcare provider, the new regulations provide that the two visits must occur in-person within 30 days of the first day of incapacity (unless extenuating circumstances exist), and the first in-person visit must take place within 7 days of incapacity. With respect to serious health conditions involving three consecutive, full calendar days of incapacity plus a regimen of continuing treatment, the new regulations likewise require that the first visit to the healthcare provider take place in-person within 7 days of the first day of incapacity. In addition, serious health conditions involving "chronic conditions" must require at least two visits for treatment by a healthcare provider per year.

C. LEAVE ENTITLEMENT

- **Minimum Leave Increment.** Unfortunately, the new regulations do not provide any significant relief to employers struggling to address practical intermittent or reduced schedule FMLA leave problems. However, the new regulations make a slight change to the language involving the counting of intermittent or reduced schedule leave, such that an employer must account for leave "using an increment no greater than the shortest period of time that the employer uses to account for use of other forms of leave," provided it is not greater than one hour. By deleting the modifier "shortest period of time that the employer's payroll system uses," this allows employers to calculate intermittent and reduced schedule leave on the same basis as that calculated for other employee absences (i.e., regardless of lesser potential increments that a payroll system might be able to count).

- **Minimal Leave Increment Exception.** Where it is "physically impossible" for an employee on intermittent or reduced schedule leave to start or end work mid-way through a shift, the entire shift may be designated and counted as FMLA leave. This exception, however, appears to be narrow, with the DOL citing examples "such as where a flight attendant or a railroad conductor is scheduled to work aboard an airplane or train, or a laboratory employee is unable to enter or leave a sealed clean room."

- **Compliance With Employer Policy.** Under the new regulations, an employer may require an employee to comply with the employer's "usual and customary notice and procedural requirements for requesting leave, absent unusual circumstances" (e.g., leave requests directed to a particular individual).
• **Concurrent Use of Paid Leave.** Prior to amendment, the current FMLA regulations applied different rules to the concurrent use of paid vacation and personal leave versus sick leave. However, according to the DOL, under the new regulations, "all forms of paid leave offered by an employer will be treated the same, regardless of the type of leave substituted (including generic paid time off)."

• **Light Duty Work.** One of the more significant changes in the new regulations involves the treatment of employees placed on light duty work. As before, if a healthcare provider treating an employee for a workers' compensation injury certifies that the employee is able to return to light duty work but is unable to return to the same or an equivalent position that the employee left, the employee may decline the employer's light duty offer and continue on FMLA leave until his or her leave entitlement is exhausted. However, consistent with the DOL's prior Wage and Hour Opinion Letter FMLA-55 (Mar. 10, 1995), under the new regulations, if an employee accepts such light duty work, the time spent performing such duties does not count against an employee's FMLA leave entitlement. Further, according to the DOL, an employee's right to job restoration to his or her original position is "effectively held in abeyance" during the period of time that the employee works in the light duty role. However, the right to job restoration in such circumstances "ceases at the end of the applicable twelve-month FMLA leave year" used by the employer to calculate leave. In short, according to the DOL, "if an employee is voluntarily performing a light duty assignment, the employee is not on FMLA leave" but may have FMLA job restoration protection (in some cases well beyond the normal twelve-week period from the employee's original FMLA leave date).

• **Overtime.** In response to employer concerns, if an employee would normally be required to work overtime but is unable to do so because of FMLA-qualifying reasons, "the hours which the employee would have been required to work may be counted against the employee's FMLA entitlement" (i.e., counted as intermittent or reduced schedule leave, as applicable). However, an employee's inability to perform voluntary overtime hours may not be counted against an employee's FMLA leave entitlement.

D. EMPLOYER NOTICE OBLIGATIONS

According to the DOL, the new regulations consolidate all FMLA employer notice requirements "into a one-stop section of the regulations." These notice requirements are divided into four categories.

• **General Notice.** As before, covered employers are required to post a notice explaining the FMLA's provisions and providing information concerning procedures for filing complaints. However, the new regulations state that electronic posting is sufficient, provided employees and applicants can access such materials. In addition, the new regulations clarify that general notice must be supplied to employees in employee handbooks or other written guidance if such materials exist or "by distributing a copy of the general notice to each new employee upon hiring."
Eligibility Notice. Under the new regulations, when an employee requests FMLA leave or the employer acquires knowledge that an employee's absence may be for an FMLA-qualifying reason, "the employer must notify the employee of the employee's eligibility to take FMLA leave within five (5) business days, absent extenuating circumstances." If the employee is ineligible, "the notice must state at least one reason why." Once such eligibility is confirmed, "all FMLA absences for the same qualifying reason are considered a single leave," and the employee's eligibility for that reason continues and "does not change during the applicable twelve-month period."

Rights and Responsibilities Notice. In addition to the eligibility notice discussed above, employers must also provide written notice to an employee "each time the eligibility notice is provided" regarding specific FMLA expectations and obligations and the consequences for failure to meet the same. This notice may be accompanied by the applicable FMLA medical certification form, if required by an employer for FMLA leave authorization.

Designation Notice. Lastly, if requested FMLA leave is approved, employers are further required to provide notice to employees "designating leave as FMLA-qualifying." Such notice must be provided within five (5) business days after an employer "has enough information to determine whether leave is being taken for a FMLA-qualifying reason," absent extenuating circumstances. Thus, unlike the current regulations that require "provisional" FMLA leave designations in some circumstances, employers may now delay final leave designation until a required medical certification form has been returned.

E. EMPLOYEE NOTICE OBLIGATIONS

Foreseeable Leave. As before, employees must provide employers with at least thirty (30) days advance notice before FMLA is to begin if the need for leave is foreseeable. For cases where such notice is not practicable (e.g., because of lack of knowledge of approximately when leave will begin), notice must be given "as soon as practicable." According to the DOL, it should be "practicable" to provide notice "either the same day or the next business day" of when the employee becomes aware of the need for foreseeable leave less than thirty (30) days in advance.

Unforeseeable Leave. When the need for leave is unforeseeable, as before, employees must provide notice to the employer "as soon as practicable." However, the new regulations clarify that "it generally should be practicable for the employee to provide notice of leave that is unforeseeable within the time prescribed by the employer's usual and customary notice requirements applicable to such leave" (e.g., calling in to a specified number or contact individual).

Notice Content. Under the new regulations, for foreseeable leave, employees must provide sufficient information for an employer to be "aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave." For unforeseeable leave, employees must provide "sufficient information for an employer to reasonably determine whether the FMLA will apply to the leave request." As before, when seeking leave for the first time for a
FMLA-qualifying reason, employees need not expressly assert or reference their rights under the FMLA. However, the regulations clarify that employees seeking leave due to a qualifying reason for which the employer has granted FMLA leave to the employee in the past "must specifically reference either the qualifying reason for leave or the need for FMLA leave." (Emphasis added). The new regulations further provide that "calling in 'sick' without providing more information will not be considered sufficient notice to trigger an employer's obligations under the Act."

F. MEDICAL CERTIFICATION

- **Timing.** Under the new regulations, employers now have 5 (versus 2) days after the employee gives notice of the need for leave (or the date that leave begins in the event of unforeseeable leave) to request that an employee furnish medical certification.

- **Separate Employee and Family Member Forms.** Employers will recall that the current medical certification form recommended by the DOL is confusing, given that it is designed for leave involving both an employee's own serious health condition and that of an employee's family member. With the new regulations, the DOL includes two separate medical certification forms – one for an employee's own serious health condition, and one for that of a family member.

- **Incomplete / Vague Certification.** If an employer receives an incomplete or "vague, ambiguous or non-responsive" medical certification, the employer must provide the employee seven (7) calendar days to cure any deficiency (unless "not practicable under the particular circumstances despite the employee's diligent good faith efforts"). If the deficiencies specified by the employer are not cured within the time frame required, FMLA leave may be denied. Moreover, according to the DOL in a government-speak acknowledgment of the obvious, a certification that is not returned is not considered incomplete or insufficient, but "constitutes a failure to provide certification."

- **Healthcare Provider Follow-Up.** A significant change in the new regulations provides that employer representatives may contact a healthcare provider directly for purposes of clarification and authentication of medical certification forms after giving an employee the opportunity to cure any deficiencies. Such contact must be made using a healthcare provider, a human resources professional, a leave administrator or some other management official of the employer. However, the regulations further provide that "under no circumstances" may an employee's "direct supervisor" contact the healthcare provider.

- **Extended / Chronic Conditions.** Where a serious health condition (for an employee's own condition or that of a family member) lasts beyond a single leave year, employers may now require employees to provide a new medical certification each subsequent leave year.
• **ADA / Workers’ Compensation Data.** In a helpful clarification designed to address concern for HIPAA privacy rules, the new regulations state that employers may consider information provided by employees and their healthcare providers in connection with Americans With Disabilities Act (ADA) disability or reasonable accommodation requests and/or workers’ compensation claims. Such information may be used to evaluate medical certifications provided and determine an employee's entitlement to FMLA-qualifying leave.

G. FITNESS FOR DUTY CERTIFICATION

• **Essential Job Functions.** In a change from current regulations, the new regulations allow employers to "require that the [fitness for duty] certifications specifically address the employee's ability to perform the essential functions of the employee's job."

• **Job Safety Exception.** Unfortunately, the current prohibition remains against employers requesting fitness to return to duty certificates for employees on intermittent or reduced leave schedules. However, under the new regulations, employers may request a fitness to return to duty certificate for such absences up to once every 30 days "if reasonable safety concerns exist regarding the employee's ability to perform his or her duties, based on the serious health condition for which the employee took such leave."

H. RETALIATION / ENFORCEMENT

• **Achievement and Incentive Awards.** As before, the new regulations provide that with some limited exceptions, employees have a right to reinstatement to the same or an equivalent position that the employee held when leave began upon return from authorized FMLA leave. This includes the right to the same or equivalent pay, benefits and working conditions. However, the new regulations provide that if an employer award or other payment is based on the achievement of a specified goal such as hours worked, products sold or perfect attendance which the employee has not met due to FMLA leave, "then the payment may be denied, unless otherwise paid to employees on an equivalent leave status for a reason that does not qualify as FMLA leave."

• **Liability Waivers.** In a significant departure from a prior 4th Circuit court ruling, the new regulations provide that employees may voluntarily settle or release any actual or potential FMLA claims against an employer without the requirement of court or DOL approval. However, prospective waivers of FMLA rights continue to be prohibited.

I. MILITARY FAMILY LEAVE

• **Military Caregiver Leave.** Under the new regulations, eligible employees who are family members of covered service members are able to take up to 26 workweeks of leave in a "single twelve-month period" to care for a covered service member who: (1) is on the temporary disability retired list; (2) has a serious injury or illness "incurred in the line of duty on active duty" for which he or she is undergoing medical treatment, recuperation or therapy; or (3) is otherwise on outpatient status. For purposes of calculating leave entitlement, the regulation
provides that the single twelve-month period "begins on the first day the eligible employee takes FMLA leave to care for a covered service member," regardless of the method used by the employer to determine the employee's twelve workweeks of leave entitlement for other FMLA-qualifying reasons.

• Qualifying Exigency Leave. The new regulations also address the second type of new military family leave entitlement. Specifically, the regulations provide the normal twelve workweeks of FMLA job-protected leave to eligible employees with a covered military member serving in the National Guard or Reserves to use for any "qualifying exigency" arising out of the fact that such member is on active duty or called to active duty status. The regulations define "qualifying exigencies" to include the following eight items (with various caveats): (1) short-notice deployment; (2) military events and related activities; (3) childcare and school activities; (4) financial and legal arrangements; (5) counseling; (6) rest and recuperation; (7) post-deployment activities; and (8) "additional activities" not addressed in the other categories, provided that both the employer and the employee agree to the timing and duration of such leave.
CHAPTER 3 – REVIEW QUESTIONS

The following questions are designed to ensure that you have a complete understanding of the information presented in the assignment. They do not need to be submitted in order to receive CPE credit. They are included as an additional tool to enhance your learning experience.

We recommend that you answer each review question and then compare your response to the suggested solution before answering the final exam questions related to this assignment.

1. What is the maximum amount of leave mandated by the Family and Medical Leave Act annually:
   a) 4 weeks
   b) 8 weeks
   c) 12 weeks
   d) 16 weeks

2. The Family and Medical Leave Act does not apply to public agencies or local school districts.
   a) true
   b) false

3. Which of the following is not one of the requirements for eligibility for a family or medical leave under the FMLA:
   a) that the employee be in a management or supervisorial position
   b) that the employee have worked for the employer for at least one year
   c) that the employer have at least 50 employees at the worksite
   d) both a and c above

4. An FMLA leave may be taken in which of the following circumstances:
   a) to care for a child with leukemia
   b) for a severe hangover
   c) to care for a friend with pneumonia
   d) both a and c above

5. Which of the following would not be considered a “serious health condition” making one eligible for a family or medical leave:
   a) pregnancy
   b) a severe migraine headache
   c) reconstructive back surgery requiring inpatient rehabilitation
   d) both a and b above
6. FMLA leave is **not** available for treatment for substance abuse.
   
a) true  
b) false  

7. The Family and Medical Leave Act does **not** cover routine medical examinations.
   
a) true  
b) false  

8. Intermittent leave is **not** permitted under the FMLA.
   
a) true  
b) false  

9. How much notice must an employee provide their employer when requesting a family or medical leave:
   
a) at least 10 days, regardless of the circumstances  
b) as long as practically possible under the circumstances  
c) only 24 hours notice is required  
d) at least 30 days unless not practicable under the circumstances
CHAPTER 3 – SOLUTIONS AND SUGGESTED RESPONSES

1. A: Incorrect. The Family and Medical Leave Act requires employers to provide eligible employees with a maximum amount of unpaid leave annually for certain qualifying conditions. The actual length of permitted leave is longer.

   B: Incorrect. The Family and Medical Leave Act requires employers to provide eligible employees with a maximum amount of unpaid leave annually for certain qualifying conditions. The actual length of permitted leave is longer.

   C: Correct. Eligible employees are entitled to a maximum of 12 weeks of unpaid leave per year.

   D: Incorrect. The actual period is only 12 weeks.

   (See page 3-1 of course material.)

2. A: True is incorrect. The law covers private as well as public sector employers.

   B: False is correct. The Family and Medical Leave Act applies to public agencies, including state, local and federal employers, local education agencies (schools), as well as private-sector employers with a minimum number of employees.

   (See page 3-2 of course material.)

3. A: Correct. The eligibility requirements deal with longevity of service and the size of the employer. They have nothing to do with the job title of the employee.

   B: Incorrect. This is one of the requirements for eligibility under the FMLA.

   C: Incorrect. This is required under the FMLA. The employee count is based on the site of the employee seeking leave and the surrounding 75 miles.

   D: Incorrect. Because B and C are requirements of the FMLA, D cannot be the correct answer.

   (See page 3-4 of course material.)
4. **A: Correct.** Caring for a seriously ill child is one of the situations that allows for a leave under the FMLA.

   B: Incorrect. Care of oneself can permit a FMLA leave, but the condition must be serious. This is obviously a temporary and non serious condition.

   C: Incorrect. Care of a friend is not covered under the FMLA. It must be a family member.

   D: Incorrect. Because C is not correct, this answer cannot be correct.

   (See pages 3-5 to 3-6 of course material.)

5. A: Incorrect. Pregnancy and conditions related thereto is expressly covered as a condition allowing for family and medical leave.

   **B: Correct.** A migraine headache, unless it results in incapacitation over a long period of time (beyond a day or two of missed work), will not render one eligible for family or medical leave.

   C: Incorrect. This is the type of inpatient treatment that clearly qualifies as a serious medical condition for purposes of the Family and Medical Leave Act.

   D: Incorrect. Because pregnancy is a covered condition, D cannot be correct.

   (See page 3-7 of course material.)

6. A: True is incorrect. Leave for substance abuse treatment is allowed under certain circumstances.

   **B: False is correct.** FMLA leave is available for treatment for substance abuse provided certain conditions are met. However, treatment for substance abuse does not prevent an employer from taking employment action against an employee. The employer may not take action against the employee because the employee has exercised his or her right to take FMLA leave for treatment.

   (See page 3-8 of course material.)

7. **A: True is correct.** The FMLA does not cover routine physical examinations, eye examinations, or dental examinations.

   B: False is incorrect. Other excluded conditions include most cosmetic treatment, colds, headaches other than migraines, and routine dental care.

   (See page 3-9 of course material.)
8. A: True is incorrect. Intermittent leave is allowed under some circumstances.

**B: False is correct.** Under some circumstances, employees may take FMLA leave intermittently. If, for example, FMLA leave is for birth and care or placement for adoption or foster care, use of intermittent leave is subject to the employer's approval. In addition, FMLA leave may be taken intermittently whenever medically necessary to care for a seriously ill family member, or because the employee is seriously ill and unable to work.

(See page 3-11 of course material.)

9. A: Incorrect. Employees must generally provide 30 days notice in advance of a family or medical leave.

B: Incorrect. No more than 30 days notice is required, regardless of the circumstances.

C: Incorrect. Unless impracticable to provide more, generally 30 days notice is mandated under the law.

**D: Correct.** Unless the situation is unusual, such as a sudden car accident, employees must provide their employer with 30 days advance notice of their intent to take a family or medical leave.

(See page 3-13 of course material.)
Chapter 4: EEO Laws – An Overview

I. Overview of the EEOC and EEO Laws

A. THE EEOC

The Equal Employment Opportunity Commission (EEOC) is an independent federal agency originally created by Congress in 1964 to enforce Title VII of the Civil Rights Act of 1964. The EEOC is composed of five Commissioners and a General Counsel appointed by the President and confirmed by the Senate. Commissioners are appointed for five-year staggered terms; the General Counsel's term is four years. The President designates a Chair and a Vice-Chair. The Chair is the chief executive officer of the Commission. The Commission has authority to establish equal employment policy and to approve litigation. The General Counsel is responsible for conducting litigation. The EEOC carries out its enforcement, education and technical assistance activities through 50 field offices serving every part of the nation.

B. MAJOR LAWS

Laws prohibiting discrimination in employment are frequently referred to as Equal Employment Opportunity (EEO) Laws. The federal EEO laws prohibiting job discrimination are:

- Title VII of the Civil Rights Act of 1964 (Title VII), which prohibits employment discrimination based on race, color, religion, sex, or national origin;
- The Equal Pay Act of 1963 (EPA), which protects men and women who perform substantially equal work in the same establishment from sex-based wage discrimination;
- The Age Discrimination in Employment Act of 1976 (ADEA), which protects individuals who are 40 years of age or older;
- Title I and Title V of the Americans with Disabilities Act of 1990 (ADA), which prohibit employment discrimination against qualified individuals with disabilities in the private sector, and in state and local governments;
- Sections 501 and 505 of the Rehabilitation Act of 1973, which prohibit discrimination against qualified individuals with disabilities who work in the federal government; and
- The Civil Rights Act of 1992, which, among other things, provides monetary damages in cases of intentional employment discrimination.

The U.S. Equal Employment Opportunity Commission (EEOC) enforces all of these laws. EEOC also provides oversight and coordination of all federal equal employment opportunity regulations, practices, and policies.
Other federal laws, not enforced by EEOC, also prohibit discrimination and reprisal against federal employees and applicants. The Civil Service Reform Act of 1978 (CSRA) contains a number of prohibitions, known as prohibited personnel practices, which are designed to promote overall fairness in federal personnel actions. The CSRA prohibits any employee who has authority to take certain personnel actions from discriminating for or against employees or applicants for employment on the bases of race, color, national origin, religion, sex, age or disability. It also provides that certain personnel actions cannot be based on attributes or conduct that do not adversely affect employee performance, such as marital status and political affiliation. The Office of Personnel Management (OPM) has interpreted the prohibition of discrimination based on conduct to include discrimination based on sexual orientation. The CSRA also prohibits reprisal against federal employees or applicants for whistle-blowing, or for exercising an appeal, complaint, or grievance right. The CSRA is enforced by both the Office of Special Counsel (OSC) and the Merit Systems Protection Board (MSPB).

Table 4-1. Major Federal EEO Acts

<table>
<thead>
<tr>
<th>EEO Law</th>
<th>Protections</th>
<th>Covered Employers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Title VII of the Civil Rights Act of 1964</td>
<td>Prohibits discrimination in employment based on an individual’s race, color, national origin, sex or religion.</td>
<td>Employers with 15 or more employees.</td>
</tr>
<tr>
<td>Age Discrimination in Employment Act of 1964</td>
<td>Prohibits discrimination based on age against persons 40 years or older.</td>
<td>Employers with 20 or more employees.</td>
</tr>
<tr>
<td>Americans with Disabilities Act</td>
<td>Prohibits discrimination in employment against qualified individuals with a covered disability.</td>
<td>Employers with 15 or more employees.</td>
</tr>
<tr>
<td>Equal Pay Act of 1963</td>
<td>Prohibits wage discrimination between men and women in substantially equal jobs within the same establishment.</td>
<td>The EPA applies to most employers with one or more employees.</td>
</tr>
</tbody>
</table>

C. COVERAGE OF ACTS

1. Title VII of the Civil Rights Act of 1964

Title VII prohibits race, color, religion, sex, and national origin discrimination. Title VII applies to employers with 15 or more employees.

2. Age Discrimination in Employment Act of 1967

The Age Discrimination in Employment Act (ADEA) prohibits age discrimination against individuals who are forty (40) years of age or older. The ADEA applies to employers with 20 or more employees.
3. **Americans with Disabilities Act of 1990**

Title I of the Americans with Disabilities Act (ADA) prohibits employment discrimination against qualified individuals with disabilities. The ADA applies to employers with 15 or more employees.

4. **Equal Pay Act of 1963**

The Equal Pay Act (EPA) prohibits wage discrimination between men and women in substantially equal jobs within the same establishment. The EPA applies to most employers with one or more employees. EPA coverage is extremely broad. The EPA applies to employers "engaged in commerce or in the production of goods for commerce" with an annual gross volume of sales or business done of at least $500,000. Health and educational institutions and government agencies are covered by the EPA, regardless of size. There are a few narrow exemptions for employees in certain professions.

These laws prohibit employment discrimination based on race, color, sex, religion, national origin, age, disability, and prohibit retaliation for opposing job discrimination, filing a charge, or participating in proceedings under these laws.

5. **Discriminatory Practices Prohibited by EEO Laws**

Under Title VII, the ADA, and the ADEA, it is illegal to discriminate in any aspect of employment, including:

- Hiring and firing;
- Compensation, assignment, or classification of employees;
- Transfer, promotion, layoff, or recall;
- Job advertisements;
- Recruitment;
- Testing;
- Use of company facilities;
- Training and apprenticeship programs;
- Fringe benefits;
- Pay, retirement plans, and disability leave; or
- Other terms and conditions of employment.
Discriminatory practices under these laws also include:

- Harassment on the basis of race, color, religion, sex, national origin, disability, or age;
- Retaliation against an individual for filing a charge of discrimination, participating in an investigation, or opposing discriminatory practices;
- Employment decisions based on stereotypes or assumptions about the abilities, traits, or performance of individuals of a certain sex, race, age, religion, or ethnic group, or individuals with disabilities; and
- Denying employment opportunities to a person because of marriage to, or association with, an individual of a particular race, religion, national origin, or an individual with a disability.
- Title VII also prohibits discrimination because of participation in schools or places of worship associated with a particular racial, ethnic, or religious group.

Employers are required to post notices to all employees advising them of their rights under the laws EEOC enforces and their right to be free from retaliation. Such notices must be accessible, as needed, to persons with visual or other disabilities that affect reading.

D. COUNTING EMPLOYEES

Smaller employers commonly ask how to determine if their business is covered by EEO laws outlined above. Application of these laws is triggered by the firm’s number of employees. Under federal law, all employees, including part-time and temporary workers, are counted for purposes of determining whether an employer has a sufficient number of employees.

"Employers" include private sector and state and local government entities. An employer is covered under Title VII or the ADA if it has 15 or more employees for each working day in each of 20 or more calendar weeks in the same calendar year as, or in the calendar year prior to when, the alleged discrimination occurred. The requirements for coverage of a private sector employer under the ADEA are the same, except that it must have 20 or more employees. A state or local government employer is covered under the ADEA regardless of its number of employees.

In determining whether the 20-week requirement is met, only calendar weeks when the employer had the requisite number of employees for each workday of that week are counted. However, the 20 weeks need not be consecutive. In addition, an employee who started or ended employment during the middle of a calendar week is counted as an employee on the days when s/he had an employment relationship with the employer.

The employer is not required to have the statutory number of employees at the time of the alleged violation or before it, as long as the requirement is met by the end of the calendar year in which the discrimination occurred. For example, a newly formed company may have been in operation for only a short period at the time that a disputed
action transpired. However, it would be covered if it met the 20-week requirement during the remainder of the same calendar year.

Example.

Angie filed a charge with the EEOC alleging that she was not hired by an accounting firm because of her sex and age on March 1, 2000. A review of the firm’s personnel records reveals the following:

January 1 – April 1, 2000: 14 employees

April 2 – August 1, 2000: 21 employees

August 2 – November 1, 2000: 14 employees

November 2 – December 21, 2000: 19 employees

These records show that the firm had 15 or more employees for at least 20 calendar weeks during 2000, the year during which the alleged discrimination occurred. Therefore, it is a covered employer under Title VII. However, it is not covered by the ADEA because it did not have 20 or more employees for at least 20 weeks.

An employee is someone with whom the employer has an employment relationship. The existence of an employment relationship is most easily shown by a person's appearance on the employer's payroll, but this alone does not necessarily answer the question. Determining whether an employer has enough employees to be covered by these laws is, ultimately, a legal question.

The Supreme Court has held that the "ultimate touchstone" in determining whether an employer has a sufficient number of employees to satisfy the jurisdictional prerequisite for coverage under Title VII of the Civil Rights Act of 1964 is "whether an employer has employment relationships with 15 or more individuals for each working day in 20 or more weeks during the year in question."1 The Court adopted the EEOC's position that employees should be counted whether or not they are actually performing work for or being paid by the employer on any particular day.

In its decision, the Supreme Court interpreted the relevant provisions of Title VII, which defines a covered employer as one who "has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year." The EEOC has interpreted this provision to include employers who have an employment relationship with 15 or more employees for the relevant days, regardless of the daily work schedules of the individual employees.

The method the Supreme Court adopted is often called the "payroll method" because "the employment relationship is most readily demonstrated by the individual's appearance on the employer's payroll." However, the Court stressed that "what is ultimately critical is the existence of an employment relationship, not appearance on the

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payroll." The Court upheld the EEOC's interpretation, reasoning that "an employer 'has' an employee if he maintains an employment relationship with that individual" on the day in question.

The Supreme Court held that "all one needs to know about a given employee for a given year is whether the employee started or ended employment during the year and, if so, when. He is counted as an employee for each working day after arrival and before departure." The phrase "for each working day" means simply that an employee is counted as an employee for each working day starting on the day that the employment relationship begins and ending on the last day of the employment relationship.

Records used to determine whether an employer meets the threshold include the following:

- Payroll records and employment contracts relating to relevant workers for the year of and the year preceding the alleged adverse employment action. This includes contracts that involve workers provided by temporary employment agencies, contract firms, and other types of staffing firms. For example, it includes maintenance workers and security personnel assigned by a contract firm and temporary clerical personnel assigned by a temporary employment agency; and

- Personnel, payroll and/or contract documents that reflect the dates that the disputed workers began and/or ended their employment relationship with the employer.

E. DETERMINING “EMPLOYEE” STATUS

1. Independent Contractors Excluded

Independent contractors are not counted as employees. Determining whether an individual is, under the law, an independent contractor, also is a legal question that may not be as easy to answer as you might think.

Example.

The accounting firm of Jackson & Jackson has fourteen employees. It has recently installed a new computer system in its office. The firm contracted with an expert computer technician (worker) to perform a myriad of duties relating to the installation of, and training on, the new system. The worker's contract will expire in six months. The firm alleges that this worker is an independent contractor, and not an employee. The firm does not supervise the worker or control the details of how she performs her job. The worker is engaged in a distinct occupation which requires special knowledge and expertise. The contract, and thus the relationship with the firm, will end at a specified time. The worker is not paid by the hour, but paid to complete the specific job. In this case, the worker would be found to be an independent contractor and not counted as an employee.
A more detailed discussion of how to distinguish an independent contractor from an employee can be found in Chapter 14.

2. Joint Employers

The term "joint employer" refers to two or more employers that are unrelated or that are not sufficiently related to qualify as an integrated enterprise, but that each exercise sufficient control of an individual to qualify as his/her employer. The "joint employer" issue frequently arises in cases involving temporary staffing agencies. A charge must be filed against each employer to pursue a claim against that employer.

To determine whether an employer is covered, count the number of individuals employed by the respondent alone and the employees jointly employed by the respondent and other entities. If an individual is jointly employed by two or more employers, then s/he is counted for coverage purposes for each employer with which s/he has an employment relationship.

If a charge is filed by a contract worker who is jointly employed by a private-sector employer and a federal agency, s/he should be notified that a claim against the federal agency must be filed with the agency's EEO office.

Example.

A temporary employment agency hires, pays, and assigns legal secretaries to an accounting firm. The firm supervises, establishes work schedules, and assigns duties to the secretaries. If the firm is dissatisfied with any secretary, it can require the agency to remove him/her. In this case, the agency and the firm exercise sufficient control over the secretaries to both be deemed their employer. The secretaries are counted as employees of both the firm and the agency.

3. Integrated Enterprises

If an employer does not have the minimum number of employees to meet the statutory requirement, it is still covered if it is part of an "integrated enterprise" that, overall, meets the requirement. An integrated enterprise is one in which the operations of two or more employers are considered so intertwined that they can be considered the single employer of the charging party. The separate entities that form an integrated enterprise are treated as a single employer for purposes of both coverage and liability. If a charge is filed against one of the entities, relief can be obtained from any of the entities that form part of the integrated enterprise. The factors to be considered in determining whether separate entities should be treated as an integrated enterprise are:

- The degree of interrelation between the operations:
  - Sharing of management services such as check writing, preparation of mutual policy manuals, contract negotiations, and completion of business licenses;
  - Sharing of payroll and insurance programs;
• Sharing of services of managers and personnel;
• Sharing use of office space, equipment, and storage; and
• Operating the entities as a single unit.

☑ The degree to which the entities share common management:

• Whether the same individuals manage or supervise the different entities; and
• Whether the entities have common officers and boards of directors.

☑ Centralized control of labor relations:

• Whether there is a centralized source of authority for development of personnel policy;
• Whether one entity maintains personnel records and screens and tests applicants for employment;
• Whether the entities share a personnel (human resources) department and whether inter-company transfers and promotions of personnel are common; and
• Whether the same persons make the employment decisions for both entities.

☑ The degree of common ownership or financial control over the entities:

• Whether the same person or persons own or control the different entities;
• Whether the same persons serve as officers and/or directors of the different entities; and
• Whether one company owns the majority or all of the shares of the other company.

The purpose of these factors is to establish the degree of control exercised by one entity over the operation of another entity. All of the factors should be considered in assessing whether separate entities constitute an integrated enterprise, but it is not necessary that all factors be present, nor is the presence of any single factor determinative. The primary focus should be on centralized control of labor relations. It should be noted that while this issue often arises where there is a parent-subsidiary relationship, a parent-subsidiary relationship is not required for two companies to be considered an integrated enterprise.
Example.

*Linda applies for a position with ABC Corp., is rejected, and files a charge with the EEOC alleging sex and age discrimination. ABC Corp. is a computer training center. Jane Smith is its president and sole proprietor. She is also the president and sole proprietor of three other computer training centers, and of Computer Training, Inc. (CTI), which manages ABC Corp. and the three other centers. Smith is personally involved in the management of each of these companies and makes personnel decisions for the training centers in her capacity as president of CTI and as president of the individual centers. CTI pays the bills for each of the training centers, handles payroll, and negotiates contracts for the centers.*

*CTI created a personnel handbook for use by each of the training centers. The profits of the individual training centers are pooled into one bank account in the name of CTI, which maintains a centralized management account allowing the profits of more successful training centers to cover the losses of less successful ones. Under these circumstances, ABC, CTI, and the other training centers are an integrated enterprise, and should be considered a single employer for purposes of coverage and liability under the EEO statutes.*

4. Employment Agencies

An entity is a covered employment agency if it regularly procures employees for at least one covered employer, whether or not it receives compensation for those services. An employment agency that regularly procures employees for at least one covered employer is covered with respect to all of its employee procurement and referral activities, including its referrals to a non-covered employer. Coverage extends to agents of such an employment agency. An employee of a covered employment agency may file a charge against the agency as his/her employer even if it does not have the requisite number of employees for employer coverage under the relevant EEO statute.

*Example.*

*Gabi files a charge alleging that she was not referred by Respondent, an employment agency, for a position with ABC Corp., which has 17 employees, because of her age. Respondent also regularly procures employees for XYZ Corp., which has over 50 employees. Although ABC is not a covered employer under the ADEA, Respondent also regularly procures employees for XYZ, which is a covered employer. Therefore, Respondent is a covered employment agency, and is prohibited from discriminating in any of its referral and procurement activities, including those conducted with ABC, a non-covered employer.*

5. Labor Organizations

A labor organization is covered under Title VII, the ADEA, and the ADA if it meets one of the following two tests:
- It represents the employees of an employer; and it has 15 or more members (25 or more under the ADEA) or maintains a hiring hall that procures employees for at least one covered employer; or
- It is engaged in an industry affecting commerce.

This latter basis for union coverage will generally bring a union representing federal employees under the EEO statutes. A labor organization is covered under the EPA if it represents the employees of at least one covered employer.

Most labor organizations, including those representing federal employees, are covered under at least one of the above definitions of "labor organization." Where coverage is disputed and cannot be easily assessed, the investigator should contact the legal unit. Agents of labor organizations may also be covered.

6. Partners, Officers, Members of Boards of Directors, and Major Shareholders

In most circumstances, individuals who are partners, officers, members of boards of directors, or major shareholders will not qualify as employees. An individual's title, however, does not determine whether the individual is a partner, officer, member of a board of directors, or major shareholder, as opposed to an employee. The investigator should determine whether the individual acts independently and participates in managing the organization, or whether the individual is subject to the organization's control. If the individual is subject to the organization's control, s/he is an employee. The following factors should be considered:

- Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work;
- Whether and, if so, to what extent the organization supervises the individual's work;
- Whether the individual reports to someone higher in the organization;
- Whether and, if so, to what extent the individual is able to influence the organization;
- Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts; and
- Whether the individual shares in the profits, losses, and liabilities of the organization.

**Example 1.**

*Jack works for an accounting firm and has the title of partner. The firm pays Jack a salary, and Jack is supervised by an individual at a higher level. Jack receives a share of the firm’s profits in addition to his salary, but he does not have any input into decisions made by the firm, which are made by higher-level partners. While Jack has the title of partner, he is in fact an employee.*
Example 2.

Kathy is an officer with her employer, a small corporation. She is the head of one of the corporation’s divisions and has no supervisor, although her actions are reviewed by the board of directors. She does not draw a salary, but receives a share of the profits made by the employer. Kathy has the right to vote on decisions taken by her employer, although her vote does not count as much as those of other individuals. Kathy is not an employee, and therefore is not protected by the EEO statutes.

F. LIABILITY FOR ACTIONS TAKEN BY AGENTS

A covered entity is as liable for the actions of its agents as it would be for actions taken by itself. An agent is an individual or entity having the authority to act on behalf of, or at the direction of, the covered entity. Examples of agents include:

- Supervisors;
- Union officials;
- Insurance providers or benefits administrators; and
- Pension plan administrators.

1. Liability of Agents

An entity that is an agent of a covered entity is liable for the discriminatory actions it takes on behalf of the covered entity. For example, an insurance company that provides discriminatory benefits to the employees of a law firm may be liable under the EEO statutes as the law firm's agent.

Most of the federal appeals courts have held that supervisors may not be held individually liable for discrimination because they do not meet the definition of the term "employer." If a charge is filed against an individual supervisor, the investigator should consult the legal unit. The investigator should also consult with the legal unit regarding potential charges against state officials for injunctive relief. Of course, a sole proprietor who employs at least 15 or 20 employees (depending upon the applicable statute) would be liable as a covered "employer."

2. Successor Liability

A business that acquires another may be subject to liability under the EEO statutes for discrimination that was committed by the entity that it succeeded, even if the successor is not named in the charge. Whether the successor should be held liable for the discriminatory acts of its predecessors must be determined on a case-by-case basis, and requires a balancing of the interests of the employer and the employee. The following factors should be considered:
Whether the successor entity had notice of the charge;

Whether the predecessor can provide relief;

Whether the same business operations have continuously been in place:

- Whether the successor used the same plant, workforce, management, and/or equipment and means of production as the predecessor;
- Whether the same jobs exist under substantially the same working conditions; and
- Whether the successor produces the same product.

Generally, the successor can only be held liable if it had notice of the charge and the predecessor is unable to provide relief. The third factor, continuity of business operations, requires a weighing of the criteria listed above.

**Example.**

*CP alleges that Respondent discharged him from his position as a salesman based on his national origin. Respondent sells its sales operations to ABC Corporation, but remains in business as a manufacturer. CP seeks back pay for the period from his discharge through the date he got another position with XYZ Corporation. Because Respondent is able to provide relief, ABC should not be held liable.*

3. **Foreign Employers in the United States**

A foreign employer doing business in the United States is generally covered by the EEO statutes to the same extent as an American employer. However, in some cases, such an employer may allege that it is party to a treaty that permits it to prefer its own nationals for certain positions. In determining whether a U.S.-based branch of a foreign employer is covered, employees based abroad should also be counted if the U.S. and foreign branches constitute an integrated enterprise. Thus, if a Japanese employer has a U.S.-based branch with only 10 employees, it would still be covered by Title VII if the U.S. employer is integrated with a foreign branch with at least five employees.

4. **American Employers Overseas**

Title VII, the ADEA, and the ADA generally prohibit discrimination against U.S. citizens by American employers operating overseas. The EPA does not apply overseas. An employer operating abroad that is incorporated in the United States will generally have sufficient ties to the United States to be deemed an American employer. Where an employer is not incorporated in the United States or it is not incorporated at all, e.g., a law firm, various factors should be considered to determine if the employer has sufficient connections with the United States to make it an American employer. Factors to consider include the following:
The employer’s principal place of business, i.e., the primary place where factories, offices, and other facilities are located;

The nationality of dominant shareholders and/or those holding voting control; and

The nationality and location of management.

The EEO statutes also prohibit discrimination by a foreign employer that is controlled by an American employer. The determination of whether an American employer controls a foreign employer is based on the following factors: (1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership or financial control of the American employer and the foreign employer.

II. Exemptions and Exclusions from Coverage

A. ENTITIES THAT ARE EXEMPT FROM COVERAGE FOR ANY EMPLOYMENT DECISION

1. Title VII and ADA Exemption of American Indian Tribes

Title VII and the ADA do not apply to American Indian tribes, which are excluded from the definition of "employer," but may apply to a tribally owned business. The critical factors in determining whether a tribally owned business is exempt are whether it performs essentially governmental functions on the tribe's behalf and whether it is integrated with and controlled by the tribe.

Neither the ADEA nor the EPA excludes American Indian tribes from the definition of "employer." Therefore, those statutes presumptively apply to American Indian tribes unless their application would infringe on treaty rights or tribal sovereignty.

2. Bona Fide Private Membership Clubs

Title VII and the ADA do not apply to a bona fide private membership club (other than a labor organization) which is exempt from taxation under § 501(c) of the Internal Revenue Code of 1954. Bona fide private membership clubs are not exempt under the ADEA or EPA.

To fall under the Title VII/ADA exemption, an organization must show both that it is tax-exempt and that it is a bona fide private membership club. An organization is deemed a bona fide private membership club if it meets each of the following requirements:

- The organization is a club in the ordinary sense of the word;
- The organization is private; and
- There are meaningful conditions of limited membership.
a. Definition of "Club"

A "club" is defined as follows “an association of persons for social and recreational purposes or for the promotion of some common object (as literature, science, political activity) usually jointly supported and meeting periodically, membership in social clubs usually being conferred by ballot and carrying the privilege of use of the club property.”

b. Is the Club Private?

In determining whether a club is private, the EEOC considers the following:

- The extent to which it limits its facilities and services to club members and their guests;
- The extent to which and/or the manner in which it is controlled or owned by its membership; and
- Whether and, if so, to what extent and in what manner it publicly advertises to solicit members or to promote the use of its facilities or services by the general public.

The presence or absence of any one of these factors is not determinative, however, and the question as to whether an organization is private must be addressed on a case-by-case basis.

c. Meaningful Conditions of Limited Membership

Finally, in determining whether the requirement of meaningful conditions of limited membership is met, the Commission will consider both the size of the membership, including the existence of any limitations on its size, and membership eligibility requirements.

3. Public International Organizations

Public international organizations, such as the World Bank, the International Monetary Fund, and the United Nations are generally not covered by the EEO statutes because of immunity conferred under international and United States law. An organization will be immune if it is included on the list of organizations entitled to immunity set out in the International Organizations Immunities Act unless immunity has been waived by the organization or by Presidential Executive Order. If it is unclear whether an organization's immunity has been waived, the charge should be referred to the legal unit for a determination of whether the EEO statutes can be applied to the organization.

B. PARTIAL EXEMPTIONS

1. Exemptions for Discrimination Based on Religion

Title VII does not apply to discrimination by a religious organization on the basis of religion in hiring and discharge. The exemption applies to an organization whose "purpose and character are primarily religious." This determination requires a weighing of all significant religious and secular characteristics.
The exemption applies to all positions; however, discrimination is not permitted on any basis other than religion. In addition, the exemption only applies to hiring and discharge, and does not apply to terms, conditions, or privileges of employment, such as wages or benefits.

A separate "ministerial" exception based on the First Amendment prevents interference between a religious institution and its ordained clergy, an individual effectively acting in that capacity, or an individual intimately involved in religious indoctrination. Thus, the EEO statutes do not apply to an employment decision regarding an individual who falls within the exception.

2. Business on or Near an American Indian Reservation

An entity on or near an American Indian reservation may grant preferential treatment to a Native American living on or near the reservation with respect to a publicly announced employment practice. "Near" is defined as being located within reasonable commuting distance. Employment practices in which preferential treatment may be granted include hiring, promotion, transfer, reinstatement, and reduction in force. The exemption permits employers to prefer Native Americans over non-Native Americans, but not to prefer members of one tribe over members of another tribe. The preference extends to former reservations in Oklahoma and Native Alaska land held under provisions of the Alaska Native Claims Settlement Act.

To satisfy the public announcement requirement, an entity must disclose that preferential treatment will be given with respect to a particular employment practice. For example, if an employer wishes to grant preferential treatment to Native Americans applying for a certain vacancy, then it must state that it is doing so in the same notice that announces the vacancy.

3. Veterans' Preference

Title VII does not apply to a decision taken because of a veterans' preference created by a federal, state, or local law. Thus, even though a veterans' preference may, for example, disproportionately exclude women, it does not violate Title VII if it is a legislatively enacted preference. In contrast, a veterans' preference that is voluntarily provided by an employer may violate EEO laws, including Title VII, if it has the purpose or effect of discriminating on a prohibited basis.

The ADA, the ADEA, and the EPA do not exempt employment actions that are taken based on a veterans' preference.

4. National Security

Title VII does not prohibit termination, or refusal to hire or refer for jobs where an individual does not meet the requirements for a position that are imposed in the interest of national security under any security program in effect under statute or Executive Order. The respondent must affirmatively establish that the security clearance is required for the position under a national security program pursuant to statute or Executive Order.
If an employer establishes that such a security clearance is required, Commission review is limited. The Commission can review whether the grant, denial, or revocation of a security clearance was conducted in a discriminatory manner. Thus, the Commission can review whether procedural requirements in making security clearance determinations were followed without regard to an individual's protected status. For instance, the EEOC could review a claim that the respondent followed certain procedural requirements when revoking the clearances of white individuals but failed to follow those procedures when revoking the clearances of Asian individuals. However, the Commission is precluded from reviewing the substance of the security clearance determination or the security requirement under any of the EEO statutes.

III. Filing a Complaint

Federal law has strict time limits within which a person who feels their rights under the EEO laws have been violated must file a complaint with the EEOC. Note that a complaint filed with the EEOC is formally referred to as a “charge.”

A. TIME LIMITS FOR FILING A CHARGE

1. Title VII, ADEA, ADA

The limit for filing a charge under one of these statutes is 300 days for states with their own fair employment practice agency, i.e. California's Department of Fair Employment and Housing. For other states, the time limit is 180 days from the date of the allegedly illegal action. If the deadline falls on a weekend or holiday, it is extended until the next business day. A person who feels their rights have been violated must file a charge with the EEOC within the mandated time period or they will lose their right to file a lawsuit.

2. EPA

The limit for filing a charge under the EPA is generally two years. The limit is three years if the violation was willful. However, persons who believe their rights under the EPA have been violated have the option of filing a lawsuit in federal court without first filing a complaint with the EEOC.

B. FILING CIVIL LAWSUITS

1. Title VII, the ADEA, and the ADA

Under Title VII or the ADA, a private lawsuit must be brought within 90 days of receiving the notice of right to sue (NRTS) from the EEOC. The NRTS will be issued when the EEOC has dismissed the charge or failed to enter into a conciliation agreement. An individual can request an NRTS 180 days after the filing of a charge. The EEOC's regulations provide that an individual may request an NRTS before the expiration of the 180-day period if the Commission determines that it is unlikely that it will complete its administrative processing of the charge within 180 days of the filing date. Courts in some jurisdictions, however, have determined that the 180-day waiting period is mandatory and may not be waived by the EEOC.
Similarly, under the ADEA, an aggrieved person must sue within 90 days of receipt of the EEOC's notice that the charge is dismissed or that the EEOC proceedings are otherwise terminated. However, receipt of a notice of right to sue is not a condition for bringing a private suit under the ADEA. An aggrieved person may bring an ADEA suit anytime after 60 days have elapsed from the filing of a timely charge or earlier if EEOC has attempted and failed to conciliate the matter.

2. EPA

Because a charge need not be filed with the EEOC before a lawsuit is filed in court, an individual may file an EPA lawsuit anytime within two years after the alleged unlawful compensation practice or, in the case of a willful violation, within three years. The filing of an EPA charge does not toll the time frame for going to court.

C. DETERMINING DATE OF ALLEGED VIOLATION

1. Generally

The date that an alleged violation took place is generally the date that the employee or applicant received unequivocal notification of the disputed employment action, regardless of the effective date of the action. A mere warning or proposal that an action might be taken does not trigger the start of the limitations period.

Example 1.

On March 1, Mary received written notification that she would be discharged effective April 30. Mary believes the action is being taken based on her gender and race. Accordingly, she must file a charge within either 180 or 300 days of March 1, depending on whether her state has an employment practice agency.

Example 2.

On January 1, Jerry was notified that his demotion was being proposed. On February 1, Jerry was notified that his demotion would be effective on March 1. Accordingly, Jerry must file a charge within 180/300 days of February 1.

2. Continuing Violations

In contrast to a charge which involves an event that transpired on a certain date, a continuing violation takes place over a period of time, including into the filing period. Where a charge raises a continuing violation, all of the events forming part of the continuing violation, including those that transpired outside the filing period, are considered timely, and relief may be obtained for all of the discriminatory events. There are two kinds of continuing violations:

☐ Serial violations; and

☐ Systemic violations.
a. Serial Violations

A serial violation is a series of separate but closely related discriminatory acts. To establish a serial violation, there must be:

- **Timely event:** A discriminatory event or act that occurred within the limitations period.
  
  - It is not enough that an injury occurred within the filing period. For example, if the charging party was discriminatorily demoted outside the filing period, the fact that the demotion adversely affected her wages during the filing period is insufficient to render a charge of discriminatory demotion timely.
  
  - The event that occurred within the filing period must be discriminatory, but it need not be enough, by itself, to state an actionable claim. For example, if the charging party was subjected to sexual comments that created a hostile work environment based on sex and they continued into the filing period, the charge would be timely if one or more of the comments were made within the filing period, even if that single comment did not create a hostile work environment.

- **Link:** A link between the discriminatory event occurring within the limitations period and the actions that occurred outside the limitations period.
  
  - The factors that must be considered to determine whether there is a link will vary from case to case. Such factors may include the time interval between timely and untimely events and whether the events were of a similar nature, taken by the same individual or group of individuals, or motivated by the same discriminatory animus. For example, a series of actions that were based on the same negative perception of the charging party and continue into the filing period might constitute a continuing violation.

Even if an untimely discriminatory act is not part of a continuing violation and cannot otherwise be raised in a charge, it might nevertheless be used as background evidence if it is relevant to the actionable issues raised in a charge. There is **no** time limit on relevant evidence.

**Example.**

*Frank, a black man, was subjected to ongoing incidents of racial harassment by his coworker and supervisor between January 1, 2001, and September 15, 2002, when he received a transfer. Frank also alleges that he was demoted by his supervisor on October 1, 2001, because of his race. Frank filed a charge on October 15, 2002, pertaining to the harassment and demotion. These actions are sufficiently related to constitute a continuing violation, and thus, both may be challenged.*
b. Systemic Violations

A systemic violation is a continuing violation in which an employer maintains a discriminatory policy or practice that continues into the statutory 180/300-day filing period. A challenge to a systemic violation that continues into the filing period is timely if brought by an employee or applicant directly affected by the policy, even if there was no specific application of the policy within the filing period. If an employee is discriminatorily discharged pursuant to a discriminatory policy or practice, however, a charge generally must be filed within 180/300 days of the discharge. This is because after discharge, the former employee will no longer be subjected to the discriminatory policy or practice. A systemic violation will usually take the form of a discriminatory policy or a discriminatory practice:

- **Discriminatory policy**: Formal policy that differentially treats or has a disparate impact on members of a protected group.

- **Discriminatory practice**: Although there is no formal policy that is discriminatory, the respondent engages in a discriminatory practice over an extended period of time. For example, the employer may have a practice of paying African-Americans lower wages for performing the same work as whites, or a longstanding practice of ignoring widespread sexual harassment.

The charging party is not required to prove the existence of a discriminatory policy or practice before a charge is accepted. In some situations, a charging party will not explicitly allege that the respondent had a discriminatory policy or practice. However, specific factual allegations about widespread and/or longstanding discrimination can point to the existence of a systemic violation. For example, systemic discrimination can be inferred from facts showing widespread discrimination against women in the areas of promotion, compensation, and training.

Because an individual affected by a discriminatory policy or practice is continuously subjected to discrimination by the mere existence of the policy or practice, it is not always necessary that a specific application of the discriminatory policy or practice involving the individual have occurred within the limitations period. For example, if a company maintains a promotion system that discriminates against women, each day that a qualified woman does not receive a promotion is a violation of Title VII.

Alternatively, because a discriminatory hiring policy may discourage a qualified applicant from applying for a position, it is unnecessary for the charging party to have been rejected pursuant to the discriminatory policy during the filing period, as long as s/he was subject to the policy.

**Example.**

*The accounting firm of Roberts & Roberts has a formal, written personnel policy providing insurance coverage for its employees' resident children but denying coverage for their nonresident children. Jim, a male employee of the firm, alleges that the policy has a disparate impact on the basis of sex because divorced women are far more likely than divorced men to have custody of their children. Under the circumstances, Jim has alleged a systemic continuing violation; therefore, as long as the policy continues into the filing period, the charge would be timely.*
3. Seniority Systems

If a charge alleges that a seniority plan was adopted for an intentionally discriminatory purpose, the filing period begins when any one of the following three events occurs: 1) the seniority system was adopted; 2) the person aggrieved became subject to the seniority system; or 3) the person aggrieved was injured by the application of the system. The ADEA provides that a discriminatory seniority system or employee benefit plan must comply with the statute regardless of the date that the system or plan was adopted. Thus, an individual aggrieved by a discriminatory seniority system or employee benefit plan can file a timely charge even if the system or plan was adopted outside the applicable 180/300-day limitations period.

D. EXTENDING THE TIME FRAME FOR FILING

Although the EEO statutes provide that a charge must be filed within 180/300 days of the date of the alleged violation, the limitations period is subject to equitable tolling, equitable estoppel, and waiver. Thus, there are circumstances under which the charge should be accepted as timely even though the alleged violation transpired outside the limitations period.

1. Equitable Tolling

The statutory time limits may be extended, or "tollled," for equitable reasons where the charging party was understandably unaware of the EEO process or of important facts that should have led him or her to suspect discrimination. Grounds for equitable tolling include the following:

- No reason to suspect discrimination at the time of the disputed event;
- Mental incapacity;
- Misleading information or mishandling of charge by the EEOC or FEPA; or
- Timely filing in the wrong jurisdiction.

2. Equitable Estoppel

The filing period can also be extended when the charging party's delayed filing is attributable to active misconduct by the respondent intended to prevent timely filing, or actions that an employer should have known would cause a delay in filing. The equitable estoppel doctrine generally presupposes that the charging party was aware of the facts that gave rise to the cause of action and might have filed earlier but for the respondent's misconduct. Where equitable estoppel applies, the filing period begins to run when the charging party knew or should have discovered the misconduct.

Situations in which equitable estoppel might be available include the following:

- **Promise not to raise:** The respondent promised not to raise the limitations period as a defense;
☐ **Threat of retaliation:** The respondent threatened the charging party with retaliation for asserting his/her EEO rights;

☐ **Concealment or misrepresentation:** The respondent concealed or misrepresented facts that would support a charge of discrimination;

☐ **Assurances of relief:** The respondent lulled the charging party into not filing a charge by giving assurances that relief would be provided through internal procedures. Merely entering into settlement negotiations, however, would not be sufficient to extend the filing period;

☐ **Failure to post notices:** The employer failed to post notices explaining the EEO process and the time frames for filing a charge, and the charging party was not otherwise aware of his/her rights. Under such circumstances, the 180/300-day filing period begins when the individual learns of his/her rights or retains an attorney.

3. **Waiver**

   The time requirements for filing a charge may be waived by the parties by mutual agreement, thereby allowing a charging party to file a charge beyond the 180/300-day statutory time limit. For example, the parties may agree to waive the limitations period so that they can engage in private negotiations. If the negotiations do not result in a resolution satisfactory to the charging party, then s/he would be required to file a charge within a reasonable period of time after the termination of negotiations.

**E. STANDING**

Standing to file a charge under the EEO statutes is very broad. A charge must allege that an adverse employment action was taken because of an individual's membership in one or more protected classes. Such a charge may be brought by an aggrieved person, a person filing on behalf of an aggrieved person, or an EEOC Commissioner. The following persons generally have standing:

☐ **Aggrieved persons:**
   • Individuals who were subjected to alleged discrimination
   • Persons (both individuals and organizations) who were harmed by alleged discrimination against others;

☐ **Persons bringing a charge "on behalf of" an aggrieved person or persons;** and

☐ **EEOC Commissioners.**

1. **Charges Brought by Individuals Subjected to Alleged Discrimination**

   A typical charge alleges that an individual was subjected to prohibited discrimination because of his/her protected status. For example, a woman might file a charge alleging that her employer paid her less than her male coworkers, or a man with a hearing impairment might allege that he was not provided a reasonable accommodation for his disability.
A charge may be filed by a "tester," an individual who applies for employment to test for discriminatory hiring practices, but does not intend to accept such employment, even if offered.

2. Charges Brought by Aggrieved Persons Who Were Personally Harmed by Discrimination Against Others

A charge may also be filed under Title VII, the ADEA, the ADA, or the EPA by an individual who was not subjected to prohibited discrimination but was harmed by prohibited discrimination against others. For instance, a white employee has standing to allege that she was denied the benefits of interracial associations as the result of discrimination against minorities, and individuals who are under 40 would have standing to file a charge if they were laid off because a particular plant was closed as the result of discrimination against individuals 40 or over. A charge of this type must include a description of how the charging party was harmed by the respondent's discriminatory actions.

Under some circumstances, an organization has standing to file a charge as an "aggrieved person." For example, the organization may be aggrieved because it has lost members, bargaining power, or financial support because its members or potential members have been subjected to discrimination. Alternatively, an organization may be aggrieved if it depletes its resources by sponsoring testers as a means of uncovering discriminatory hiring practices.

A charge can also be filed under any of the EEO statutes by an individual, agency, or organization "on behalf of" an aggrieved person or aggrieved persons. For example, a union, a civil rights organization, or an advocacy organization may file a charge on behalf of one of its constituents. An "on behalf of" charge permits the aggrieved individual to remain anonymous while the charge is being processed by the Commission.

3. Commissioner Charges

An EEOC Commissioner may file a charge with the Commission under Title VII or the ADA. The ADEA and the EPA do not specifically refer to Commissioner charges; however, the Commission can conduct directed investigations and litigation on its own initiative under those statutes, either concurrently with the processing of a charge or as a separate matter.

F. PROCESS AFTER A CHARGE HAS BEEN FILED

The employer is notified that the charge has been filed. From this point there are a number of ways a charge may be handled:

- A charge may be assigned for priority investigation if the initial facts appear to support a violation of law. When the evidence is less strong, the charge may be assigned for follow up investigation to determine whether it is likely that a violation has occurred;
EEOC can seek to settle a charge at any stage of the investigation if the charging party and the employer express an interest in doing so. If settlement efforts are not successful, the investigation continues;

In investigating a charge, EEOC may make written requests for information, interview people, review documents, and, as needed, visit the facility where the alleged discrimination occurred. When the investigation is complete, EEOC will discuss the evidence with the charging party or employer, as appropriate;

The charge may be selected for EEOC's mediation program if both the charging party and the employer express an interest in this option. Mediation is offered as an alternative to a lengthy investigation. Participation in the mediation program is confidential, voluntary, and requires consent from both charging party and employer. If mediation is unsuccessful, the charge is returned for investigation; or

A charge may be dismissed at any point if, in the agency’s best judgment, further investigation will not establish a violation of the law. A charge may be dismissed at the time it is filed, if an initial in-depth interview does not produce evidence to support the claim. When a charge is dismissed, a notice is issued in accordance with the law which gives the charging party 90 days in which to file a lawsuit on his or her own behalf.

1. How the EEOC Resolves Discrimination Charges

If the evidence obtained in an investigation does not establish that discrimination occurred, this will be explained to the charging party. A required notice is then issued, closing the case and giving the charging party 90 days in which to file a lawsuit on his or her own behalf;

If the evidence establishes that discrimination has occurred, the employer and the charging party will be informed of this in a letter of determination that explains the finding. EEOC will then attempt conciliation with the employer to develop a remedy for the discrimination;

If the case is successfully conciliated, or if a case has earlier been successfully mediated or settled, neither EEOC nor the charging party may go to court unless the conciliation, mediation, or settlement agreement is not honored; or

If EEOC is unable to successfully conciliate the case, the agency will decide whether to bring suit in federal court. If EEOC decides not to sue, it will issue a notice closing the case and giving the charging party 90 days in which to file a lawsuit on his or her own behalf. In Title VII and ADA cases against state or local governments, the Department of Justice takes these actions.
2. When an Individual Can File an Employment Discrimination Lawsuit in Court

A charging party may file a lawsuit within 90 days after receiving a notice of a "right to sue" from EEOC, as stated above. Under Title VII and the ADA, a charging party also can request a notice of "right to sue" from EEOC 180 days after the charge was first filed with the Commission, and may then bring suit within 90 days after receiving this notice. Under the ADEA, a suit may be filed at any time 60 days after filing a charge with EEOC, but not later than 90 days after EEOC gives notice that it has completed action on the charge.

Under the EPA, a lawsuit must be filed within two years (three years for willful violations) of the discriminatory act, which in most cases is payment of a discriminatory lower wage.

G. REMEDIES FOR DISCRIMINATION

The "relief" or remedies available for employment discrimination, whether caused by intentional acts or by practices that have a discriminatory effect, may include:

- Back pay,
- Hiring,
- Promotion,
- Reinstatement,
- Front pay,
- Reasonable accommodation, or
- Other actions that will make an individual "whole" (in the condition s/he would have been but for the discrimination).

Remedies also may include payment of:

- Attorneys' fees,
- Expert witness fees, and
- Court costs.

Under most EEOC-enforced laws, compensatory and punitive damages also may be available where intentional discrimination is found. Damages may be available to compensate for actual monetary losses, for future monetary losses, and for mental anguish and inconvenience. Punitive damages also may be available if an employer acted with malice or reckless indifference. Punitive damages are not available against the federal, state or local governments.
In cases concerning reasonable accommodation under the ADA, compensatory or punitive damages may not be awarded to the charging party if an employer can demonstrate that "good faith" efforts were made to provide reasonable accommodation.

An employer may be required to post notices to all employees addressing the violations of a specific charge and advising them of their rights under the laws EEOC enforces and their right to be free from retaliation. Such notices must be accessible, as needed, to persons with visual or other disabilities that affect reading.

The employer also may be required to take corrective or preventive actions to cure the source of the identified discrimination and minimize the chance of its recurrence, as well as discontinue the specific discriminatory practices involved in the case.
CHAPTER 4 – REVIEW QUESTIONS

The following questions are designed to ensure that you have a complete understanding of the information presented in the assignment. They do not need to be submitted in order to receive CPE credit. They are included as an additional tool to enhance your learning experience.

We recommend that you answer each review question and then compare your response to the suggested solution before answering the final exam questions related to this assignment.

1. Which of the following employers are subject to the anti-discrimination provisions of Title VII:
   a) all private sector employers, regardless of size
   b) only those public or private sector employers with at least 50 employees
   c) private sector employers with at least 15 employees
   d) all employers with at least five employees

2. The Equal Pay Act prohibits wage discrimination between which of the following two groups:
   a) Caucasians and African Americans
   b) men and women
   c) American citizens and guest workers
   d) all of the above

3. Illegal employment discrimination practices include harassment and retaliation on the basis of a person’s membership in a protected class.
   a) true
   b) false

4. Only full-time workers are counted when determining if an employer is subject to an EEO law.
   a) true
   b) false

5. Payroll records have been used to determine if an employer is subject to EEO laws.
   a) true
   b) false

6. Employers without the minimum number of employees can still be subject to EEO laws in some cases.
   a) true
   b) false
7. Which of the following businesses are subject to the anti-discrimination provisions of Title VII:

   a) foreign employers doing business in the United States
   b) American businesses hiring foreign workers overseas
   c) American employers hiring American workers overseas
   d) both a and c above

8. Which of the following is exempt from the anti-discrimination in employment provisions of Title VII:

   a) an Indian tribe operating a casino
   b) a private, non-profit golf club
   c) an airline
   d) a family-owned business

9. What is the time limit for filing a charge of illegal employment discrimination with the EEOC:

   a) 100 days for persons in all states
   b) 300 days for persons that live in a state with their own fair employment agency
   c) 150 days for persons in states with their own fair employment agencies
   d) one year for all persons

10. Remedies for illegal employment discrimination include reinstatement and back pay.

    a) true
    b) false
CHAPTER 4 – SOLUTIONS AND SUGGESTED RESPONSES

1. A: Incorrect. There is a minimum number of employees required before an employer is subject to the provisions of Title VII.

B: Incorrect. The threshold for coverage is only 15 employees.

C: Correct. All employers with at least 15 employees are subject to the employment provisions of Title VII.

D: Incorrect. The required number of employees is 15.

(See page 4-2 of course material.)

2. A: Incorrect. Title VII of the Civil Rights Act of 1964 prohibits discrimination in all of the terms and conditions of employment, including wages, and applies to race-based discrimination. The Equal Pay Act, however, does not address discrimination on the basis of race.

B: Correct. The Equal Pay Act requires men and women doing comparable work to be paid the same. Its provisions apply only to discrimination in wages based on sex.

C: Incorrect. The Equal Pay Act covers only wage-based discrimination on the basis of sex.

D: Incorrect. Only one of the responses is correct.

(See page 4-3 of course material.)

3. A: True is correct. The EEO laws protect individuals from discrimination of all forms in employment, including harassment on the basis of race, color, religion, national origin, disability or age, as well as retaliation against an individual who files a complaint alleging illegal discrimination.

B: False is incorrect. The EEO laws offer broad protection against discrimination, including harassment and retaliation.

(See pages 4-3 to 4-4 of course material.)
4. **A: True is incorrect. Full and part-time workers are counted.**

   **B: False is correct.** Application of the EEO laws is triggered by the firm’s number of employees. Under federal law, all employees, including part-time and temporary workers, are counted for purposes of determining whether an employer has a sufficient number of employees.

   (See page 4-4 of course material.)

5. **A: True is correct.** Records used to determine whether an employer meets the threshold include payroll records and employment contracts relating to relevant workers for the year of and the year preceding the alleged adverse employment action. This includes contracts that involve workers provided by temporary employment agencies, contract firms, and other types of staffing firms. For example, it includes maintenance workers and security personnel assigned by a contract firm and temporary clerical personnel assigned by a temporary employment agency.

   **B: False is incorrect. Payroll records are appropriate to determine the number of employees in a firm.**

   (See page 4-6 of course material.)

6. **A: True is correct.** If an employer does not have the minimum number of employees to meet the statutory requirement, it is still covered if it is part of an "integrated enterprise" that, overall, meets the requirement. An integrated enterprise is one in which the operations of two or more employers are considered so intertwined that they can be considered the single employer of the charging party. The separate entities that form an integrated enterprise are treated as a single employer for purposes of both coverage and liability.

   **B: False is incorrect. The employer can be subject to EEO laws if it is deemed to be an "integrated enterprise."**

   (See page 4-7 of course material.)

7. **A: Incorrect. A foreign company operating in the United States is subject to federal anti-discrimination laws assuming other requirements are met. However, this is not the best answer.**

   **B: Incorrect. American businesses are subject to U.S. laws to the extent they employ American workers but not with respect to foreign workers in a foreign country.**

   **C: Incorrect. When they employ American workers, they are subject to U.S. laws. However, this is not the best answer.**

   **D: Correct. Both A and C are true.**

   (See page 4-12 of course material.)
8. A: Incorrect. While Indian tribes are exempt from the anti-discrimination provisions of Title VII, that exemption does not apply when they are operating a business as in this case.

B: Correct. A purely private, non-profit social club such as this is exempt from Title VII.

C: Incorrect. Airlines are clearly employers subject to the full weight of Title VII.

D: Incorrect. Even family-owned businesses are subject to Title VII.

(See pages 4-14 to 4-16 of course material.)

9. A: Incorrect. The time period depends on which state the individual lives in. Those with their own fair employment agencies are given additional time to file. That time is 300 days.

B: Correct. The time period is less for persons in states without their own fair employment agencies.

C: Incorrect. The time period is actually 300 days.

D: Incorrect. The period varies depending on whether the state has its own fair employment agency. In no event is the time for filing one year.

(See page 4-16 of the course material.)

10. A: True is correct. The EEO laws provide for a broad array of remedies for individuals who have been the victim of illegal employment discrimination, including reinstatement, back pay, hiring, promotion, front pay, and reasonable accommodation.

B: False is incorrect. These are some of the remedies available to make a victim of employment discrimination “whole.”

(See page 4-24 of the course material.)
Chapter 5: The Civil Rights Act of 1964

I. Protected Classes and Prohibited Practices

The Civil Rights Act of 1964 was the first comprehensive federal legislation to address employment discrimination in this country. Today, it is still the most significant anti-discrimination federal law. In general, the law prohibits discrimination in all of the terms and conditions of employment (from recruitment and hiring through termination) against persons based on their membership in one of the following protected classes:

- Race;
- Color;
- National origin;
- Religion; and
- Sex (including pregnancy).

### Do’s and Don’ts of Title VII

- Do avoid making assumptions about people’s abilities on the basis of their race, religion, national origin, color or sex;
- Do provide reasonable accommodation for employee’s and applicant’s religious beliefs;
- Don’t make stereotypical assumptions about certain people; and
- Do ensure that recruitment methods are not discriminatory.

If a claim of discrimination is not based on the individual’s membership in one of the above classes, it must be brought, if at all, under a different statute. For example, claims for discrimination based on physical disability must be brought under the Americans with Disabilities Act, discussed in detail in Chapter 6. Also note that not all discrimination is illegal. For example, federal law does not prohibit discrimination in employment based on sexual orientation or marital status. However, such status is protected under the laws of some states. It is therefore essential for employers to be familiar with any anti-discrimination laws in their state or states of operation.

**Example.**

*Bill, a gay accountant, applies for a position with an accounting firm in California. He is qualified for the job, but is rejected because the hiring partner is not comfortable working with gays. Bill does not have a cause of action under Title VII of the Civil Rights Act of 1964, but he does have a cause of action under California’s Fair Employment and Housing Act, which includes sexual orientation as a protected class.*
A. DISCRIMINATION BY A MEMBER OF THE SAME PROTECTED CLASS

Title VII prohibits a member of a protected class from discriminating against another member of the same protected class. For example, Title VII prohibits a male supervisor from sexually harassing his male subordinates on the basis of sex. Likewise, it is just as illegal for an African-American employer to discriminate against African-Americans than it is for a Caucasian to discriminate against African-Americans.

B. DISCRIMINATION AGAINST A SUBCLASS

Title VII prohibits discrimination against a subclass of a particular protected group. For example, an employer cannot refuse to hire women with preschool age children if it hires men with preschool age children.

C. INTERSECTIONAL DISCRIMINATION

Title VII prohibits discrimination against an individual based on his or her membership in two or more protected classes. For example, Title VII prohibits discrimination against African-American males even if an employer does not discriminate against white males or African-American females. Similarly, intersectional discrimination can involve more than one EEO statute, e.g., discrimination based on age and disability, or based on sex and age.

D. STEREOTYPE

Discrimination on a protected basis includes discrimination because of stereotypical assumptions about members of the protected class. For example, discrimination against a woman because she is perceived as "too aggressive" or because she uses profanity, which is seen as "unfeminine," is a form of sex discrimination.

Also remember that not just so-called “minority” groups are covered under this law. Title VII prohibits employment discrimination against any individual on the basis of his/her race, color, national origin, religion, or sex. Thus, for example, the statute protects Whites, African-Americans, and Asians from race and color discrimination; men and women from sex discrimination; Iranians, Cubans, and Americans from national origin discrimination; and Christians, Jews, Muslims, and atheists from religious discrimination.

E. OTHER PROHIBITED PRACTICES

Title VII is a broad statute offering protection from more than simply the refusal to hire or the discharge of workers in a protected class. Other actions prohibited by Title VII include all of the following:

- Job decisions, employment practices, and other terms, conditions, and privileges of employment;
- Harassment;
- Reasonable accommodation;
- Referral practices;
harassment; Practices undertaken by apprenticeships and other training programs; Advertising and recruitment; Medical inquiries and examinations; Maintenance and confidentiality of medical records; Limiting, segregating, and classifying; and Retaliation: Actions likely to deter protected activity.

Specific issues of this type that a charging party may raise include, but are not limited to, the following:

- Failure to hire;
- Termination;
- Denial of promotion;
- Undesirable reassignment;
- Awards;
- Leave;
- Compensation;
- Benefits;
- Training; and
- Work assignments.

1. Harassment

A charging party may allege harassment based on any of the protected bases. Harassment that results in a tangible employment action or is sufficiently severe or pervasive to alter the conditions of employment will establish an actionable claim under Title VII.

2. Reasonable Accommodation

An individual may allege that a reasonable accommodation was denied by an employer for a religious observance or practice. Employers are required to provide a reasonable accommodation unless it can show that doing so would impose an undue hardship. An employer will be able to establish undue hardship if it can show that the accommodation would require more than a *de minimis* – that is, minor financial burden.
3. Referral Practices

Title VII prohibits discriminatory employment referral practices by any covered entity, including employers, employment agencies, and unions.

4. Labor Organization Practices

Title VII prohibits discrimination in labor organization practices, including referrals. In addition, a labor organization is prohibited from refusing to bring a grievance because of an individual's protected status, or because the grievance alleges discrimination.

5. Practices Undertaken by Apprenticeships and Other Training Programs

Title VII prohibits discrimination with respect to admission to or employment in an apprenticeship or other job-training program. A covered entity may not discriminate with respect to an apprenticeship or other training program, regardless of whether the program is the product of an employment relationship. For example, if two individuals are sexually harassed while participating in an employer's training program but only one of them is the employer's employee, they can both file a Title VII charge against the employer. Discrimination in training programs might also constitute discrimination in hiring if participation in the program is required prior to employment, or regularly leads to employment.

6. Advertising and Recruitment

Title VII prohibits discrimination based on race, color, national origin, sex, or religion in advertisements and recruitment related to employment, referral for employment, or apprenticeships or other training. Advertisements also may not contain terms or phrases that would deter members of a particular class from applying. The following are examples of illegal advertisements.

Example 1.

*Help Wanted: Strong, able-bodied males to perform heavy manual labor.*

Example 2.

*Help Wanted. Looking for good Christian men and women to work in office."

7. Limiting, Segregating and Classifying

Title VII prohibits limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of the individual because of his or her membership in a protected class. For example, an employer may not provide segregated or unequal facilities. It is also unlawful to have separate job classifications based on a protected category or to "channel" individuals of a certain protected class into particular jobs or career paths. For example, an employer may not have one job category for men and a separate job category for women who are performing the same work; nor may an employer channel women, minorities, or individuals with disabilities into lower-paying jobs.
8. Retaliation: Actions Likely to Deter Protected Activity

Title VII prohibits a covered entity from retaliating against an individual who has engaged in a protected activity, which includes both filing a discrimination claim and opposing discrimination. The prohibition against retaliation is very broad and covers more than merely discriminatory treatment with respect to terms, conditions, or privileges of employment. The anti-retaliation provisions prohibit any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity. For example, it would be retaliatory to instigate criminal theft and forgery charges against a former employee because she filed an EEOC charge.

II. Race and Color Discrimination

Title VII prohibits both race and color discrimination. Courts, however, do not always distinguish them. In many cases, therefore, both charges are made. It is unlawful to discriminate against any employee or applicant for employment because of his or her race or color in regard to hiring, termination, promotion, compensation, job training, or any other term, condition, or privilege of employment. Title VII also prohibits employment decisions based on stereotypes and assumptions about abilities, traits, or the performance of individuals of certain racial groups. Title VII prohibits both intentional discrimination and neutral job policies that disproportionately exclude minorities and that are not job related. The following are all included under race and color discrimination:

1. Physical Characteristics

Race discrimination includes discrimination on the basis of physical characteristics associated with a particular race, even where a victim and the discriminator are members of the same race. For example, Title VII prohibits discrimination against an Asian individual because of physical characteristics, e.g., facial features or height.

2. Skin Color

Race and color discrimination includes discrimination on the basis of shade of skin color. For example, it would be unlawful for an employer to discriminate against dark- or light-skinned African-Americans.

3. Association with a Protected Individual

Title VII prohibits discrimination against an individual because of his or her association with another individual of a particular race or color. For example, it is unlawful to take an adverse employment action against a white employee because s/he is married to an individual who is Native American or because he or she has a mixed-race child.

4. Race-Related Characteristics and Conditions

Discrimination on the basis of an immutable characteristic associated with race, such as skin color, hair texture, or certain facial features violates Title VII, even though not all members of the race share the same characteristic. Title VII also prohibits discrimination on the basis of a condition that predominantly affects one race. For example, since sickle cell anemia predominantly occurs in African-Americans, a policy that excludes
individuals with sickle cell anemia must be job related and consistent with business necessity. Similarly, a "no-beard" employment policy may discriminate against African-American men who have a predisposition to pseudofolliculitis barbae (severe shaving bumps) unless the policy is job related and consistent with business necessity.

5. Harassment

Harassment on the basis of race or color violates Title VII. Ethnic slurs, racial "jokes," offensive or derogatory comments, or other verbal or physical conduct based on an individual's race or color constitutes unlawful harassment if the conduct creates an intimidating, hostile, or offensive working environment or interferes with the individual's work performance.

6. Segregation and Classification of Employees

Title VII is violated when employees who belong to a protected group are segregated by physically isolating them from other employees or from customer contact. In addition, employers may not assign employees according to race or color. For example, Title VII prohibits assigning primarily African-Americans to predominantly African-American establishments or geographic areas. It is also illegal to exclude members of one group from particular positions or to group or categorize employees or jobs so that certain jobs are generally held by members of a certain protected group. Coding applications or resumes to designate an applicant's race, by either an employer or employment agency, constitutes evidence of discrimination where people of a certain race or color are excluded from employment or from certain positions.

7. Pre-Employment Inquiries

Requesting pre-employment information that discloses or tends to disclose an applicant's race strongly suggests that race will be used unlawfully as a basis for hiring. Therefore, if members of minority groups are excluded from employment, the request for such pre-employment information would likely constitute evidence of discrimination.

If an employer legitimately needs information about its employees' or applicants' race for affirmative action purposes or to track applicant flow, it may obtain racial information and simultaneously guard against discriminatory selection by using "tear-off sheets" for the identification of an applicant's race. After the applicant completes the application and the tear-off portion, the employer separates the tear-off sheet from the application and does not use it in the selection process.

It is also unlawful to retaliate against an individual for opposing employment practices that discriminate based on race or color, or for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or litigation under Title VII.

III. National Origin Discrimination

Title VII's protections extend to all workers in the United States, whether born in the United States or abroad and regardless of citizenship status.
A. WHAT IS "NATIONAL ORIGIN" DISCRIMINATION?

Generally, national origin discrimination means treating someone less favorably because that individual (or his or her ancestors) is from a certain place or belongs to a particular national origin group. Title VII prohibits employer actions that have the purpose or effect of discriminating against persons because of their national origin. In addition, Title VII prohibits discrimination against a person because he or she is associated with an individual of a particular national origin.

B. EMPLOYMENT DISCRIMINATION BASED ON PLACE OF ORIGIN

National origin discrimination includes discrimination because a person (or his or her ancestors) comes from a particular place. The place is usually a country or a former country, for example, Colombia or Serbia. In some cases, the place has never been a country, but is closely associated with a group of people who share a common language, culture, ancestry, and/or other similar social characteristics, for example, Kurdistan.

C. EMPLOYMENT DISCRIMINATION AGAINST A NATIONAL ORIGIN GROUP

A "national origin group," often referred to as an "ethnic group," is a group of people sharing a common language, culture, ancestry, and/or other similar social characteristics. Title VII prohibits employment discrimination against any national origin group, including larger ethnic groups, such as Hispanics and Arabs, and smaller ethnic groups, such as Kurds or Roma (Gypsies). National origin discrimination includes discrimination against American Indians or members of a particular tribe.

Employment discrimination against a national origin group includes discrimination based on any of the following.

1. **Ethnicity**

   Employment discrimination against members of an ethnic group, for example, discrimination against someone because he is Arab violates Title VII. National origin discrimination also includes discrimination against anyone who does not belong to a particular ethnic group, for example, less favorable treatment of anyone who is not Hispanic.

2. **Physical, Linguistic, or Cultural Traits**

   Employment discrimination against an individual because she has physical, linguistic, or cultural characteristics closely associated with a national origin group violates Title VII. For example, discrimination against someone based on her traditional African style of dress is illegal.

3. **Perception**

   Employment discrimination against an individual based on the employer's belief that he is a member of a particular national origin group is also covered by Title VII. For example, discrimination against someone perceived as being Arab based on his speech, mannerisms, and appearance, regardless of how he identifies himself or whether he is, in fact, of Arab ethnicity is illegal.
D. RELATED FORMS OF DISCRIMINATION PROHIBITED BY TITLE VII

Title VII's prohibition against national origin discrimination often overlaps with the statute's prohibitions against discrimination based on race or religion. The same set of facts may state a claim of national origin discrimination and religious discrimination when a particular religion is strongly associated, or perceived to be associated, with a specific national origin. Similarly, discrimination based on physical traits or ancestry may be both national origin and racial discrimination. If a claim presents overlapping bases of discrimination prohibited by Title VII, each of the pertinent bases should be asserted in the charge.

Example 1.

*Thomas, who is Egyptian, alleges that he has been harassed by his coworkers about his Arab ethnicity. He also has been subjected to derogatory comments about Islam even though he has told his coworkers that he is Christian. Thomas' charge should assert both national origin and religious discrimination.*

Example 2.

*Toni alleges that she was not hired for a server position in a Greek restaurant based on her Chinese ethnicity and physical features. Toni's charge should assert both national origin and race discrimination.*

A significant difference between Title VII's coverage of national origin and religion relates to accommodation. Title VII only requires accommodation of religious practices. Pursuant to this requirement, an employer must modify workplace policies that conflict with religious practices unless doing so would result in an undue hardship to the operation of the employer's business. For example, an employer would be required to provide an exception to a dress code to accommodate an employee's religious attire unless doing so would result in undue hardship. If the modification imposed only a minor financial or administrative burden on the employer, it would not impose an undue hardship.

While accommodation requirements do not apply to national origin, Title VII prohibits employers from imposing more restrictive workplace policies on some national origin (or religious) groups than on others. For example, an employer may not require that Hispanic workers wear business attire while permitting non-Hispanic workers in similar positions to wear more casual attire. However, an employer could impose the same dress code on all workers in similar jobs, regardless of their national origin, as long as the policy was not adopted for discriminatory reasons and is enforced evenhandedly.

E. RECRUITMENT

1. Application of Title VII to Recruitment

Title VII prohibits employers from engaging in recruitment practices that discriminate on the basis of national origin. Thus, an employer may not recruit individuals belonging to some national origin groups while deliberately not recruiting members of other national origin groups. Nor may an employer adopt certain recruitment practices, such as word-
of-mouth recruitment, where such practices have the purpose or effect of discriminating against particular national origin groups.

Because employment agencies are covered by Title VII, they may not comply with requests from employers to engage in discriminatory recruitment or referral practices. Thus, a placement agency may not honor a client request to exclude Arab or South Asian applicants. Recruiters also may not independently screen out job seekers or applicants on the basis of national origin, religion, or any other characteristic covered by Title VII.

Finally, coverage of Title VII also applies to temporary agencies with respect to referrals and treatment of employees on the job. For instance, if a temporary agency learns that one of its employees was involuntarily transferred by a client from a position that involves public contact to a lower-paying position because of perceptions about her national origin, the agency should insist that the client return the employee to the former position. If the client refuses, the agency should offer to assign the worker to another client at the same rate of pay, and decline to assign other employees to the same worksite unless the client changes its discriminatory practices. A temporary agency that fails to take reasonable steps to remedy discrimination by a client may be jointly liable for any discriminatory actions taken against the agency's employees while assigned to the client.

2. Recommended Recruitment Practices

A common employer practice is to use a variety of recruitment and hiring techniques, some of which are low cost, including job fairs and open houses, professional associations, search firms, and internships and scholar programs. This approach casts a wide net for talent and is more likely to result in a diverse pool of job seekers. Specialized publications or websites, including those directed to particular communities, may be effective tools for these purposes. Some recruitment methods, such as word-of-mouth hiring, are less likely to reach a diverse pool of job seekers and may tend to reinforce the make-up of the existing work force to the exclusion of other qualified individuals.

Employment advertisements should notify prospective applicants of all qualifications, including any qualifications related to language ability. For example, employment advertisements for positions where English skills are required by business necessity should specify such requirements. Advertisements should state that the employer is an "equal opportunity employer."

F. HIRING, PROMOTION, ASSIGNMENT

1. Application of Title VII to Hiring, Promotion, and Assignment

Title VII prohibits hiring, promotion, and assignment decisions that are based on national origin.
Example.

Anu is a woman of Bangladeshi ancestry who wears a sari. She is offered a position at XYZ Bakery after a phone interview. When she reports for the first day of work, she is told by the manager who interviewed her that the bakery has found someone "better suited" for the position. Anu files an EEOC charge alleging discrimination based on national origin. She believes that the bakery’s manager changed his mind about hiring her after meeting her in person and seeing that she is South Asian. The EEOC investigation reveals that the bakery hired an Hispanic woman for the position one week after turning Anu away and that Anu and the selectee possessed comparable qualifications. Under the circumstances, the evidence establishes that the employer has provided a false reason for its action as a pretext for unlawful discrimination.

2. Customer Preference

Employers may not rely on coworker, customer, or client discomfort or preference as the basis for a discriminatory action. If an employer takes an action based on the discriminatory preferences of others, the employer is also discriminating.

Example.

Alexi, a Serbian-American college student, applies to work as a cashier at a suburban XYZ Discount store. Although Alexi speaks fluent English, the manager who conducts the routine interview comments about his name and noticeable accent, observing that XYZ’s customers prize its “all-American image.” Alexi is not hired. XYZ has subjected Alexi to unlawful national origin discrimination if it based the hiring decision on assumptions that customers would have negative perceptions about Alexi’s ethnicity.

3. Assignment

Employers may not assign applicants or employees to certain positions based on national origin.

Example.

XYZ Pizza Palace decides to open a restaurant at a suburban shopping mall. It runs an advertisement in local newspapers recruiting for positions in food preparation, serving, and cleaning. Carlos, an Hispanic man with a few years of experience as a server at other restaurants, applies for a position with XYZ and states a preference for a server position. Believing that Hispanic employees would be better suited for positions with limited public contact at this location, XYZ offers Carlos a position in cleaning or food preparation even though he is as well qualified for a server position as many non-Hispanic servers employed by XYZ. Under the circumstances, XYZ has unlawfully assigned Carlos to a position based on his national origin.

Similarly, employers may not limit promotional opportunities based on national origin.
Example.

Raj, who is Indian, is a computer programmer for XYZ Information Technology Consultants. Raj applies for a slot in XYZ’s management development program and is rejected. Raj files an EEOC charge alleging that the rejection was based on his national origin. The employer states that Raj was not selected because he was not as qualified as other applicants.

The investigation reveals that, based on XYZ’s written criteria, Raj had superior qualifications to three non-Indian candidates selected for the program. The investigation also reveals that since XYZ initiated the management program, only one out of the fifteen candidates selected for the program has been South Asian, even though nearly one-third of the applicants and nearly one-half of the programming staff are South Asian. The evidence establishes that XYZ unlawfully rejected Raj for its management program based on his national origin.

4. Mixed-Motives Cases

Employment decisions that are motivated by both national origin discrimination and legitimate business reasons violate Title VII. However, remedies in such "mixed-motives" cases are limited if the employer would have taken the same action even if it had not relied on national origin. The charging party may receive injunctive relief and attorney's fees but is not entitled to reinstatement, back pay, or compensatory or punitive damages.

Example.

Jane, a Chinese-American, was hired to fill a temporary position as an assistant professor of philosophy at a major private university. Several years later, she was rejected for a permanent position in the Philosophy Department. A colleague tells Jane that at the board meeting at which the permanent position and the relative qualifications of the candidates were discussed, the Department Chair, one of the five people on the hiring committee for the position, stated, "I don't care how brilliant she is - one Asian in the Department is enough." Jane files an EEOC charge alleging national origin discrimination based on this evidence.

The EEOC investigation reveals that the Department Chair did, in fact, make the reported statement and that the other hiring committee members generally defer to his hiring recommendations. The investigation also reveals that Jane was less qualified than the selectee. The selectee had numerous well-received publications and lectures recently, but Jane had only published one academic article in three years and had not spoken at conferences in her field. Because the evidence establishes that the university would have made the same decision even absent discrimination, Jane is entitled to injunctive relief and attorney's fees, but not reinstatement, back pay, or compensatory or punitive damages.
5. Security Requirements

In some circumstances, employers may justify hiring and other selection decisions by relying on security requirements. Title VII permits refusal to hire, refusal to refer, or termination, where an individual does not meet job requirements that are imposed in the interest of national security under any security program in effect pursuant to federal statute or Executive Order.

Additionally, the EEOC may not review the substance of a security clearance determination or the security requirement, even if it is allegedly based on national origin. Accordingly, EEOC review of employment decisions involving security clearances is very limited. However, the EEOC can review whether procedural requirements in making security clearance determinations were followed without regard to an individual’s protected status. For instance, an employer may not deny procedural safeguards when revoking the security clearances of Cuban-American employees that it grants to other employees.

An employer also may adopt other security requirements for its employees or applicants. Such requirements must be adopted for nondiscriminatory reasons and applied in a nondiscriminatory manner. For instance, an employer may require applicants of Middle Eastern descent to undergo only the same background investigation as applicants of other national origin groups. In addition, employers do not violate Title VII by cooperating with requests by law enforcement officers for access to employee personnel files.

**Caution!**

Employers can reduce the risk of discriminatory employment decisions by establishing written objective criteria for evaluating candidates for hire or promotion and applying those criteria consistently to all candidates. Likewise, in conducting job interviews, employers can promote nondiscriminatory treatment by asking the same questions of all applicants and inquiring about matters related to the position in question. If an employer has clearly defined criteria for employment decisions, managers can be more confident that they are selecting the most qualified candidates. Appropriate objective criteria for employment decisions will be tied to business needs. Criteria that are not business-related sometimes improperly screen out individuals based on national origin.

**Example.**

For many years, XYZ Tool Corporation has had an apprenticeship program that trains participants in the skills needed to become a journeyman machine mechanic. XYZ started as a family-owned business and has limited the program to individuals who are sponsored by current machine mechanics.

In the course of negotiating a new collective bargaining agreement with the local union, XYZ and the union note that the number of applicants to the program has declined steadily for the last ten years and that, while there has been an increase in Filipino and Hispanic workers in the local labor force, there are none in the apprenticeship program. XYZ and the union agree to discontinue the personal sponsorship requirement because it screens out people on the basis of national origin and it is not related to the requirements of the mechanic position.
G. DISCIPLINE, DEMOTION AND DISCHARGE

1. Application of Title VII to Discipline, Demotion, and Discharge

As with other employment decisions, discipline, demotion, and discharge decisions may not be based on national origin.

Example.

Ahmed, who is Lebanese, was discharged from his position as a city bus driver. According to the employer, Ahmed was discharged because, while his performance was satisfactory, customers complained that they were wary of riding with an obviously Middle Eastern driver after the recent arrest of several suspected terrorists in the same city. The employer has unlawfully discharged Ahmed based on his national origin.

Discipline, demotion, and discharge decisions are typically based on either employee misconduct or unsatisfactory work performance. While neutral rules and policies regarding discipline, demotion, and discharge generally do not violate Title VII, they must be enforced in an evenhanded manner, without regard to national origin.

Example.

XYZ Foods, a grocery store, has a written policy of docking workers' pay for being late. Stephanie, a Somali employee, was docked pay as a penalty for being 15 minutes late on two occasions. While other Somali workers have also been docked pay for being late, Hmong workers have been given warnings or permitted to make up the time for comparable violations. Because XYZ treats Somali employees who violate its tardiness policy more severely than Hmong employees who violate it, the company has discriminated against Stephanie based on her national origin.

Employer decisions to discharge or "lay off" employees must be based on nondiscriminatory reasons, such as seniority, or quality or quantity of work, rather than national origin, religion, or other prohibited factors.

Example.

Bob, who is Jamaican, was laid off from his position as an accountant with XYZ Medical Supply Co. Bob asks the employer why he was laid off while others were retained and is told that his performance was inferior to that of other accountants. Bob suspects that the employer's reason is a pretext for national origin discrimination and files an EEOC charge. The investigation reveals that XYZ generally relies on seniority in making layoff decisions among employees with satisfactory performance and only relies on other factors, like comparative performance, when employees have comparable levels of seniority. Bob had three years more seniority than Phil and Susan, two non-Jamaican accountants who were not laid off. Bob, Phil, and Susan all received performance evaluations from the same supervisor commending them for "excellent" performance, and all received year-end bonuses.
Under the circumstances, the evidence establishes that XYZ has provided a false reason - performance - for laying off Bob. Bob had the same "excellent" performance as two other accountants, and XYZ failed to follow its normal layoff policy. Therefore, the evidence establishes that Bob was laid off because of his national origin in violation of Title VII.

2. Recommended Employment Practices

Employers can best treat employees of different national origin groups in a nondiscriminatory manner by developing and applying clear objective criteria for discipline, demotion, and discharge decisions. These policies should address issues related to employee misconduct and unsatisfactory work performance. One common approach for addressing misconduct is a progressive discipline policy directed at correcting employee misconduct.

Employers also will benefit from carefully recording the business reasons for disciplinary or performance-related actions and sharing these reasons with the affected employees. In appropriate circumstances, employers also may choose alternative approaches, such as an employee assistance program. Because any policy related to discipline or poor work performance will require some exercise of managerial discretion, employers also may wish to monitor the actions of inexperienced managers and encourage them to consult with more experienced managers when addressing difficult issues.

H. HARASSMENT

Harassment is one of the most common claims raised in national origin charges filed with the EEOC. National origin harassment violates Title VII when it is so severe or pervasive that the individual being harassed reasonably finds the work environment to be hostile or abusive. Harassment based on national origin can take many different forms, including ethnic slurs, workplace graffiti, or other offensive conduct directed towards an individual's birthplace, ethnicity, culture, or foreign accent.

A hostile environment may be created by the actions of supervisors, coworkers, or even nonemployees, such as customers or business partners. Relevant factors in evaluating whether national origin harassment rises to the level of creating a hostile work environment may include any of the following:

- Whether the conduct was physically threatening or intimidating;
- How frequently the conduct was repeated;
- Whether the conduct was hostile and/or patently offensive;
- The context in which the harassment occurred; and
- Whether management responded appropriately when it learned of the harassment.

The following example illustrates the distinction between "merely offensive" and unlawful conduct.
Example.

Muhammad, an Arab-American, works for XYZ Motors, a large automobile dealership. His coworkers regularly call him names like "camel jockey," "the local terrorist," and "the ayatollah," and intentionally embarrass him in front of customers by claiming that he is incompetent. Muhammad reports this conduct to higher management, but XYZ does not respond. The constant ridicule has made it difficult for Muhammad to do his job. The frequent, severe, and offensive conduct linked to Muhammad's national origin has created a hostile work environment in violation of Title VII.

In contrast, the example below illustrates circumstances in which conduct that may be offensive is not sufficiently severe or pervasive to create a hostile work environment.

Example.

Henry, a Romanian emigrant, was hired by XYZ Shipping as a dockworker. On his first day, Henry dropped a carton, prompting Bill, the foreman, to yell at him. The same day, Henry overheard Bill telling a coworker that foreigners were stealing jobs from Americans. Two months later, Bill confronted Henry about an argument with a coworker, called him a "lazy jerk," and mocked his accent. Although Bill's conduct was offensive, it was not sufficiently severe or pervasive for the work environment to be reasonably considered sufficiently hostile or abusive to violate Title VII.

Caution!

Employers and employees each play an essential role in preventing national origin harassment. Failure by an employer to take appropriate steps to prevent or correct harassment may contribute to employer liability for unlawful harassment. Likewise, failure by an employee to take reasonable steps to report harassment may preclude the employee from being able to hold an employer responsible for the harassment. When employers and employees both take appropriate steps to prevent and correct national origin harassment, offensive conduct generally will be corrected before escalating to the point of violating Title VII.

Generally, an employer will be liable for unlawful harassment by a supervisor unless it can show the following:

- The employer exercised reasonable care to prevent and correct promptly any harassing behavior; and
- The employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

An employer is liable for unlawful national origin harassment by coworkers or non-employees if the employer knew or should have known about the harassment and failed to take immediate and appropriate corrective action.
The most important step for an employer in preventing harassment is clearly communicating to employees that harassment based on national origin will not be tolerated and that employees who violate the prohibition against harassment will be disciplined. In addition, an employer should have effective and clearly communicated policies and procedures for addressing complaints of national origin harassment and should train managers on how to identify and respond effectively to harassment.

Employees who are harassed should take appropriate steps at an early stage to prevent the continuation of the objectionable conduct. In some cases, an employee who is offended by a supervisor's or coworker's conduct may feel he or she can raise it directly with the individual who engaged in the objectionable conduct.

In other situations, where the employee believes that the employer's intervention is required to prevent further harassment, the employee should notify the official designated by the employer's complaint or harassment procedures. In some circumstances, it may be reasonable for the employee to notify another appropriate official not specifically designated by the employer to accept complaints, such as where the employer's procedure requires the employee to report the harassment to his or her direct supervisor and that individual is the alleged harasser.

Example.

Carla, a Guatemalan, claims that she was subjected to frequent offensive comments based on sex and national origin by her first-level supervisor. Carla was aware of the employer's anti-harassment complaint procedures, but did not notify her employer or explain her failure to follow those procedures. The employer learned of the harassment from Carla's coworker, and immediately conducted an investigation. The employer reprimanded the supervisor and transferred him to another division. The company is not liable for the harassment because it took reasonable preventive and corrective measures and Carla unreasonably failed to complain about the harassment.

I. LANGUAGE ISSUES

As the U.S. labor force has grown more ethnically diverse, the number of workers who are not native English speakers has increased dramatically. Employers sometimes have legitimate business reasons for basing employment decisions on linguistic characteristics. However, linguistic characteristics are closely associated with national origin. Therefore, employers should ensure that the business reason for reliance on a linguistic characteristic justifies any burdens placed on individuals because of their national origin. The subsections below provide guidance on employment decisions that are based on foreign accent or fluency, and guidance on policies requiring employees to speak only English while in the workplace.

1. Accent Discrimination

Because linguistic characteristics are a component of national origin, employers should carefully scrutinize employment decisions that are based on accent to ensure that they do not violate Title VII.
An employment decision based on foreign accent does not violate Title VII if an individual's accent materially interferes with the ability to perform job duties. This assessment depends upon the specific duties of the position in question and the extent to which the individual's accent affects his or her ability to perform job duties. Employers should distinguish between a merely discernible foreign accent and one that interferes with communication skills necessary to perform job duties. Generally, an employer may only base an employment decision on accent if effective oral communication in English is required to perform job duties and the individual's foreign accent materially interferes with his or her ability to communicate orally in English. Positions for which effective oral communication in English may be required include teaching, customer service, and telemarketing. Even for these positions, an employer must still determine whether the particular individual's accent interferes with the ability to perform job duties.

Example.

Anna, a Pakistani librarian in an elementary school, is responsible for cataloguing, researching, and reading aloud to young children. Her performance evaluations reflect that she is an excellent cataloguer and researcher and that she can communicate effectively with teachers and older children, but that some of the youngest children have had difficulty understanding her due to her accent.

When her position is eliminated, Anna asks the local school board to transfer her to a position at a high school that involves cataloguing and researching but requires minimal student contact. The school board appropriately grants Anna's transfer request because Anna is qualified and her accent would not materially interfere with her ability to perform the librarian position at the high school.

2. Fluency Requirements

Generally, a fluency requirement is permissible only if required for the effective performance of the position for which it is imposed. Because the degree of fluency that may be lawfully required varies from one position to the next, employers should avoid fluency requirements that apply uniformly to a broad range of dissimilar positions.

As with a foreign accent, an individual's lack of proficiency in English may interfere with job performance in some circumstances, but not in others. For example, an individual who is sufficiently proficient in spoken English to qualify as a cashier at a fast food restaurant may lack the written language skills to perform a managerial position at the same restaurant requiring the completion of copious paperwork in English.

Example.

Jorge, a Dominican national, applies for a sales position with XYZ Appliances, a small retailer of home appliances in a non-bilingual, English-speaking community. Jorge has very limited skill with spoken English. XYZ notifies him that he is not qualified for a sales position because his ability to effectively assist customers is limited. However, XYZ offers to consider him for a position in the stock room. Under these circumstances, XYZ's decision to exclude Jorge from the sales position does not violate Title VII.
3. Foreign Language Fluency

With American society growing more diverse, employers have increasingly required that some employees be fluent in languages other than English. For example, a business that provides services to Spanish-speaking customers might have a sound business reason for requiring that some of its employees speak Spanish. As with English fluency requirements, requirements for fluency in foreign languages must actually be necessary for the positions for which they are imposed.

A business with a diverse clientele may assign work based on foreign language ability. For example, an employer may assign bilingual Spanish-speaking employees to provide services to customers who speak Spanish, while assigning employees who only speak English to provide services to English-speaking customers. Of course, employers should make such assignments based on language ability. In most cases, employers also may lawfully assign comparable work to employees based on their language skills, and are not required by Title VII to provide additional compensation for work that is performed in a foreign language.

4. English-Only Rules

Some employers have instituted workplace policies restricting communication in languages other than English, often called "English-only rules." Title VII permits employers to adopt English-only rules under certain circumstances. As with any other workplace policy, an English-only rule must be adopted for nondiscriminatory reasons. An English-only rule would be unlawful if it were adopted with the intent to discriminate on the basis of national origin. Likewise, a policy that prohibits some but not all of the foreign languages spoken in a workplace, such as a no-Navajo rule, would be unlawful.

Example.

*XYZ Textile Corp. adopts a policy requiring employees to speak only English while in the workplace, including when speaking to coworkers during breaks or when making personal telephone calls. XYZ places Hispanic workers under close scrutiny to ensure compliance and replaces workers who violate the rule with non-Hispanics. Jose, a native Spanish speaker, files a charge with the EEOC alleging that the policy discriminates against him based on his national origin.*

*XYZ states that the rule was adopted to promote better employee relations and to help improve English skills. However, the investigation reveals no evidence of poor employee relations due to communication in languages other than English. Nor are proficient English skills required for any of the positions held by non-native English speakers. Because XYZ’s explanation is contradicted by the evidence, the English-only rule is unlawful.*

Even where an English-only rule has been adopted for nondiscriminatory reasons, the employer's use of the rule should relate to specific circumstances in its workplace. An English-only rule is justified by "business necessity" if it is needed for an employer to operate safely or efficiently. The following are some situations in which business necessity would justify an English-only rule:
For communications with customers, coworkers, or supervisors who only speak English;

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

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

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

Example.

XYZ Petroleum Corp. operates an oil refinery and has a rule requiring all employees to speak only English during an emergency. The rule also requires that employees speak in English while performing job duties in laboratories and processing areas where there is the danger of fire or explosion. The rule does not apply to casual conversations between employees in the laboratory or processing areas when they are not performing a job duty. The English-only rule does not violate Title VII because it is narrowly tailored to safety requirements.

Caution!

In evaluating whether to adopt an English-only rule, an employer should weigh business justifications for the rule against possible discriminatory effects of the rule. While there is no precise test for making this evaluation, relevant considerations include:

- Evidence of safety justifications for the rule
- Evidence of other business justifications for the rule, such as supervision or effective communication with customers
- Likely effectiveness of the rule in carrying out objectives
- English proficiency of workers affected by the rule

Before adopting an English-only rule, the employer should consider whether there are any alternatives to an English-only rule that would be equally effective in promoting safety or efficiency.
Example.

At a management meeting of XYZ Electronics Co., a supervisor proposes that the company adopt an English-only rule to decrease tensions among its ethnically diverse workforce. He reports that two of the employees he supervises, Ann and Vinh, made derogatory comments in Vietnamese about their coworkers. Because such examples of misconduct are isolated and thus can be addressed effectively under the company’s discipline policy, XYZ decides that the circumstances do not justify adoption of a facility-wide English-only rule. To reduce the likelihood of future incidents, XYZ supervisors are instructed to counsel line employees about appropriate workplace conduct.

An employer should ensure that affected employees are notified about an English-only rule and the consequences for violation. The employer may provide notice by any reasonable means under the circumstances, such as a meeting, e-mail, or posting. In some cases, it may be necessary for an employer to provide notice in English and in the other native languages spoken by its workers. A grace period before the effective date of the rule also may be required to ensure that all workers have received notice.

J. CITIZENSHIP REQUIREMENTS

Discrimination based on citizenship violates Title VII's prohibition against national origin discrimination under limited circumstances. While Title VII does not prohibit citizenship discrimination per se, citizenship discrimination does violate Title VII where it has the "purpose or effect" of discriminating on the basis of national origin. For example, a citizenship requirement would be unlawful if it is a "pretext" for national origin discrimination, or if it is part of a wider scheme of national origin discrimination.

Example.

Juanita is a Mexican citizen living in Houston, Texas, and is authorized to work in the United States. She would like to apply for a position as a tour guide with XYZ Tours, for which she meets all of the stated qualifications except U.S. citizenship. Believing the policy of requiring U.S. citizenship to be discriminatory, she files a charge with the EEOC.

The investigation reveals that XYZ recently employed several tour guides who were citizens of northern European countries, but has never hired citizens of South American or African countries as tour guides. Based on these facts, the investigator concludes that XYZ’s citizenship requirement is a pretext for unlawful national origin discrimination.

Federal law requires U.S. citizenship for most federal civil service employment. For such employment, the failure to hire an individual because he or she is not a U.S. citizen does not constitute national origin discrimination in violation of Title VII. In addition to national origin claims under Title VII, individuals who are not U.S. citizens may have claims under other federal statutes, which are enforced by other agencies:
Immigration Reform and Control Act of 1986 (IRCA): IRCA prohibits employers with four or more employees from discriminating because of citizenship status against U.S. citizens and certain classes of foreign nationals authorized to work in the United States with respect to hiring, referral, or discharge. IRCA also prohibits national origin discrimination by employers with between four and fourteen employees. IRCA's nondiscrimination requirements are enforced by the Office of Special Counsel for Immigration-Related Unfair Employment Practices, Civil Rights Division, at the Department of Justice.

Fair Labor Standards Act (FLSA): The FLSA requires, among other things, that covered workers, including those who are not U.S. citizens, be paid no less than the federally designated minimum wage. The FLSA is enforced by the Employment Standards Administration, Wage and Hour Division of the Department of Labor (DOL).

Special Visa Programs: Employment of foreign nationals under special visa programs, such as H-1B and H-2A visas, also may be subject to certain requirements related to wages, working conditions, or other aspects of employment. The Wage and Hour Division of DOL investigates alleged violations of some visa program requirements, including H-1B and H-2A visa requirements.

K. COVERAGE OF FOREIGN NATIONALS

Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Equal Pay Act (the EEO statutes) prohibit discrimination against employees who work in the United States for covered employers, regardless of citizenship or work authorization. While federal law prohibits employers from employing individuals lacking work authorization, employers who nonetheless employ undocumented workers are prohibited from discriminating against those workers.

The EEOC has taken the position that foreign nationals are covered by the EEO statutes when they apply for U.S.-based employment from outside the United States. If the employment is outside the United States, however, individuals who are not U.S. citizens are not protected by the U.S. EEO statutes.

L. RETALIATION

Title VII prohibits retaliation against an individual because he or she has opposed unlawful national origin discrimination or participated in the complaint process by filing a charge, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing under Title VII.

IV. Religion

Title VII prohibits employers from discriminating against individuals because of their religion in hiring, firing, and other terms and conditions of employment, including the following:

- Employers may not treat employees or applicants less – or more – favorably because of their religious beliefs or practices. For example, an employer may not refuse to hire individuals of a certain religion, may not impose stricter promotion requirements for persons of a certain religion, and may not impose more or
different work requirements on an employee because of that employee's religious beliefs or practices;

- Employees cannot be forced to participate – or not participate – in a religious activity as a condition of employment;

- Employers must reasonably accommodate employees' sincerely held religious beliefs or practices unless doing so would impose an undue hardship on the employer;

- An employer is not required to accommodate an employee's religious beliefs and practices if doing so would impose an undue hardship on the employers' legitimate business interests. 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 co-workers to carry the accommodated employee's share of potentially hazardous or burdensome work, or if the proposed accommodation conflicts with another law or regulation;

- Employers must permit employees to engage in religious expression if employees are permitted to engage in other personal expression at work, unless the religious expression would impose an undue hardship on the employer. Therefore, an employer may not place more restrictions on religious expression than on other forms of expression that have a comparable effect on workplace efficiency; and

- Employers must take steps to prevent religious harassment of their employees. An employer can reduce the chance that employees will engage unlawful religious harassment by implementing an anti-harassment policy and having an effective procedure for reporting, investigating and correcting harassing conduct.

It is also unlawful to retaliate against an individual for opposing employment practices that discriminate based on religion or for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or litigation under Title VII.

A. “RELIGION” DEFINED

1. EEOC’s Broad Interpretation

The EEOC defines "religion" to include moral or ethical beliefs as to right and wrong that are sincerely held with the strength of traditional religious views. This broad coverage ensures that individuals are protected against religious discrimination regardless of how widespread their particular religious beliefs or practices are. According to EEOC regulations, "the fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee."
Example.

Lonnie is an accountant with the firm of Less, Lesser & Least. While in College, Lonnie traveled to a remote island in the South Pacific where he met a band of natives whose religious observances included daily sunbathing. Lonnie has since engaged in this practice every day of his life and truly believes that it makes him closer to God. He feels he must do this every day for at least 15 minutes in order to facilitate his relationship with God. This will likely qualify as a sincerely held religious belief for which his employer will be required to provide reasonable accommodation unless to do so would constitute an undue hardship.

2. Atheism Protected

Religious discrimination also includes discrimination against someone because he or she is an atheist.

Example.

Bob, a devout Christian, is an accountant who owns his own financial planning firm. Although Bob does not insist that all of his employees practice Christianity, he does believe that everyone needs to worship God in some way every day. Bob may not impose his beliefs on his employees and may not deny employment to someone based on their lack of religious conviction.

B. REASONABLE ACCOMMODATION REQUIREMENT

In most cases, Title VII merely prohibits discrimination against persons on the basis of their membership in a protected class. In the case of religion, however, employers may be required to take affirmative steps to accommodate an employee under some circumstances. Title VII makes it a violation of the Act for an employer to fail to reasonably accommodate the religious practices of an employee or prospective employee unless the employer can demonstrate that providing the accommodation would result in an “undue hardship” in the conduct if its business.

1. Notice Required

Employers have no obligation to provide an accommodation for a practice of which they are not aware. An applicant or employee therefore has an affirmative obligation to notify the employer of their religious belief and their need for an accommodation.

2. Duty to Accommodate

Once notice is given, a refusal to accommodate is justified only when an employer or labor organization can demonstrate that an undue hardship would in fact result from each available alternative method of accommodation. A mere assumption that many more people, with the same religious practices as the person being accommodated, may also need accommodation is not evidence of undue hardship.
3. **Multiple Methods Available**

When there is more than one method of accommodation available that would not cause undue hardship, the EEOC generally requires the employer to offer the alternative that least disadvantages the individual with respect to his or her employment opportunities.

4. **Common Accommodations**

Some of those practices for which employees and prospective employees commonly seek accommodation are:

- Observance of a Sabbath or religious holidays;
- Need for prayer break during working hours;
- Practice of following certain dietary requirements;
- Practice of not working during a mourning period for a deceased relative;
- Prohibition against medical examinations;
- Prohibition against membership in labor and other organizations; and
- Practices concerning dress and other personal grooming.

Employees and prospective employees most frequently request an accommodation because their religious practices conflict with their work schedules. The following means of accommodating the conflict between work schedules and religious practices have been proposed by the EEOC.

**a. Voluntary Substitutes and “Swaps”**

Reasonable accommodation without undue hardship is generally possible where a voluntary substitute with substantially similar qualifications is available. One means of substitution is the voluntary swap. In a number of cases, the securing of a substitute has been left entirely up to the individual seeking the accommodation. The EEOC believes that the obligation to accommodate requires that employers and labor organizations facilitate the securing of a voluntary substitute with substantially similar qualifications.

Some means of doing this which employers and labor organizations should consider are: to publicize policies regarding accommodation and voluntary substitution; to promote an atmosphere in which such substitutions are favorably regarded; or to provide a central file, bulletin board or other means for matching voluntary substitutes with positions for which substitutes are needed.

**b. Flexible Scheduling**

One means of providing reasonable accommodation for the religious practices of employees or prospective employees which employers and labor organizations should consider is the creation of a flexible work schedule for individuals requesting accommodation. Examples of flexibility include:
- Floating or optional holidays;
- Flexible work breaks;
- Floating arrival and departure times;
- Use of lunchtime in exchange for early departure;
- Staggered work hours; and
- Permitting an employee to make up time lost due to the observance of religious practices.

C. UNDUE HARDSHIP

1. Cost

An employer may assert undue hardship to justify a refusal to accommodate an employee's need to be absent from his or her scheduled duty hours if the employer can demonstrate that the accommodation would require more than a minor cost.

Whether a cost is minor or not depends on the size and operating cost of the employer, and the number of individuals who will in fact need a particular accommodation. In most cases, the EEOC does not impose on employers the obligation to pay a premium for a substitute worker in order to provide reasonable accommodation. However, the EEOC generally presumes that the infrequent payment of premium wages for a substitute or the payment of premium wages while a more permanent accommodation is being sought are costs which an employer can be required to bear as a means of providing a reasonable accommodation.

Further, the EEOC will presume that generally, the payment of administrative costs necessary for providing the accommodation will not constitute more than a de minimis cost. Administrative costs, for example, include those costs involved in rearranging schedules and recording substitutions for payroll purposes.

2. Seniority Rights

Undue hardship can also be shown where a variance from a bona fide seniority system is necessary in order to accommodate an employee's religious practices when doing so would deny another employee his or her job or shift preference guaranteed by that system. Arrangements for voluntary substitutes and swaps do not constitute an undue hardship to the extent the arrangements do not violate a bona fide seniority system.

D. IMPROPER SELECTION PRACTICES

Employers may run afoul of Title VII’s prohibition against religious discrimination in a number of different ways, including the following common selection practices.
1. Scheduling of Tests or Other Selection Procedures

When a test or other selection procedure is scheduled at a time when an employee or prospective employee cannot attend because of his or her religious practices, managers should be aware that they have an obligation to accommodate such employee or prospective employee unless undue hardship would result.

2. Inquiries

Employers who believe they have a legitimate interest in knowing the availability of their applicants prior to hiring must be careful in the way they solicit such information. It is recommended that managers inform the applicant of the hours they are expected to work and ask if they will be available at those times. That is preference to more specific questions such as “are you available to work Sundays?”

Caution!

Managers have the right to determine an applicant’s availability to work during an employer's scheduled working hours. However, the duty to accommodate pertains to prospective employees as well as current employees. Consequently, an employer may not permit an applicant's need for a religious accommodation to affect in any way its decision whether to hire the applicant unless it can demonstrate that it cannot reasonably accommodate the applicant's religious practices without undue hardship.

E. POST 9-11 ISSUES

Since the attacks of September 11, 2001, the EEOC and state and local fair employment practices agencies have recorded a significant increase in the number of charges alleging discrimination based on religion and/or national origin. Many of the charges have been filed by individuals who are or are perceived to be Muslim, Arab, South Asian, or Sikh. These charges most commonly allege harassment and discharge. The following are examples of EEOC guidance in response to specific factual scenarios.

Example 1.

Narinder, a South Asian man who wears a Sikh turban, applies for a position as a cashier at XYZ Discount Goods. XYZ fears Narinder's religious attire will make customers uncomfortable. What should XYZ do?

XYZ should not deny Narinder the job due to notions of customer preferences about religious attire. That would be unlawful. It would be the same as refusing to hire Narinder because he is a Sikh.

XYZ Discount Goods should also consider proactive measures for preventing discrimination in hiring and other employment decisions. XYZ could remind its managers and employees that discrimination based on religion or national origin is not tolerated by the company in any aspect of employment, including hiring. XYZ could also adopt objective standards for selecting new employees. It is important to hire people based on their qualifications rather than on perceptions about their religion, race or national origin.
Example 2.

Muhammad, who is Arab American, works for XYZ Motors, a large used car business. Muhammad meets with his manager and complains that Bill, one of his coworkers, regularly calls him names like "camel jockey," "the local terrorist," and "the ayatollah," and has intentionally embarrassed him in front of customers by claiming that he is incompetent. How should the supervisor respond?

Managers and supervisors who learn about objectionable workplace conduct based on religion or national origin are responsible for taking steps to correct the conduct by anyone under their control. Muhammad's manager should relay Muhammad's complaint to the appropriate manager if he does not supervise Bill. If XYZ Motors then determines that Bill has harassed Muhammad, it should take disciplinary action against Bill that is significant enough to ensure that the harassment does not continue.

Caution!
Workplace harassment and its costs are often preventable. Clear and effective policies prohibiting ethnic and religious slurs, and related offensive conduct, are needed. Confidential complaint mechanisms for promptly reporting harassment are critical, and these policies should be written to encourage victims and witnesses to come forward. When harassment is reported, the focus should be on action to end the harassment and correct its effects on the complaining employee.

Example 3.

Three of the 10 Muslim employees in XYZ’s 30-person template design division approach their supervisor and ask that they be allowed to use a conference room in an adjacent building for prayer. Until making the request, those employees prayed at their work stations. What should XYZ do?

XYZ should work closely with the employees to find an appropriate accommodation that meets their religious needs without causing an undue hardship for XYZ. Whether a reasonable accommodation would impose undue hardship and therefore not be required depends on the particulars of the business and the requested accommodation.

When the room is needed for business purposes, XYZ can deny its use for personal religious purposes. However, allowing the employees to use the conference room for prayers likely would not impose an undue hardship on XYZ in many other circumstances.

Similarly, prayer often can be performed during breaks, so that providing sufficient time during work hours for prayer would not result in an undue hardship. If going to another building for prayer takes longer than the allotted break periods, the employees still can be accommodated if the nature of the template design division’s work makes flexible scheduling feasible. XYZ can require employees to make up any work time missed for religious observance.
In evaluating undue hardship, XYZ should consider only whether it can accommodate the three employees who made the request. If XYZ can accommodate three employees, it should do so. Because individual religious practices vary among members of the same religion, XYZ should not deny the requested accommodation based on speculation that the other Muslim employees may seek the same accommodation. If other employees subsequently request the same accommodation and granting it to all of the requesters would cause undue hardship, XYZ can make an appropriate adjustment at that time. For example, if accommodating five employees would not cause an undue hardship but accommodating six would impose such hardship, the sixth request could be denied.

Like employees of other religions, Muslim employees may need accommodations such as time off for religious holidays or exceptions to dress and grooming codes.

Example 4.

Susan is an experienced clerical worker who wears a hijab (head scarf) in conformance with her Muslim beliefs. XYZ Temps places Susan in a long-term assignment with one of its clients. The client contacts XYZ and requests that it notify Susan that she must remove her hijab while working at the front desk, or that XYZ assign another person to Susan’s position. According to the client, Susan's religious attire violates its dress code and presents the "wrong image." Should XYZ comply with its client's request?

XYZ Temps may not comply with this client request without violating Title VII. The client would also violate Title VII if it made Susan remove her hijab or changed her duties to keep her out of public view. Therefore, XYZ should strongly advise against this course of action.

Notions about customer preference, real or perceived, do not establish undue hardship, so the client should make an exception to its dress code to let Susan wear her hijab during front desk duty as a religious accommodation. If the client does not withdraw the request, XYZ should place Susan in another assignment at the same rate of pay and decline to assign another worker to the client.

Example 5.

Anwar, who was born in Egypt, applies for a position as a security guard with XYZ Corp., which contracts to provide security services at government office buildings. Can XYZ require Muhammad to undergo a background investigation before he is hired?

XYZ may require Anwar to undergo the same pre-employment security checks that apply to other applicants for the same position. As with its other employment practices, XYZ may not perform background investigations or other screening procedures in a discriminatory manner.
In addition, XYZ may require a security clearance pursuant to a federal statute or Executive Order. Security clearance determinations for positions subject to national security requirements under a federal statute or an Executive Order are not subject to review under the equal employment opportunity statutes.

V. Sex

Title VII prohibits discrimination based on sex, including both sexual harassment, where the prohibited conduct is sexual in nature, and sex-based harassment that is not of a sexual nature, sometimes called gender-based harassment.

Example 1.

Anna alleges that her supervisor made frequent derogatory comments about women and referred to female employees as “girls.” Anna has alleged discrimination based on sex covered by Title VII.

Example 2.

Anna alleges that her supervisor refused to promote her because she refused to engage in sexual relations with him. Anna has alleged discrimination based on sex covered by Title VII.

Discrimination on the basis of sex includes discrimination because of pregnancy, childbirth, and related medical conditions. For example, an employer must provide leave and benefits for women affected by pregnancy and childbirth on the same terms as it does for other individuals similarly unable to work.

A. SEXUAL HARASSMENT

Harassment on the basis of sex is a violation of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. Given the importance and scope of this topic, it will be addressed separately in Chapter 8.

Caution!

The same principles outlining harassment on the basis of gender apply equally to race, color, religion or national origin.
B. PREGNANCY DISCRIMINATION

The Pregnancy Discrimination Act is an amendment to Title VII of the Civil Rights Act of 1964. Discrimination on the basis of pregnancy, childbirth, or related medical conditions constitutes unlawful sex discrimination under Title VII. Women who are pregnant or affected by related conditions must be treated in the same manner as other applicants or employees with similar abilities or limitations. Title VII's pregnancy-related protections include:

1. Hiring

An employer cannot refuse to hire a pregnant woman because of her pregnancy, because of a pregnancy-related condition or because of the prejudices of co-workers, clients, or customers.

2. Pregnancy and Maternity Leave

An employer may not single out pregnancy-related conditions for special procedures to determine an employee's ability to work. However, if an employer requires its employees to submit a doctor's statement concerning their inability to work before granting leave or paying sick benefits, the employer may require employees affected by pregnancy-related conditions to submit such statements.

If an employee is temporarily unable to perform her job due to pregnancy, the employer must treat her the same as any other temporarily disabled employee. For example, if the employer allows temporarily disabled employees to modify tasks, perform alternative assignments or take disability leave or leave without pay, the employer also must allow an employee who is temporarily disabled due to pregnancy to do the same.

Pregnant employees must be permitted to work as long as they are able to perform their jobs. If an employee has been absent from work as a result of a pregnancy-related condition and recovers, her employer may not require her to remain on leave until the baby's birth. An employer also may not have a rule that prohibits an employee from returning to work for a predetermined length of time after childbirth.

Employers must hold open a job for a pregnancy-related absence the same length of time jobs are held open for employees on sick or disability leave.

3. Health Insurance

Any health insurance provided by an employer must cover expenses for pregnancy-related conditions on the same basis as costs for other medical conditions. Health insurance for expenses arising from abortion is not required, except where the life of the mother is endangered.

Pregnancy-related expenses should be reimbursed exactly as those incurred for other medical conditions, whether payment is on a fixed basis or a percentage of reasonable-and-customary-charge basis. The amounts payable by the insurance provider can be limited only to the same extent as amounts payable for other conditions. No additional, increased, or larger deductible can be imposed. Employers must provide the same level
of health benefits for spouses of male employees as they do for spouses of female employees.

4. Fringe Benefits

Pregnancy-related benefits cannot be limited to married employees. In an all-female workforce or job classification, benefits must be provided for pregnancy-related conditions if benefits are provided for other medical conditions. If an employer provides any benefits to workers on leave, the employer must provide the same benefits for those on leave for pregnancy-related conditions.

Employees with pregnancy-related disabilities must be treated the same as other temporarily disabled employees for accrual and crediting of seniority, vacation calculation, pay increases, and temporary disability benefits.

It is also unlawful to retaliate against an individual for opposing employment practices that discriminate based on pregnancy or for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or litigation under Title VII.

C. SEX AS A BONA FIDE OCCUPATIONAL QUALIFICATION

There is an exception to the general rule that an employer may not prefer one sex over another in employment, namely when being a member of one particular sex qualifies as a bona fide occupational qualification, popularly known as a “BFOQ.” The exception applies where it is necessary for the purpose of authenticity or genuineness, e.g., an actor or actress.

Example.

Luke, a successful male model, applies for a position to model bras. The company tells Luke that they are only considering women for the position. The employer is able to exclude males from consideration since being female is a BFOQ for modeling bras.

Like all exceptions, the EEOC and the courts apply the BFOQ exception narrowly. For example, the EEOC has said that the following situations do not warrant the finding of a BFOQ:

- The refusal to hire a woman because of her sex based on assumptions of the comparative employment characteristics of women in general. For example, the assumption that the turnover rate among women is higher than among men;

- The refusal to hire an individual based on stereotyped characterizations of the sexes. Such stereotypes include, for example, that men are less capable of assembling intricate equipment, or that women are less capable of aggressive salesmanship. The principle of nondiscrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group; and
The refusal to hire an individual because of the preference of coworkers, the employer, or customers.

**Example.**

*The accounting firm of Just, Just & Simple has a large number of Japanese clients. Because Japanese men traditionally do not believe that women should work outside the home, the firm denies employment to women. Although this practice might be good for business, it clearly violates Title VII. The firm cannot use the preference of its clients to justify sex discrimination in employment.*

**D. SEPARATE LINES OF PROGRESSION AND SENIORITY SYSTEMS**

It is an unlawful employment practice to classify a job as “male” or “female” or to maintain separate lines of progression or separate seniority lists based on sex where this would adversely affect any employee unless sex is a bona fide occupational qualification for that job. Accordingly, employment practices are unlawful which arbitrarily classify jobs so that:

- A female is prohibited from applying for a job labeled “male,” or for a job in a “male” line of progression, and vice versa;

- A male scheduled for layoff is prohibited from displacing a less senior female on a “female” seniority list, and vice versa; or

- A Seniority system or line of progression which distinguishes between “light” and “heavy” jobs constitutes an unlawful employment practice if it operates as a disguised form of classification by sex, or creates unreasonable obstacles to the advancement by members of either sex into jobs which members of that sex would reasonably be expected to perform.

**E. DISCRIMINATION AGAINST MARRIED WOMEN**

An employer's rule which forbids or restricts the employment of married women and which is not applicable to married men is a discrimination based on sex prohibited by Title VII. The behavior is not excused, in other words, merely because it is not directed against all females, but only against married females, for so long as sex is a factor in the application of the rule, such application involves a discrimination based on sex.

**F. ADVERTISING**

It is a violation of Title VII for a help-wanted advertisement to indicate a preference, limitation, specification, or discrimination based on sex unless sex is a bona fide occupational qualification for the particular job involved. The placement of an advertisement in columns classified by publishers on the basis of sex, such as columns headed “Male” or “Female,” will be considered an expression of a preference, limitation, specification, or discrimination based on sex.
G. PRE-EMPLOYMENT INQUIRIES

A pre-employment inquiry may ask “Male........, Female........”; or “Mr. Mrs. Miss,” provided that the inquiry is made in good faith for a nondiscriminatory purpose. Any pre-employment inquiry in connection with prospective employment which expresses directly or indirectly any limitation, specification, or discrimination as to sex shall be unlawful unless based upon a bona fide occupational qualification.

H. RELATIONSHIP TO EQUAL PAY ACT

The employee coverage of the prohibitions against discrimination based on sex contained in Title VII is coextensive with that of the other prohibitions contained in Title VII and is not limited by section 703(h) to those employees covered by the Fair Labor Standards Act. A defense based on the Equal Pay Act may be raised in a proceeding under Title VII.

I. FRINGE BENEFITS

It is a violation of Title VII for an employer to discriminate between men and women with respect to the provision of fringe benefits. Fringe benefits include, but are not limited to, any of the following:

- Medical insurance;
- Hospital insurance;
- Life insurance;
- Retirement benefits;
- Profit-sharing;
- Bonus plans; and
- Leave.

1. “Head of Household” Designation

Where an employer conditions benefits available to employees and their spouses and families on whether the employee is the “head of the household” or “principal wage earner” in the family unit, the benefits tend to be available only to male employees and their families. Due to the fact that such conditioning discriminatorily affects the rights of women employees, and that “head of household” or “principal wage earner” status bears no relationship to job performance, benefits which are so conditioned will be found a prima facie violation of the prohibitions against sex discrimination contained in the act.

2. Benefits for Only One Gender

It is also a violation of Title VII for an employer to make available benefits for the wives and families of male employees where the same benefits are not made available for the husbands and families of female employees; or to make available benefits for the wives
of male employees which are not made available for female employees; or to make available benefits to the husbands of female employees which are not made available for male employees. An example of such an unlawful employment practice is a situation in which wives of male employees receive maternity benefits while female employees receive no such benefits. It is not a defense that the cost of such benefits is greater with respect to one sex than the other.

3. Pension Plans

Likewise, it violates Title VII for an employer to have a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex, or which differentiates in benefits on the basis of sex.

J. POLICIES RELATED TO CHILDBIRTH

A written or unwritten employment policy or practice that excludes from employment applicants or employees because of pregnancy, childbirth or related medical conditions is in prima facie violation of Title VII.

1. Treatment of Disabilities

Disabilities caused or contributed to by pregnancy, childbirth, or related medical conditions, for all job-related purposes, must be treated the same as disabilities caused or contributed to by other medical conditions, under any health or disability insurance or sick leave plan available in connection with employment. Written or unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy, childbirth or related medical conditions on the same terms and conditions as they are applied to other disabilities.

2. Health Insurance Programs

Health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term or where medical complications have arisen from an abortion, are not required to be paid by an employer. However, nothing precludes an employer from providing abortion benefits or otherwise affects bargaining agreements in regard to abortion. Any fringe benefit program, or fund, or insurance program offered by an employer must treat women affected by pregnancy, childbirth, or related medical conditions the same as other persons not so affected.
CHAPTER 5 – REVIEW QUESTIONS

The following questions are designed to ensure that you have a complete understanding of the information presented in the assignment. They do not need to be submitted in order to receive CPE credit. They are included as an additional tool to enhance your learning experience.

We recommend that you answer each review question and then compare your response to the suggested solution before answering the final exam questions related to this assignment.

1. Which of the following classes is not protected by Title VII of the Civil Rights Act of 1964:
   a) sex
   b) religion
   c) sexual orientation
   d) race

2. Which of the following practices are illegal under Title VII:
   a) refusing to hire African-American women while hiring African-American men
   b) the failure of an African-American business owner to promote another African-American
   c) the promotion of a woman over a man on the basis of sex
   d) all of the above

3. Title VII does not prohibit discrimination in job referrals.
   a) true
   b) false

4. It does not violate Title VII for an employer to prefer light skin African-Americans over dark skin African-Americans.
   a) true
   b) false

5. Discrimination against someone because of his or her linguistic or cultural traits violates Title VII.
   a) true
   b) false
6. How can an employer’s method of recruitment violate Title VII’s prohibition against national origin discrimination:

a) if an employer recruits only from one national origin group, that is illegal discrimination under Title VII
b) it cannot unless the employer expressly limits employment to one or more specific ethnic groups
c) when an employer is from a minority ethnic group, there is a legal presumption that he or she prefers persons from that ethnic group
d) unless an employer advertises in at least three foreign language newspapers in the area of his business, it is considered national origin discrimination

7. Customer or co-worker preferences may be used to justify discrimination in employment on the basis of national origin if such preference is very strong.

a) true
b) false

8. Harassment in the workplace based on a person’s national origin is:

a) technically illegal under Title VII but rarely brought up in discrimination claims
b) only illegal if the alleged harasser and the victim are not of the same national origin
c) one of the most common claims involving national origin discrimination
d) only illegal if the victim is not a U.S. citizen

9. Employers are always free under Title VII to adopt a requirement that employees speak only English in the workplace.

a) true
b) false

10. Title VII’s prohibition against religious discrimination outlaws which of the following practices:

a) forcing an employee to participate in a religious practice at work
b) refusing to allow an employee to wear a religiously-requited hat when it poses no impact on the workplace
c) refusing to allow an employee to take a day off for a religious observance when it does not impact the workplace
d) all of the above

11. Title VII’s protections against discrimination on the basis of religion do not apply to atheists.

a) true
b) false
12. Discrimination on the basis of sex includes discrimination because of pregnancy.
   
   a) true
   b) false

13. Are there any exceptions to the general rule that prohibits employers from discrimination in employment on the basis of sex:
   
   a) yes, when there is a strong customer preference
   b) yes, but only when there is a bona fide occupational qualification
   c) no, regardless of the circumstances
   d) both a and b above
CHAPTER 5 – SOLUTIONS AND SUGGESTED RESPONSES

1. A: Incorrect. Although sex was originally included in the Act in an attempt to defeat the legislation, it is among the classes protected by the Civil Rights Act of 1964.

B: Incorrect. The Act protects religion and requires employers to provide reasonable accommodation to employees on the basis of their religious beliefs.

C: Correct. Although the laws in a number of states protect persons from discrimination on the basis of sexual orientation, it is not included in this federal law.

D: Incorrect. Combating race discrimination was the original goal of the Act.

(See page 5-1 of course material.)

2. A: Incorrect. Discrimination within a protected class, or so-called “intersectional discrimination” is as illegal as any other kind under Title VII. However, this is not the best answer.

B: Incorrect. Such practices fall under the umbrella of Title VII. It is not just so-called minority groups that are protected under the law. However, this is not the best answer.

C: Incorrect. Although not as common, preference of women over men is just as illegal as the opposite.

D: Correct. All of the above actions constitute violations of Title VII. It is a very broad statute that governs all aspects of employment.

(See page 5-2 of course material.)

3. A: True is incorrect. Discriminatory referral practices are illegal under Title VII.

B: False is correct. Title VII prohibits discriminatory employment referral practices by any covered entity, including employers, employment agencies, and unions.

(See page 5-4 of course material.)

4. A: True is incorrect. Such a preference would constitute illegal race discrimination in violation of Title VII.

B: False is correct. Race/color discrimination includes discrimination on the basis of shade of skin color. For example, it would be unlawful for an employer to discriminate against dark or light skinned African-Americans.

(See page 5-5 of course material.)
5. **A: True is correct.** Employment discrimination against an individual because she has physical, linguistic, and/or cultural characteristics closely associated with a national origin group violates Title VII. For example, discrimination against someone based on her traditional African style of dress is illegal.

   B: False is incorrect. Such actions constitute illegal discrimination on the basis of national origin.

   (See page 5-7 of course material.)

6. **A: Correct.** Targeted recruitment towards a specific national origin or ethnic group constitutes illegal discrimination under Title VII. This can be done through word of mouth or published ads in foreign language newspapers or other methods that open up the job to persons from only one or designated ethnic groups or national origins.

   B: Incorrect. Express preferences are not required to show violations of Title VII, including those that prohibit preference on the basis of national origin.

   C: Incorrect. There is no such presumption under federal law.

   D: Incorrect. Employers are not obligated to recruit in any specific way; they are, on the other hand, precluded from recruiting in a way that shows a preference.

   (See pages 5-8 to 5-9 of course material.)

7. **A: True is incorrect.** Customer or co-worker preference, no matter how strong, does not justify discrimination in employment.

   **B: False is correct.** Under Title VII, employers may not rely on coworker, customer, or client discomfort or preference as the basis for a discriminatory action. If an employer takes an action based on the discriminatory preferences of others, the employer is also discriminating.

   (See page 5-10 of course material.)

8. **A: Incorrect.** It is not only illegal, but is one of the more common violations alleged under Title VII involving national origin discrimination.

   B: Incorrect. Both the victim and harasser can be members of the same protected class Title VII.

   **C: Correct.** This is a very common charge under Title VII and can involve things like slurs and other offensive conduct sufficient to give rise to a hostile work environment.

   D: Incorrect. All workers are protected by the Act’s protections against national origin discrimination regardless of their citizenship.

   (See page 5-14 of course material.)
9. A: True is incorrect. Although acceptable under limited circumstances, such rules can violate Title VII.

**B: False is correct.** Title VII permits employers to adopt English-only rules under certain circumstances. As with any other workplace policy, an English-only rule must be adopted for nondiscriminatory reasons. An English-only rule would be unlawful if it were adopted with the intent to discriminate on the basis of national origin. Likewise, a policy that prohibits some but not all of the foreign languages spoken in a workplace, such as a no-Navajo rule, would be unlawful.

(See page 5-18 of course material.)

10. A: Incorrect. Title VII protects employees from discrimination on the basis of religion. This includes protecting employees from being forced to practice any religion. However, this is not the best answer.

B: Incorrect. Employers must accommodate an employee’s religious beliefs, including those related to clothing and appearance, unless to do so would constitute an undue hardship. Since there is no impact, it must be allowed. However, this is not the best answer.

C: Incorrect. Employers must provide reasonable accommodation for their employee’s religious beliefs. This includes scheduling changes unless such changes would result in an undue hardship. Since there is no impact, it must be allowed. However, this is not the best answer.

**D: Correct.** All of the above represent correct statements about the law of religious discrimination. Not only must employers not directly discriminate, they must provide reasonable accommodation to allow their employees to practice their religion unless to do so would constitute an undue hardship.

(See pages 5-21 to 5-22 of course material.)

11. A: True is incorrect. Religious beliefs, as well as the absence thereof, are all protected by Title VII.

**B: False is correct.** Religious discrimination also includes discrimination against someone because he or she is an atheist.

(See page 5-23 of course material.)
12. **A: True is correct.** Title VII’s protections against discrimination on the basis of gender are broad and include discrimination because of pregnancy, childbirth, and related medical conditions.

   B: False is incorrect. Such discrimination is illegal. For example, an employer must provide leave and benefits for women affected by pregnancy and childbirth on the same terms as it does for other individuals similarly unable to work.

   (See page 5-30 of course material.)

13. A: Incorrect. Customer preference is never a permissible basis for employment discrimination under Title VII.

   **B: Correct.** There is a narrow exception that allows for a preference on the basis of sex, and that is where being of one sex is a bona fide occupational qualification. However, the EEOC interprets this exception very narrowly.

   C: Incorrect. There is an exception in cases of a BFOQ.

   D: Incorrect. Because A is not a permissible basis of preference, D cannot be correct.

   (See page 5-31 of course material.)
Chapter 6: Americans with Disabilities Act

I. Introduction

The Americans with Disabilities Act ("ADA") is a federal civil rights law designed to prevent discrimination and enable individuals with disabilities to participate fully in all aspects of society, including access to public accommodations such as restaurants and hotels and employment. As applied to employers, the ADA prohibits employers from discriminating against individuals with a covered disability.

<table>
<thead>
<tr>
<th>ADA Do's and Don'ts</th>
</tr>
</thead>
<tbody>
<tr>
<td>✓ Do ensure that your application process is available to everyone;</td>
</tr>
<tr>
<td>✓ Do look for ways to provide reasonable accommodation;</td>
</tr>
<tr>
<td>✓ Don’t make assumptions about the abilities of persons with disabilities; and</td>
</tr>
<tr>
<td>✓ Don’t make inquiries about an individual’s health conditions that violate the ADA.</td>
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The Americans with Disabilities Act (ADA) applies to all businesses with 15 or more employees. Employers, employment agencies, labor organizations and joint labor-management committees covered by the ADA must:

- Have non-discriminatory application procedures, qualification standards, and selection criteria in all other terms and conditions of employment; and
- Make reasonable accommodation to the known limitations of a qualified applicant or employee unless to do so would constitute an undue hardship.

The first major amendments to the law (the ADA Amendments Act or so-called "ADAAA") were signed into law by President George W. Bush in September 2008 and became effective January of 2009. In particular, the ADAAA broadens the scope of protection available to employees by rejecting two Supreme Court decisions which had narrowly construed the definition of “disability” under the ADA.

The Act instructs courts that "the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." More specifically, the Act rejects the standard announced by the United States Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), which required that the determination of whether an impairment substantially limits a major life activity be balanced against the "ameliorative effects of mitigation measures," such as medication or medical devices. The Act also rejects the standards set forth by the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), which held that (1) the terms "substantially limited" and "major life activities" must be strictly construed when determining the existence of a qualifying disability and that (2) an individual must show that such disability prevents or severely restricts him/her from "doing activities that are of central importance to most people’s lives." The rejection of these decisions calls into question numerous court decisions that have denied protection for various conditions,
including diabetes, epilepsy, heart disease, mental disabilities and cancer. In addition to
rejecting the Supreme Court decisions, the Act also adds new definitions and provisions
which provide guidance for determining whether an individual's impairment is considered
a disability. In particular, the Act contains the following amendments:

- The Act specifically provides that the term “disability” shall be construed in favor
  of broad coverage for individuals;

- The Act prohibits the consideration of “mitigating measures,” such as medication,
  medical supplies, prosthetics, hearing aids, mobility devices and assistive
  technology, in determining whether an individual has a disability;

- The Act clarifies that an impairment that substantially limits one major life activity
  need not limit other major life activities in order to be a disability; and

- The Act states that an impairment that is episodic or in remission is a disability if
  it would substantially limit a major life activity when active.

As a result of these amendments, many employees who were not previously protected
under the ADA may now be considered to have a disability.

A. PROTECTED PERSONS

1. Mental or Physical Condition

The ADA applies to a person who has a physical or mental impairment that substantially
limits one or more major life activities (like sitting, standing, or sleeping). Managers need
to keep the following points in mind:

- The ADA covers more than just people who are deaf, people who are blind, or
  people who use wheelchairs;

- People who have physical conditions such as epilepsy, diabetes, HIV infection,
  or severe forms of arthritis, hypertension, or carpal tunnel syndrome may be
  individuals with disabilities; and

- People with mental impairments such as major depression, bipolar disorder and
  mental retardation may also be covered.

2. Record of Impairment

The ADA also protects a person with a record of a substantially limiting impairment even
if they are no longer actually disabled.

Example.

In 1990, David, a CPA, was diagnosed with cancer. He was treated with
chemotherapy and radiation therapy and was eventually found to be free
of cancer. David is now applying for a position with the firm of Brady,
McGinist and Law. Brady, who worked with David in the early 1990s, is
concerned about the cost of the firm’s health care plan if they hire David.
The ADA prohibits the firm from denying David employment based on his history of disability. The firm’s concerns about costs do not provide an exception.

3. Persons Regarded as Being Disabled

The ADA also protects persons who are regarded (or treated by an employer) as if they have a substantially limiting impairment. Sometimes, a person may be covered even if he or she has no impairment or has a minor impairment, particularly if the employer acts based on myths, fears, or stereotypes about a person's medical condition.

Example.

As a child, Martin suffered severe burns to his face. He is an intelligent, successful CPA who is now looking to relocate. When he interviews for a job with the firm of Caesar, Julius and Augusta, the partners are concerned that clients will not believe he is mentally competent and deny him employment. The firm’s stereotypical concerns do not justify their decision, which violates the ADA.

4. Qualified Individuals

Having a covered disability is just the beginning of the story. The ADA only protects persons who are qualified for the job in question. It does not require employers to hire unqualified workers and it does not require employers to prefer persons with a disability over those without such a condition.

Example.

Roger, a paraplegic with no formal education beyond junior high school, applies for a position as an administrative assistant with a large accounting firm. The firm is not required to consider Roger for the position because he is not qualified for the job. The fact that he is disabled is irrelevant.

A qualified individual with a disability:

- Must meet legitimate job-related requirements (i.e. education, training or skills requirements); and
- Must be able to perform the essential functions of the job (i.e. its fundamental duties) with or without reasonable accommodation.

B. EMPLOYER OBLIGATIONS

The ADA does more than prohibit discrimination in hiring decisions. The ADA is a broad law that requires employers to ensure that persons with disabilities:

- Have an equal opportunity to apply for jobs and to work in jobs for which they are qualified;
Have an equal opportunity to be promoted once they are working;

Have equal access to benefits and privileges of employment that are offered to other employees, such as employer-provided health insurance or training; and

Are not harassed because of their disability.

Caution!

Harassing someone because of a disability is just as serious as harassing someone because of race, sex, religion, or national origin. If an employee complains to you that s/he is being harassed because of a disability, respond to the complaint right away by conducting an appropriate investigation and, if necessary, taking action to correct the situation.

II. Hiring Do's and Don'ts - Pre-Job Offer

A. PRE-EMPLOYMENT EXAMINATIONS

The ADA generally prohibits employers from asking applicants questions about disabilities and prohibits the use of medical examinations until someone has been made a conditional offer of employment. In addition, to be legal, an employer must require all similarly situated applicants to undergo a medical examination.

Example.

The accounting firm of Nash & Nash requires all applicants, after they have been made a conditional offer of employment, to undergo a physical examination. The firm pays for the exam. This is a legal policy so long as it applies to all similarly situated workers and is only required after an offer of employment has been made.

B. PERMISSIBLE INQUIRIES

In practical terms, the ADA’s limitations on pre-employment inquiries mean that employers should focus their interview questions on the applicant’s job qualification, not on other, ancillary topics.

Example.

David, a CPA, is interviewing for a position with the accounting firm of Bryant & O’Neal. David is a parapalegic who uses a wheelchair to get around. When the interview begins Steve, the firm’s hiring partner, asks David how long he has been in the wheelchair and whether his condition causes him pain. These questions are not related to his qualifications as an accountant and are prohibited under the ADA. While Steve’s curiosity is understandable, it threatens to expose the firm to liability.
The following are examples of the types of questions that are permissible to ask in the pre-employment stage:

- Whether the applicant has the right education, training, and skills for the position;
- Whether the applicant can satisfy the job's requirements or essential functions (describe them to the applicant); and
- How much time off the applicant took in a previous job (but not why), the reason he or she left a previous job, and any past discipline.

C. IMPERMISSIBLE INQUIRIES

The following are examples of the types of questions that are prohibited by the ADA:

- Questions about an applicant's physical or mental impairment or how s/he became disabled;
  
  **Example.**
  
  Richard, a CPA who uses a wheelchair, applies for a position with an accounting firm. The hiring partner, Steve, is curious about Richard’s condition and asks him why he is confined to a wheelchair. While Steve’s curiosity is understandable, the question is impermissible.

- Questions about an applicant's use of medication; or
- Questions about an applicant's prior workers' compensation history.
  
  **Example.**
  
  Although it is reasonable for employers to be concerned about absenteeism, it is illegal for an employer to ask an applicant whether they have ever filed a workers’ compensation claim\(^1\). It is also illegal to ask applicants about their record of attendance at prior jobs.

Where it seems likely that an applicant has a disability that will require a reasonable accommodation, an employer may ask the applicant whether he or she will need one. This is an exception to the usual rule that questions regarding disability and reasonable accommodation should come after making a conditional job offer.

**Example.**

During a job interview, an employer may ask a blind applicant interviewing for a position that requires working with a computer whether he or she will need a reasonable accommodation, such as special software that will read information on the screen.

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\(^1\) Such questions may violate more than the ADA. Some states, including California, make it illegal to discriminate in employment based on an individual’s record of filing a workers’ compensation claim. Managers are therefore advised to avoid the question entirely.
III. Hiring Do’s & Don’ts – Post-Job Offer

After making a job offer, an employer may ask any disability-related questions and conduct medical examinations as long as this is done for everybody in the same job category.

Caution!
You may withdraw an offer from an applicant with a disability only if it becomes clear that s/he cannot do the essential functions of the job or would pose a direct threat (i.e., a significant risk of substantial harm) to the health or safety of him/herself or others. Be sure to consider whether any reasonable accommodation(s) would enable the individual to perform the job’s essential functions and/or would reduce any safety risk the individual might pose.

A. PERMISSIBLE ACTIONS

Certain inquiries are permissible under the ADA after an individual has been offered a job. For example, if an employer is hiring a person for a job that involves heavy labor, the employer may require that individual to undergo a medical exam or to demonstrate their ability to perform the functions of the job, so long as this requirement is made of all similarly situated individuals.

Likewise, an employer may withdraw an offer of a manufacturing job involving the use of dangerous machinery if the employer learns during a post-offer medical exam that the applicant has frequent and unpredictable seizures. This issue, referred to as a “direct threat”, is discussed in further detail below.

B. PROHIBITED ACTIONS

Unless an employer learns that the existence of a condition will prevent an employee or applicant from performing the essential functions of a job with or without reasonable accommodation, adverse action is prohibited. For example, withdrawing a job offer to an HIV-positive applicant because the employer is concerned about customer and client reactions or because the employer assumes that anyone with HIV infection will be unable to work long and stressful hours is illegal. Such assumptions are at the heart of the actions that are prohibited by the ADA. Likewise, employers cannot use concerns expressed by customers or co-workers as a basis for denying employment to an individual with a disability.

C. GETTING MEDICAL INFORMATION FROM EMPLOYEES

Once a person with a disability has started working, actual performance, and not the employee’s disability, is the best indication of the employee’s ability to do the job.

1. Reasonable Belief Requirement

The ADA strictly limits the circumstances under which an employer may ask questions about disability or require medical examinations of employees. Such questions and exams are only permitted where an employer has a reasonable belief, based on
objective evidence, that a particular employee will be unable to perform essential job functions or will pose a direct threat because of a medical condition.

Sometimes an employer may have observed the employee's job performance or may have received reports from others who have seen the employee's behavior. These observations or reports may provide an employer with a reasonable belief that the employee's ability to perform essential job functions is impaired by a medical condition or that the employee poses a direct threat because of a medical condition.

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**Caution!**

*If an employee with a disability is having trouble performing essential job functions, or doing so safely, do not immediately assume that the disability is the reason. Poor job performance is often unrelated to a medical condition and, when this is the case, it should be handled in accordance with the company’s existing policies concerning performance (e.g., informal discussions with the employee, verbal or written warnings, or termination where necessary). On the other hand, if a manager has information that reasonably causes them to conclude that the problem is related to the employee's disability, then medical questions, and perhaps even a medical examination, may be appropriate.*

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**Example.**

*A normally reliable employee who is making frequent mistakes tells his supervisor that the medication she has started taking for her lupus makes her lethargic and unable to concentrate. Under these circumstances, a supervisor may ask her some questions relating to her medical condition, such as how long the medication can be expected to affect job performance.*

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2. **Permitted Exams and Inquiries**

Certain types of inquiries or examinations are always permitted, even if they disclose some medical information. For example, an employer may:

- Ask all employees to provide a doctor's note to support a request for leave; or

- Ask about an employee's medical condition and conduct medical examinations that are required by another federal law.

**D. CONFIDENTIALITY**

With limited exceptions, employers must keep confidential any medical information learned about an applicant or employee. Information can be confidential even if it contains no medical diagnosis or treatment course and even if it is not generated by a health care professional. For example, an employee's request for a reasonable accommodation would be considered medical information subject to the ADA's confidentiality requirements.
Caution!

Do not place medical information in regular personnel files. Rather, keep medical information in a separate medical file that is accessible only to designated officials. Medical information stored electronically must be similarly protected (e.g., by storing it on a separate database).

The ADA recognizes that employers may sometimes have to disclose medical information about applicants or employees. Therefore, the law contains certain exceptions to the general rule requiring confidentiality. Information that is otherwise confidential under the ADA may be disclosed:

- To supervisors and managers where they need medical information in order to provide a reasonable accommodation or to meet an employee’s work restrictions;
- To first aid and safety personnel if an employee would need emergency treatment or require some other assistance (such as help during an emergency evacuation) because of a medical condition;
- To individuals investigating compliance with the ADA and with similar state and local laws; or
- Pursuant to workers’ compensation laws (e.g., to a state workers’ compensation office in order to evaluate a claim) or for insurance purposes.

IV. Reasonable Accommodation and Undue Hardship

A. WHAT IS REASONABLE ACCOMMODATION?

Reasonable accommodations are adjustments or modifications provided by an employer to enable people with disabilities to enjoy equal employment opportunities. Accommodations vary depending upon the needs of the individual applicant or employee. Not all people with disabilities (or even all people with the same disability) will require the same accommodation. For example:

- A deaf applicant may need a sign language interpreter during the job interview;
- An employee with diabetes may need regularly scheduled breaks during the workday to eat properly and monitor blood sugar and insulin levels;
- A blind employee may need someone to read information posted on a bulletin board; or
- An employee with cancer may need leave to have radiation or chemotherapy treatments.
**B. WHEN REASONABLE ACCOMMODATIONS MUST BE PROVIDED**

An employer must provide a reasonable accommodation if a person with a disability needs one in order to apply for a job, perform a job, or enjoy benefits equal to those the employer offers other employees. Employers do not have to provide any accommodation that would pose an undue hardship, discussed below.

**C. UNDUE HARDSHIP**

Undue hardship means that providing the reasonable accommodation would result in significant difficulty or expense, based on a particular employer's resources and the operation of the business. In general, the larger a business the more money it is required to spend to provide an accommodation. If providing a particular accommodation would result in undue hardship, an employer must consider whether another accommodation exists that would not. Employers must not be quick to assume that an accommodation would result in an undue hardship. This is particularly true in light of the fact that, according to research conducted by the U.S. Department of Labor that most accommodations are not expensive\(^2\). In addition, employers may be able to offset the cost of an accommodation through certain tax credits\(^3\). Regardless of cost, however, employers are not required to provide an accommodation that would pose significant difficulty in terms of the operation of a business.

**Example.**

*A store clerk with a disability asks to work part-time as a reasonable accommodation, which would leave part of one shift staffed by one clerk instead of two. This arrangement poses an undue hardship if it causes untimely customer service.*

\(^2\) According to the Department of Labor, most accommodations are not expensive: (1) one-fifth cost nothing; (2) more than half of them cost only cost between $1 and $500; (3) the median cost is approximately $240; (4) technological advances continue to reduce the cost of many accommodations; and (5) some employees provide their own accommodations in the form of assistive devices or equipment.

\(^3\) The Internal Revenue Code includes several provisions aimed at making businesses more accessible to people with disabilities: (1) Small Business Tax Credit (Internal Revenue Code Section 44: Disabled Access Credit): Small businesses with either $1,000,000 or less in revenue or 30 or fewer full-time employees may take a tax credit of up to $5,000 annually for the cost of providing reasonable accommodations such as sign language interpreters, readers, materials in alternative format (such as Braille or large print), the purchase of adaptive equipment, the modification of existing equipment, or the removal of architectural barriers; (2) Work Opportunity Tax Credit (Internal Revenue Code Section 51): Employers who hire certain targeted low-income groups, including individuals referred from vocational rehabilitation agencies and individuals receiving Supplemental Security Income (SSI) may be eligible for an annual tax credit of up to $2,400 for each qualifying employee who works at least 400 hours during the tax year. Additionally, a maximum credit of $1,200 may be available for each qualifying summer youth employee; (3) Architectural/Transportation Tax Deduction (Internal Revenue Code Section 190: Barrier Removal): This annual deduction of up to $15,000 is available to businesses of any size for the costs of removing barriers for people with disabilities, including the following: providing accessible parking spaces, ramps, and curb cuts; providing wheelchair-accessible telephones, water fountains, and restrooms; making walkways at least 48 inches wide; and making entrances accessible. Local or state incentives may also be available.
Example.

An employee with a disability asks to change her scheduled arrival time from 9:00 a.m. to 10:00 a.m. to attend physical therapy appointments and to stay an hour later. If this accommodation would not affect her ability to complete work in a timely manner or disrupt service to clients or the performance of other workers, it does not pose an undue hardship.

D. OTHER LIMITATIONS ON THE OBLIGATION TO PROVIDE REASONABLE ACCOMMODATION

In addition to actions that would result in undue hardship, employers are generally not required to do any of the following:

- Provide an employee with an adjustment or modification that would assist the individual both on and off the job, such as a prosthetic limb, wheelchair, or eyeglasses; or
- Remove or alter a job's essential functions;

Example.

A grocery store bagger develops a disability that makes her unable to lift any item weighing more than five pounds. The store does not have to grant an accommodation removing its fifteen-pound lifting requirement if doing so would remove the main job duty of placing items into bags and handing filled bags to customers or placing them in grocery carts.

- Lower production or performance standards;

Example.

A hotel that requires its housekeepers to clean 16 rooms per day does not have to lower this standard for an employee with a disability.

- Excuse violations of conduct rules necessary for the operation of your business.

Example.

Employers do not have to tolerate violence, threats of violence, theft, or destruction of property, even if the employee claims that a disability caused the misconduct.

E. HOW EMPLOYEES ASK FOR AN ACCOMMODATION

An employer generally does not have to provide a reasonable accommodation unless an individual with a disability has asked for one. Likewise, employers are not required to accommodate an unknown disability.
Example.

Racine is a receptionist for an accounting firm. Racine has hearing loss and has been prescribed a hearing aid. Racine is vain and chooses not to wear the hearing aid and not to disclose the condition to anyone. After several months on the job, she is fired for failing to take accurate phone messages. Racine cannot complain that the employer failed to accommodate her hearing disability because it was unknown to her employer.

A request for accommodation can be a statement in "plain English" that an individual needs an adjustment or change in the application process or at work for a reason related to a medical condition. The request does not have to include the terms "ADA" or "reasonable accommodation," and the request does not have to be in writing, although employers may ask for something in writing to document the request.

A family member, friend, health professional, rehabilitation counselor, or other representative also may request a reasonable accommodation on behalf of an individual with a disability.

Example.

A doctor's note indicating that an employee can work "with restrictions" is a request for a reasonable accommodation.

Caution!

Even though you do not have to initiate discussions about the need for a reasonable accommodation, if you believe that a medical condition is causing a performance or conduct problem, you certainly may ask the employee how you can help to solve the problem and even may ask if the employee needs a reasonable accommodation.

F. RESPONDING TO A REQUEST FOR AN ACCOMMODATION

Once a reasonable accommodation is requested, an employer and the individual should discuss his or her needs and identify the appropriate reasonable accommodation. Where more than one accommodation would work, the employer may choose the one that is less costly or that is easier to provide.

"Interactive process" is a formal way of saying that the employer and the employee or applicant should talk about the request for a reasonable accommodation, especially where the need for the accommodation might not be obvious. A conversation also helps where there may be a question regarding what type of accommodation might best help the individual apply for a job or perform the essential functions of a job.
1. Asking for Information About a Disability

If the need for an accommodation is not obvious, employers may ask for documentation describing the individual's disability and why the requested accommodation is needed. Under such circumstances, an employer may:

- Specify what types of information they are seeking about the disability and needed accommodation;
- Explain what they will need to know (e.g., the type of impairment the individual has, how the impairment limits a major life activity (like sitting, standing, performing manual tasks, or sleeping);
- Request information about how an accommodation would enable the employee to perform job-related tasks; and
- Consider providing the employee's health care professional with a description of the job's essential functions to increase the likelihood that the employer will get accurate and complete information the first time they ask for it.

2. Insufficient Information

If an employer does not get sufficient information in response to an initial request for documentation, they explain what additional information they will need and then allow the individual an opportunity to provide it. Note that there are limitations on the amount of documentation an employer may obtain. For example, an employer may not ask for an individual's entire medical record or for information about conditions unrelated to the impairment for which accommodation has been requested.

Employers also may make an accommodation without requesting any documentation at all. An employer is free to rely instead on an individual's own description of his or her limitations and needs.

G. PROCEDURES FOR PROVIDING REASONABLE ACCOMMODATION

The ADA does not require an employer to have a particular type of procedure in place for providing reasonable accommodations. Employers should consider putting procedures for providing reasonable accommodations in writing (though this may not be necessary, particularly for very small employers that do not have one person designated to receive and process accommodation requests).

As an alternative to written procedures, an employer might include a short statement in an employee handbook indicating that they will provide reasonable accommodations for qualified individuals with disabilities, along with the name and telephone number of the person designated to handle requests. An employer also may want to indicate on written job applications that they will provide reasonable accommodations for the application process and during employment. Whether an employer has written procedures or not, the following are important suggestions:
Develop time frames within which accommodations generally will be provided, remembering that you must respond promptly to a request;

Keep lines of communication open, particularly when it will take longer than expected to provide an accommodation or when an employer needs more supporting documentation from the individual;

Use outside resources to identify and provide reasonable accommodations; and

Explain decisions; employers should share their reasons with an applicant or employee so that s/he understands why they denied the request.

H. TYPES OF REASONABLE ACCOMMODATIONS

There are many accommodations that enable individuals with disabilities to apply for jobs, be productive workers, and enjoy equal employment opportunities. In general, though, they can be grouped into the following categories.

1. Equipment

Purchasing equipment or modifying existing equipment is a form of reasonable accommodation.

Example.

An accounting firm could purchase a talking computer for a blind accountant.\(^4\)

2. Accessible Materials

An employer may have to make written materials accessible to an individual with a disability who may not be able to read or understand them. Simple accommodations could include having someone read a list of employee conduct rules to an employee with a visual impairment or providing a simpler explanation of the rules for an employee with a cognitive disability.

3. Changes to the Workplace

Making changes to facilities or work areas is a form of reasonable accommodation.

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\(^4\) Remember, whether or not the purchase of such equipment would constitute an undue hardship to the employer is a secondary question. The employer should first attempt to determine what types of accommodation would be successful, then consider which ones do not pose an undue hardship. Assuming there are more than one alternative identified in this process, the employer, not the employee, is free to select the specific accommodation.
Example.

An accounting firm could lower a paper cup dispenser near the water fountain and reconfigure desks so that an employee in a wheelchair can get water and have access to all parts of the office.

4. Job-Restructuring

Job-restructuring includes shifting responsibility to other employees for minor tasks (or "marginal functions") that an employee is unable to perform because of a disability and altering when and/or how a task is performed.

Example.

If moving boxes of files into a storage room is a function that a secretary in an accounting firm performs only from time to time, this function could likely be reallocated to other employees if the secretary's severe back impairment makes him unable to perform it.

Remember, however, that employers are not required to remove essential functions (i.e., fundamental duties) of the job.

Example.

Where an employee has to spend a significant amount of time retrieving heavy boxes of merchandise and loading them into customers' cars as part of his job, he probably cannot be relieved of this duty as an accommodation. Where your workforce is small and all workers must be able to perform a number of different tasks, job restructuring may not be possible.

5. Working at Home

If this accommodation is requested, consider whether any or all of the job's essential functions can be performed from home. Computers, internet access, telephones, and fax machines make it possible to do many kinds of jobs from home at least some of the time.

Example.

A telemarketer, proofreader, researcher, or writer may have the type of job that can be performed at least partly at home.

But where the work involves use of materials that cannot be replicated at home, direct customer and co-worker access is necessary, or immediate access to documents in the workplace is necessary and cannot be anticipated in advance, working at home likely would present an undue hardship.
6. Modified Work Schedules

This may involve adjusting arrival or departure times, providing periodic breaks, or altering when certain job tasks are performed.

Example 1.

An accountant for a small employer whose medication for depression causes extreme grogginess in the morning may not be able to begin work at 9:00 a.m., but could work from 10:00 until 6:30 without affecting her ability to complete tasks in a timely manner.

Example 2.

It may be an undue hardship to adjust the arrival time for someone on a construction crew if it would affect the ability of others to begin work.

7. Leave

Allowing an employee to use accrued paid leave, and providing additional unpaid leave once an employee has exhausted all available leave, is also a form of reasonable accommodation. Leave may be provided for a number of reasons related to a disability, for example, to allow an employee to receive or recover from treatment related to a disability or recover when a condition “flares up.”

Employers are encouraged to take the following steps when someone asks for a leave related to a medical condition:

- Determine whether the request is covered by the firm’s general leave policy for all employees. If yes, grant the leave according to such policy; and

- If an employee requests more leave than would be available under the firm’s policy, consider whether additional leave could be provided as a reasonable accommodation, absent undue hardship.

Note that not all requests for leave as a reasonable accommodation must be granted. For example, where a job is highly specialized, so that it will be difficult to find someone to perform it on a temporary basis, and where the employee cannot provide a date of return, granting leave and holding the position open may constitute undue hardship.

Example 1.

If the Executive Chef at a top restaurant requests leave for treatment of her disability but cannot provide a fixed date of return, the restaurant can show undue hardship because of the difficulty of replacing, even temporarily, a chef of this caliber. Moreover, it leaves the restaurant unable to determine how long it must hold open the position or to plan for the chef’s absence.
Example 2.

A restaurant food server requests 10 to 14 weeks off for disability-related surgery with the date of return depending on the speed of recuperation. The employer must decide whether granting this amount of leave, and doing so without a fixed date of return, would cause an undue hardship.

8. Policy Modifications

Modifying a workplace rule because of an employee's disability may be a form of reasonable accommodation.

Example.

A retail store that does not allow its cashiers to drink beverages at the checkout and limits them to two 15 minute breaks per day may need to modify one rule or the other to accommodate an employee with a psychiatric disability who needs to drink a beverage once an hour due to dry mouth, a side effect of some psychiatric medications.

9. Modifying Supervisory Methods

Simple modifications of supervisory methods may include communicating assignments in writing rather than orally for someone whose disability limits concentration or providing additional day-to-day guidance or feedback. An employer is not required, however, to change someone's supervisor.

10. Job Coaches

A job coach who assists in training or guiding the performance of a qualified individual with a disability may be a form of reasonable accommodation.

Example.

A custodian with mental retardation might have a job coach paid for by an outside agency to initially help, on a full-time basis, the worker learn required tasks and who then, periodically thereafter, returns to help ensure he is performing the job properly.

11. Reassignment

Reassignment may be necessary where an employee can no longer perform his or her job because of a disability. In such cases:

- The employee must be qualified for the new position;
- Employers do not have to bump another employee, promote an employee with a disability, or create a position for the individual; and
- Reassignment should be to a position that is equal in pay and status to the one held or as close as possible if an equivalent position is not vacant.
Example 1.

After being injured, a construction worker can no longer perform his job duties, even with accommodation, due to a resulting disability. He asks you to reassign him as an accommodation to a vacant, higher-paid construction foreman position for which he is qualified. You do not have to offer this reassignment because it would be a promotion.

Example 2.

The host responsible for escorting diners to their seats at one of three restaurants operated by your business can no longer perform the essential functions of her position because a disability requires her to remain mostly sedentary. However, she is qualified to perform the duties of a vacant cashier position, which has the same salary, at one of your other restaurants. You must offer her a reassignment to the cashier position at the other restaurant as a reasonable accommodation.

Note that reassignment is not available to applicants; therefore, an employer would not have to look for a job for a person with a disability who is not qualified to do the job for which he or she applied, unless they do this for all applicants for other available jobs.

V. Safety Concerns

The ADA permits employers to ask questions related to disability and even require a medical examination of an employee whose medical condition appears to be causing performance or safety problems.

A. DIRECT THREAT

An employer also may reject a job applicant with a disability or terminate an employee with a disability for safety reasons if the person poses a direct threat (i.e., a significant risk of substantial harm to self or others). Employers have legitimate concerns about maintaining a safe workplace for all employees and members of the public and, in some instances, the nature of a particular person's disability may cause an unacceptable risk of harm. Remember, however, that employers must be careful not to exclude a qualified person with a disability based on myths, unsubstantiated fears, or stereotypes about that person's ability to safely perform the job. Instead, employers should:

- Assess the particular applicant's or employee's present ability to safely perform the essential functions of the job based on objective evidence and reasonable medical judgment; and
- Consider the duration of the risk, the nature and severity of the potential harm, the likelihood that the potential harm will occur, and the imminence of the potential harm.

Remember, the determination cannot be based on generalizations about the condition.
Example.

An employer cannot automatically prohibit someone with epilepsy from working around machinery. Some forms of epilepsy are more severe than others or are not well-controlled. On the other hand, some people with epilepsy know when a seizure will occur in time to move away from potentially hazardous situations. Sometimes seizures occur only at night, making the possibility of a seizure on the job remote.

In addition, the determination cannot be based on unfounded fears about the condition.

Example.

A restaurant could not deny someone with HIV infection a job handling food based on customers’ fears that the condition could be transmitted, since there is no real risk of transmitting HIV through food handling.

If an individual with a disability has certain infectious or communicable diseases and if the risk of transmitting the disease associated with the handling of food cannot be eliminated by reasonable accommodation, an employer can refuse to assign the individual to a job involving food handling.

If the individual is a current employee, the employer must consider whether the individual can be accommodated, absent undue hardship, by reassignment to a vacant position not involving food handling. The harm must be serious and likely to occur, not remote and speculative.

Example.

An employer may not reject an applicant who had been treated for major depression but had worked successfully in stressful jobs for several years based on speculation that the stress of the job might trigger a future relapse.

There must be no reasonable accommodation that would reduce the risk.

Example.

A deaf mechanic cannot be denied employment based on the fear that he has a high probability of being injured by vehicles moving in and out of the garage if an accommodation would enable him to perform the job duties with little or no risk, such as allowing him to work in a corner of the garage facing outward so that he can see any moving vehicles.

B. DRUG AND ALCOHOL USE

1. Current Use of Illegal Drugs

The current illegal use of drugs is not protected by the ADA. Employers do not need to hire or retain someone who is currently engaging in the illegal use of drugs. Tests for the current illegal use of drugs are permitted at any time prior to or during employment.
2. Recovering Alcoholics and Addicts

The ADA expressly protects persons with a history of a drug or alcohol addiction so long as they are “in recovery.” This means that they are no longer using or drinking. There is no specific time period required.

While alcoholics and recovering addicts may be individuals with disabilities, the ADA still allows employers to hold them to the same performance and conduct standards as all other employees, including rules prohibiting drinking on the job or being under the influence of other substances.

**Example.**

_An employer may fire an employee who is drinking alcohol while on the job if it has a uniformly applied rule prohibiting such conduct._

There may be times when an employer may have to accommodate an employee with alcoholism. For example, an employer may have to modify a rule prohibiting personal phone calls at work for an employee with alcoholism who periodically has to contact his "AA sponsor," if the employee has a need to do so during work hours.

**VI. Complaint Process**

A common question is: **What do I do if a charge is filed against my business?** A charge means only that someone has alleged that a particular business discriminated against him or her on a basis that is protected under federal equal employment opportunity law, including disability. A charge does not constitute a finding that an employer did, in fact, discriminate.

**Caution!**

_Even if you believe that the charge is frivolous, submit a response to the EEOC and provide the information requested. If the charge was not dismissed by the EEOC when it was received, that means there is some basis for proceeding with further investigation. There are many cases where it is unclear whether discrimination may have occurred and an investigation is necessary. You are encouraged to present any facts that you believe show the allegations are incorrect or do not amount to an ADA violation._

**A. CONCILIATION**

When a charge is filed, the EEOC will send the employer a copy of the charge and request a response and supporting documentation. The EEOC may investigate the charge. If it finds reasonable cause to believe that the employer discriminated against the charging party, it will invite the employer to conciliate the charge (i.e., the EEOC will offer the employer a chance to resolve the matter informally). In some cases, where conciliation fails, the EEOC will file a civil court action. If the EEOC finds no discrimination, or if conciliation fails and the EEOC chooses not to file suit, it will issue a notice of a right to sue, which gives the charging party 90 days to file a civil court action.
B. MEDIATION

The EEOC notice may offer mediation as a method for dealing with the charge even before it investigates the charge. In some cases, this can be a less expensive and time-consuming way of resolving an employment dispute. As always, however, the filing of a charge is a serious matter that requires prompt consultation with a qualified employment attorney.

The EEOC's mediation program is free. The program is voluntary and all parties must agree to take part. The mediation process also is confidential. Neutral mediators provide employers and charging parties the opportunity to reach mutually agreeable solutions. If the charge filed against an employer is eligible for mediation, the employer will be notified by the EEOC of their opportunity to take part in the mediation process. In the event that mediation does not succeed, the charge is referred for investigation.

C. ILLEGAL RETALIATION

The EEOC notice will also caution employers that it is unlawful to retaliate against the charging party for filing the charge.

Example:

An employee filed a charge against her supervisor alleging disability discrimination, which the employer believed to be without merit. After receiving the charge, the employer told the employee that she would be fired if she filed another meritless charge against it. The employee filed another charge against the employer and she was fired. Even assuming the charges of discrimination were without merit, the employee has a strong claim that the employer unlawfully retaliated against her.

VII. A Note on State Disability Discrimination Laws

As always, remember that federal law provides the minimum requirements with which covered employers are required to comply. State law may require employers to follow tougher laws. In some states, for example, small employers who would not meet the minimum number of employees required for the ADA to apply might be subject to state laws protecting employees from disability discrimination.

In California, the Fair Employment and Housing Act (FEHA) prohibits employment discrimination on the basis of a person’s disability or perceived disability. The law covers mental or physical disabilities, regardless of whether the condition is presently disabling. FEHA therefore covers more people than does the ADA. In addition, FEHA applies to employers with five or more employees (compared to the 15 employee threshold of the ADA).

Thus, FEHA provides broader protections for persons with disabilities than federal law. California law has broad definitions of mental disability, physical disability and medical condition. Under California law, a disability must only “limit” a major life activity. The disability need not involve a “substantial limitation” as federal law requires to be considered a covered disability.
In addition, FEHA prohibits employers either verbally or in writing from:

- Requiring any medical / psychological examination or inquiry or any applicant or employee prior to making an offer of employment;

- Inquiring directly or indirectly as to whether an applicant or employee has either a mental or physical disability or medical condition; or

- Inquiring about the nature and severity of a mental or physical disability or medical condition.

However, a California employer may inquire into the ability of an applicant to perform job-related functions and may respond to an applicant's request for reasonable accommodation.

Once an employment offer has been made to an applicant, but before the start of duties, an employer may require a medical or psychological examination. However, the examination must be job related and consistent with business necessity and all entering employees in the same job classification must be subject to the same examination.

A California employer may also conduct voluntary medical examinations, including medical histories, which are part of an employee health program. This information must be retained separate and apart from general employee personnel records.

Florida, on the other hand, has no state law governing disability discrimination in employment and its employers are therefore covered, if at all, by the provisions of the federal ADA.

In Texas, there is a state anti-discrimination law. Its definition of disability closely mirrors those of the ADA.\(^5\)

\(^5\) "Disability" means, with respect to an individual, a mental or physical impairment that substantially limits at least one major life activity of that individual, a record of such an impairment, or being regarded as having such an impairment. The term does not include:

(A) a current condition of addiction to the use of alcohol, a drug, an illegal substance, or a federally controlled substance; or

(B) a currently communicable disease or infection as defined in Section 81.003, Health and Safety Code, or required to be reported under Section 81.041, Health and Safety Code, that constitutes a direct threat to the health or safety of other persons or that makes the affected person unable to perform the duties of the person's employment.

Texas Labor Code, Chapter 21, Section 21.001.
CHAPTER 6 – REVIEW QUESTIONS

The following questions are designed to ensure that you have a complete understanding of the information presented in the assignment. They do not need to be submitted in order to receive CPE credit. They are included as an additional tool to enhance your learning experience.

We recommend that you answer each review question and then compare your response to the suggested solution before answering the final exam questions related to this assignment.

1. What was the major impact of the Americans with Disabilities Amendments Act of 2008:
   a) it limited an employer’s damages for violations of the ADA
   b) it reduced the number of individuals considered “disabled” under the Act
   c) it increased the number of people considered “disabled” under the Act
   d) it eliminated the requirement that employers provide reasonable accommodation out of concern for the plight of the economy

2. People with mental impairments are protected by the Americans with Disabilities Act.
   a) true
   b) false

3. When does the Americans with Disabilities Act allow an employer require an applicant to undergo a medical examination:
   a) at any time after submitting their application
   b) only after the first round of interviews
   c) at no time are they allowed
   d) only after a conditional offer of employment has been made

4. The Americans with Disabilities Act requires employers to keep medical information learned about employees confidential.
   a) true
   b) false

5. Employers are not required to provide an applicant or employee with a reasonable accommodation if:
   a) the employee’s job is not critical to the employer
   b) the employer does not believe the employee intends to stay on a long term basis
   c) to do so would constitute an undue hardship to the employer
   d) to do so would cause resentment among other employees
6. Employers are **not** required to provide a reasonable accommodation unless it is demanded in writing by a disabled worker’s attorney.

   a) true
   b) false

7. Making changes to facilities or work areas is a form of reasonable accommodation.

   a) true
   b) false

8. Which of the following persons is **not** protected by the ADA:

   a) an individual who just completed a 90-day inpatient drug addiction program and has not used drugs in over 120 days
   b) an alcoholic who has been sober for 12 years
   c) a person currently addicted to heroin
   d) all of the above
1. A: Incorrect. Damages were not changed by the 2008 Act.

B: Incorrect. The opposite is true; the Act broadened the definition of disabled.

C: Correct. By rejecting several recent United States Supreme Court decisions, the Act gives more people protection from discrimination under the provisions of the ADA by expanding the definition of “disabled.”

D: Incorrect. To the contrary, more people are now entitled to reasonable accommodation than under prior law.

(See page 6-1 of course material.)

2. A: True is correct. The Americans with Disabilities Act covers physical as well as mental disabilities.

B: False is incorrect. People with mental impairments, such as major depression, bipolar (manic-depressive) disorder, and mental retardation, may be protected by the Americans with Disabilities Act.

(See page 6-2 of course material.)

3. A: Incorrect. Medical exams cannot be required until the applicant has received a conditional offer of employment.

B: Incorrect. Exams are not allowed until much later in the hiring process.

C: Incorrect. They are allowed after a conditional offer of employment has been made.

D: Correct. They can be required at this time so long as all similarly situated people are required to undergo the examination.

(See page 6-4 of course material.)
4. **A: True is correct.** With limited exceptions, employers must keep confidential any medical information learned about an applicant or employee. Information can be confidential even if it contains no medical diagnosis or treatment course and even if it is not generated by a health care professional. For example, an employee's request for a reasonable accommodation would be considered medical information subject to the ADA's confidentiality requirements.

B: False is incorrect. The ADA contains strict confidentiality provisions to protect the privacy rights of employees.

(See page 6-7 of course material.)

5. A: Incorrect. The nature of an employee's job affects the type of accommodation that is needed but not whether one must be provided.

B: Incorrect. The employer may not use this as a defense to providing a reasonable accommodation.

C: **Correct.** Unless the employer can establish a high burden, they must provide a reasonable accommodation to qualified individuals with disabilities.

D: Incorrect. The reaction of co-workers is not a factor in whether a reasonable accommodation is required.

(See page 6-9 of course material.)

6. A: True is incorrect. Employers are not required to accommodate an employee who has not disclosed a disability and requested one, but there is no need to involve attorneys.

B: **False is correct.** An employer generally does not have to provide a reasonable accommodation unless an individual with a disability has asked for one. However, the request can be made informally by the employee, his or her doctor or other representative.

(See pages 6-10 to 6-11 of course material.)

7. **A: True is correct.** Other common types of accommodations include purchasing or modifying equipment, job restructuring and modified work schedules.

B: False is incorrect. Such changes are one of the common types of accommodations that employers can make for persons with disabilities.

(See pages 6-13 to 6-17 of course material.)
8. A: Incorrect. Persons who are in recovery, regardless of the period of time, are considered disabled and therefore protected by the ADA.

B: Incorrect. Current drug use is not protected.

C: Correct. Persons currently using drugs are not protected by the ADA.

D: Incorrect. Only C is not protected. The Act otherwise defines persons in recovery as disabled for purposes of the ADA.

(See pages 6-18 to 6-19 of course material.)
Chapter 7: Age Discrimination

I. Introduction and Overview

In federal law, the Age Discrimination in Employment Act of 1967 ("ADEA") protects individuals who are 40 years of age or older from employment discrimination based on age. The ADEA's protections apply to both employees and job applicants. Under the ADEA, it is unlawful to discriminate against a person because of his or her age with respect to any term, condition, or privilege of employment, including hiring, firing, promotion, layoff, compensation, benefits, job assignments, and training.

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<thead>
<tr>
<th>ADEA Do's and Don'ts</th>
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<tr>
<td>✓ Don’t ask questions that are designed to illicit the age of a job applicant;</td>
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<tr>
<td>✓ Don’t make assumptions about the abilities of older workers;</td>
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<tr>
<td>✓ Do understand the exceptions to the ADEA; and</td>
</tr>
<tr>
<td>✓ Do know whether it is lawful to have different benefit level plans for older workers.</td>
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</table>

It is also unlawful to retaliate against an individual for opposing employment practices that discriminate based on age or for filing an age discrimination charge, testifying, or participating in any way in an investigation, proceeding, or litigation under the ADEA.

The ADEA applies to employers with 20 or more employees, including state and local governments. It also applies to employment agencies and labor organizations, as well as to the federal government. ADEA protections include those outlined below. State laws may also apply age discrimination provisions to smaller employers. ¹

A. APPRENTICESHIP PROGRAMS

It is generally unlawful for apprenticeship programs, including joint labor-management apprenticeship programs, to discriminate on the basis of an individual's age. Age limitations in apprenticeship programs are valid only if they fall within certain specific exceptions under the ADEA or if the EEOC grants a specific exemption.

¹ Many state laws also prohibit discrimination on the basis of age. Many of these laws mirror the federal law and only protect people older than 40, while some states have laws that provide broader protection. It is therefore important to be familiar with the laws in each state in which a business operates.
B. JOB NOTICES AND ADVERTISEMENTS

1. Age Limits Generally Prohibited

The ADEA generally makes it unlawful to include age preferences, limitations, or specifications in job notices or advertisements.

   Example.

   *The accounting firm of Tigger, Eeyore & Pooh placed an ad in a large daily newspaper seeking “young, energetic accountants to work long hours in a rapidly expanding firm.” This advertisement violates the ADEA by expressing a preference for “young” workers.*

2. BFOQ Exception

A job notice or advertisement may specify an age limit only in the rare circumstances where age is shown to be a "bona fide occupational qualification" (BFOQ) reasonably necessary to the normal operation of the business. This exception is discussed below.

C. PRE-EMPLOYMENT INQUIRIES

The ADEA does not specifically prohibit an employer from asking an applicant's age or date of birth. However, because such inquiries may deter older workers from applying for employment or may otherwise indicate possible intent to discriminate based on age, requests for age information will be closely scrutinized to make sure that the inquiry was made for a lawful purpose, rather than for a purpose prohibited by the ADEA.

In addition, there are many other, less direct ways in which employers can determine an applicant's age. Consider, for example, the following questions:

- *What year did you graduate from high school?*
- *What is the first presidential election for which you were eligible to vote?*
- *What was your favorite musical group when you were a child?*
- *Did you ever see Roberto Clemente play baseball?*
- *Were you alive before the United States government levied its first individual income tax?*

These questions share two things in common: (1) each is designed to elicit the age of the respondent; and (2) neither is directly related to the applicant's qualifications for the job. As a result, these and similar questions should be avoided both in written job applications and during the interview process. While not expressly illegal, asking these questions can give rise to an inference of preference on the basis of age, especially if the respondent to any of these questions is not hired.
D. BENEFITS

The Older Workers Benefit Protection Act of 1990 (OWBPA) amended the ADEA to specifically prohibit employers from denying benefits to older employees. Congress recognized that the cost of providing certain benefits to older workers is greater than the cost of providing those same benefits to younger workers, and that those greater costs would create a disincentive to hire older workers. Therefore, in limited circumstances, an employer may be permitted to reduce benefits based on age, as long as the cost of providing the reduced benefits to older workers is the same as the cost of providing benefits to younger workers.

E. WAIVER OF ADEA RIGHTS

An employer may ask an employee to waive his/her rights or claims under the ADEA either in the settlement of an ADEA administrative or court claim or in connection with an exit incentive program or other employment termination program. However, the ADEA, as amended by OWBPA, sets out specific minimum standards that must be met in order for a waiver to be considered knowing and voluntary and, therefore, valid. Among other requirements, a valid ADEA waiver must:

- Be in writing and be understandable;
- Specifically refer to ADEA rights or claims;
- Not waive rights or claims that may arise in the future;
- Be in exchange for valuable consideration;
- Advise the individual in writing to consult an attorney before signing the waiver; and
- Provide the individual at least 21 days to consider the agreement and at least seven days to revoke the agreement after signing it.

If an employer requests an ADEA waiver in connection with an exit incentive program or other employment termination program, the minimum requirements for a valid waiver are more extensive.

II. Illegal Discrimination

A. DISCRIMINATION BETWEEN INDIVIDUALS PROTECTED BY THE ACT

It is unlawful for employers covered by the ADEA to discriminate in hiring or in any other way by giving preference because of age between individuals 40 and over. Thus, if two people apply for the same position, and one is 42 and the other 52, the employer may not lawfully turn down either one on the basis of age, but must make such decision on the basis of some other factor.
The extension of additional benefits, such as increased severance pay, to older employees within the protected group may be lawful if an employer has a reasonable basis to conclude that those benefits will counteract problems related to age discrimination. The extension of those additional benefits may not be used as a means to accomplish practices otherwise prohibited by the ADEA.

**B. HELP WANTED NOTICES AND ADVERTISEMENTS**

When help wanted notices or advertisements contain terms and phrases such as age 25 to 35, young, college student, recent college graduate, boy, girl, or others of a similar nature, such a term or phrase deters the employment of older persons and is a violation of the ADEA, unless one of the exceptions applies.

**Example.**

_Such phrases as “age 40 to 50”, “age over 65”, “retired person”, or “supplement your pension” discriminate against others within the protected group and, therefore, are prohibited unless one of the exceptions applies._

The use of the phrase “state age” in help wanted notices or advertisements is not, in itself, a violation of the Act. But because the request that an applicant state his age may tend to deter older applicants or otherwise indicate discrimination based on age, employment notices or advertisements which include the phrase “state age,” or any similar term, will be closely scrutinized to assure that the request is for a lawful purpose.

**Caution!**

There are very, very few circumstances where asking an applicant their age is acceptable. Given the risks associated with making this type of inquiry, managers are advised not to ask any job applicants questions that tend to elicit their age unless the position squarely falls within one of the exceptions discussed later.

**C. EMPLOYMENT APPLICATIONS**

A request on the part of an employer for information such as “Date of Birth” or “State Age” on an employment application form is not, in itself, a violation of the Act. However, because the request that an applicant state his age may tend to deter older applicants or otherwise indicate discrimination based on age, employment application forms which request such information will be closely scrutinized to assure that the request is for a permissible purpose and not for purposes proscribed by the ADEA.

**III. Voluntary and Involuntary Retirement**

**A. INVOLUNTARY RETIREMENT**

As originally enacted in 1967, the ADEA allowed employers to institute mandatory retirement ages. However, amendments enacted in 1978 generally preclude mandatory retirement on the basis of age. The amendments also removed a provision that denied protections of the ADEA to workers when they reached the age of 70. Accordingly,
unless a specific exemption applies, an employer can no longer force retirement or otherwise discriminate on the basis of age against an individual because he or she is 70 years or older.

On the other hand, the ADEA does not make it unlawful for a retirement plan to permit individuals to elect early retirement at a specified age at their own option. Nor is it unlawful for a plan to require early retirement for reasons other than age.

**B. EXEMPTION FOR BONA FIDE EXECUTIVE OR HIGH POLICYMAKING EMPLOYEES**

The ADEA does provide for mandatory retirement for certain high level employees who are at least 65 years of age and who have served in a high level position for a minimum period of time. The law allows an employer to institute mandatory retirement where the employee is at least 65 years of age and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or higher policymaking position so long as the employee is entitled to an annual retirement benefit of at least $44,000 per year.

The ADEA also contains an exemption from the prohibition against mandatory retirement for any employee who has attained 70 years of age, and who is serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure) at an institution of higher education.

1. **Burden Rests with Employer**

Since this provision is an exemption from the non-discrimination requirements of the Act, the burden is on the one seeking to invoke the exemption to show that every element has been clearly and unmistakably met. Moreover, as with other exemptions from the Act, this exemption must be narrowly construed.

An employee within the exemption can lawfully be forced to retire on account of age at age 65 or above. In addition, the employer is free to retain such employees, either in the same position or status or in a different position or status. For example, an employee who falls within the exemption may be offered a position of lesser status or a part-time position. An employee who accepts such a new status or position, however, may not be treated any less favorably, on account of age, than any similarly situated younger employee.

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2 More specifically, the Act provides that the employee be entitled to an immediate non-forfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee which equals, in the aggregate, at least $44,000. In applying the retirement benefit test, the Act further provides that if any such retirement benefit is in a form other than a straight life annuity (with no ancillary benefits), or if employees contribute to any such plan or make rollover contributions, such benefit shall be adjusted in accordance with regulations prescribed by the Equal Employment Opportunity Commission, after consultation with the Secretary of the Treasury, so that the benefit is the equivalent of a straight life annuity (with no ancillary benefits) under a plan to which employees do not contribute and under which no rollover contributions are made.
2. “Bona Fide Executive”

In order for an employee to qualify as a “bona fide executive,” the employer must initially show that the employee satisfies the definition of a bona fide executive set forth in the ADEA. Each of the requirements must be satisfied, regardless of the level of the employee’s salary or compensation.

The Congressional record makes clear that this exemption does not apply to middle-management employees, no matter how great their retirement income, but only to a very few top level employees who exercise substantial executive authority over a significant number of employees and a large volume of business.

The phrase “high policymaking position,” is limited to certain top level employees that are not “bona fide executives.” Specifically, the Congressional record specifies that these are “individuals who have little or no line authority but whose position and responsibility are such that they play a significant role in the development of corporate policy and effectively recommend the implementation thereof.”

Example.

The chief economist or the chief research scientist of a corporation typically has little line authority. His duties would be primarily intellectual as opposed to executive or managerial. His responsibility would be to evaluate significant economic or scientific trends and issues, to develop and recommend policy direction to the top executive officers of the corporation, and he would have a significant impact on the ultimate decision on such policies by virtue of his expertise and direct access to the decision makers. Such an employee would meet the definition of a “high policymaking” employee.

On the other hand, as this description makes clear, the support personnel of a “high policymaking” employee would not be subject to the exemption even if they supervise the development, and draft the recommendation, of various policies submitted by their supervisors.

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3 As stated in the Conference Report (H.R. Rept. No. 95-950, p. 9): “Typically the head of a significant and substantial local or regional operation of a corporation [or other business organization], such as a major production facility or retail establishment, but not the head of a minor branch, warehouse or retail store, would be covered by the term “bona fide executive.” Individuals at higher levels in the corporate organizational structure who possess comparable or greater levels of responsibility and authority as measured by established and recognized criteria would also be covered.

“The heads of major departments or divisions of corporations [or other business organizations] are usually located at corporate or regional headquarters. With respect to employees whose duties are associated with corporate headquarters operations, such as finance, marketing, legal, production and manufacturing (or in a corporation organized on a product line basis, the management of product lines), the definition would cover employees who head those divisions.

“In a large organization the immediate subordinates of the heads of these divisions sometimes also exercise executive authority, within the meaning of this exemption. The conferees intend the definition to cover such employees if they possess responsibility which is comparable to or greater than that possessed by the head of a significant and substantial local operation who meets the definition.”
In order for the exemption to apply to a particular employee, the employee must have been in a “bona fide executive or high policymaking position" for the two-year period immediately before retirement. Thus, an employee who holds two or more different positions during the two-year period is subject to the exemption only if each such job is an executive or high policymaking position.

3. Annual Retirement Benefit

The “annual retirement benefit," to which covered employees must be entitled, is the sum of amounts payable during each one-year period from the date on which such benefits first become receivable by the retiree. Once established, the annual period upon which calculations are based may not be changed from year to year.

The annual retirement benefit must be immediately available to the employee to be retired pursuant to the exemption. For purposes of determining compliance, “immediate" means that the payment of plan benefits (in a lump sum or the first of a series of periodic payments) must occur no later than 60 days after the effective date of the retirement in question. The fact that an employee will receive benefits only after expiration of the 60-day period will not preclude his retirement pursuant to the exemption, if the employee could have elected to receive benefits within that period.

4. Minimum Retirement Benefit

In addition, the annual retirement benefit must equal, in the aggregate, at least $44,000. In determining whether the aggregate annual retirement benefit equals at least $44,000, the only benefits which may be counted are those authorized by and provided under the terms of a pension, profit-sharing, savings, or deferred compensation plan.

The annual retirement benefit must be “non-forfeitable." Accordingly, the exemption may not be applied to any employee subject to plan provisions that could cause the cessation of payments to a retiree or result in the reduction of benefits to less than $44,000 in any one year. For example, where a plan contains a provision under which benefits would be suspended if a retiree engages in litigation against the former employer, or obtains employment with a competitor of the former employer, the retirement benefit will be deemed to be forfeitable.

An annual retirement benefit will not be deemed forfeitable merely because the minimum statutory benefit level is not guaranteed against the possibility of plan bankruptcy or is subject to benefit restrictions in the event of early termination of the plan in accordance with federal law. However, as of the effective date of the retirement in question, there must be at least a reasonable expectation that the plan will meet its obligations.

IV. Employer Defenses

A. BONA FIDE OCCUPATIONAL QUALIFICATIONS

It is not a violation of the ADEA for an employer to make a preference or limitation on the basis of age where it is deemed to be "bona fide" to a specific job and “reasonably necessary to the normal operation of the particular business." Such a determination is generally made on the basis of all the pertinent facts surrounding each particular
situation. Because it is an exception, it is generally narrowly construed by the EEOC and the courts. An employer asserting a BFOQ defense has the burden of proving that:

- The age limit is reasonably necessary to the essence of the business; and either
- That all or substantially all individuals excluded from the job involved are in fact disqualified; or
- That some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age.

1. Public Safety Objectives

If the employer's objective in asserting a BFOQ is the goal of public safety, the employer must prove that the challenged practice does indeed effectuate that goal and that there is no acceptable alternative which would better advance it or equally advance it with less discriminatory impact.

2. Government Regulations

Many State and local governments have enacted laws or administrative regulations that limit employment opportunities based on age. Unless these laws meet the standards for the establishment of a valid bona fide occupational qualification under § 4(f)(1) of the Act, they will be considered in conflict with and effectively superseded by the ADEA.

B. DIFFERENTIATIONS BASED ON REASONABLE FACTORS OTHER THAN AGE

Section 4(f)(1) of the ADEA provides that “it shall not be unlawful for an employer, employment agency, or labor organization… to take any action otherwise prohibited … where the differentiation is based on reasonable factors other than age…”

No precise and unequivocal determination can be made as to the scope of the phrase “differentiation based on reasonable factors other than age.” Whether such differentiations exist must be decided on the basis of all the particular facts and circumstances surrounding each individual situation. When an employment practice uses age as a limiting criterion, the defense that the practice is justified by a reasonable factor other than age is unavailable.

When an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the grounds that it is a “factor other than” age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity. Tests which are asserted as “reasonable factors other than age” are typically closely scrutinized.

When the exception of “a reasonable factor other than age” is raised against an individual claim of discriminatory treatment, the employer bears the burden of showing that the “reasonable factor other than age” exists factually. A differentiation based on the average cost of employing older employees as a group is unlawful except with respect to employee benefit plans that qualify for the § 4(f)(2) exception to the ADEA.
C. BONA FIDE SENIORITY SYSTEMS

Section 4(f)(2) of the ADEA provides that “It shall not be unlawful for an employer, employment agency, or labor organization . . . to observe the terms of a bona fide seniority system . . . which is not a subterfuge to evade the purposes of this Act except that no such seniority system . . . shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act because of the age of such individual.”

Though a seniority system may be qualified by such factors as merit, capacity, or ability, any bona fide seniority system must be based on length of service as the primary criterion for the equitable allocation of available employment opportunities and prerogatives among younger and older workers.

Adoption of a purported seniority system which gives those with longer service lesser rights, and results in discharge or less favored treatment to those within the protection of the ADEA, may, depending upon the circumstances, be a “subterfuge to evade the purposes” of the Act. Unless the essential terms and conditions of an alleged seniority system have been communicated to the affected employees and can be shown to be applied uniformly to all of those affected, regardless of age, it will not be considered a bona fide seniority system within the meaning of the ADEA.

It should be noted that seniority systems which segregate, classify, or otherwise discriminate against individuals on the basis of race, color, religion, sex, or national origin, are prohibited under title VII of the Civil Rights Act of 1964, where that Act otherwise applies. The “bona fides” of such a system will be closely scrutinized to ensure that such a system is, in fact, bona fide under the ADEA.

D. COSTS AND BENEFITS

In some cases, it does not violate the ADEA to have a benefit plan that provides different benefits based on age. The ADEA provides that employers may observe the terms of any bona fide employee benefit plan such as a retirement, pension, or insurance plan, that is not created with the intention to violate the Act. The legislative history of this provision indicates that its purpose is to permit age-based reductions in employee benefit plans where such reductions are justified by significant cost considerations.

The ADEA does not apply, for example, to paid vacations and uninsured paid sick leave, since reductions in these benefits would not be justified by significant cost considerations. In addition, benefit levels for older workers may be reduced to the extent necessary to achieve approximate equivalency in cost for older and younger workers. A benefit plan will be considered in compliance with the statute where the actual amount of payment made, or cost incurred, in behalf of an older worker is equal to that made or incurred in behalf of a younger worker, even though the older worker may thereby receive a lesser amount of benefits or insurance coverage.
Since this is an exception from the general non-discrimination provisions of the Act, the burden is on the employer seeking to invoke the exception to show that every element has been clearly and unmistakably met. The exception must be narrowly construed.

1. Benefits Provided by the Government

An employer does not violate the Act by permitting certain benefits to be provided by the Government, even though the availability of such benefits may be based on age. For example, it is not necessary for an employer to provide health benefits that are otherwise provided to certain employees by Medicare. However, the availability of benefits from the Government will not justify a reduction in employer-provided benefits if the result is that, taking the employer-provided and Government-provided benefits together, an older employee is entitled to a lesser benefit of any type (including coverage for family and/or dependents) than a similarly situated younger employee. For example, the availability of certain benefits to an older employee under Medicare will not justify denying an older employee a benefit that is provided to younger employees and is not provided to the older employee by Medicare.

2. Life insurance

It is not uncommon for life insurance coverage to remain constant until a specified age, frequently 65, and then be reduced. This practice will not violate the Act (even if reductions start before age 65), provided that the reduction for an employee of a particular age is no greater than is justified by the increased cost of coverage for that employee’s specific age bracket encompassing no more than five years. It should be noted that a total denial of life insurance, on the basis of age, would not be justified under a benefit-by-benefit analysis. However, it is not unlawful for life insurance coverage to cease upon separation from service.

3. Long-term Disability

Under a benefit-by-benefit approach, where employees who are disabled at younger ages are entitled to long-term disability benefits, there is no cost-based justification for denying such benefits altogether, on the basis of age, to employees who are disabled at older ages. It is not unlawful to cut off long-term disability benefits and coverage on the basis of some non-age factor, such as recovery from disability. Reductions on the basis of age in the level or duration of benefits available for disability are justifiable only on the basis of age-related cost considerations as set forth elsewhere in this section.

An employer who provides long-term disability coverage to all employees may avoid any increases in the cost to it that such coverage for older employees would entail by reducing the level of benefits available to older employees. An employer may also avoid such cost increases by reducing the duration of benefits available to employees who become disabled at older ages, without reducing the level of benefits. In this connection, the Department would not assert a violation where the level of benefits is not reduced and the duration of benefits is reduced in the following manner:
With respect to disabilities that occur at age 60 or less, benefits cease at age 65; and

With respect to disabilities that occur after age 60, benefits cease 5 years after disablement. Cost data may be produced to support other patterns of reduction as well.

4. Retirement Plans

No employee hired prior to normal retirement age may be excluded from a defined contribution plan. With respect to defined benefit plans not subject to the Employee Retirement Income Security Act (ERISA), an employee hired at an age more than 5 years prior to normal retirement age may not be excluded from such a plan unless the exclusion is justifiable on the basis of cost considerations as set forth elsewhere in this section. With respect to defined benefit plans subject to ERISA, such an exclusion would be unlawful in any case.

An employee hired less than 5 years prior to normal retirement age may be excluded from a defined benefit plan, regardless of whether or not the plan is covered by ERISA. Similarly, any employee hired after normal retirement age may be excluded from a defined benefit plan.

V. Enforcement

A. THE EEOC

The Equal Employment Opportunity Commission (EEOC) has the authority to enforce the ADEA. Before attempting to enforce the statute in court, the EEOC is required to attempt to eliminate any illegal practices through informal means, including conciliation.

B. COURT ACTION

Any person who believes their rights under the ADEA have been violated may bring a civil action in federal court. However, no lawsuit can be filed until at least 60 days after the individual has filed a complaint alleging illegal discrimination with the EEOC. The charge must generally be filed with the EEOC within 180 days of the alleged unlawful practice.

Upon receiving a complaint, the EEOC is required to promptly notify all persons named in the complaint as prospective defendants in the action and to try and resolve the dispute through informal means.

C. AVAILABLE RELIEF

In cases where a lawsuit is filed, courts have authority to issue “make whole” relief, which means to take whatever action is necessary to put a person whose rights under the ADEA have been violated in the same position he or she would have been in absent the discrimination. Available remedies include compelling employment, reinstatement or promotion.
CHAPTER 7 – REVIEW QUESTIONS

The following questions are designed to ensure that you have a complete understanding of the information presented in the assignment. They do not need to be submitted in order to receive CPE credit. They are included as an additional tool to enhance your learning experience.

We recommend that you answer each review question and then compare your response to the suggested solution before answering the final exam questions related to this assignment.

1. The Age Discrimination in Employment Act protects individuals who are at least 50 years of age from discrimination based on their age.
   a) true
   b) false

2. Which of the following employers are subject to the Age Discrimination in Employment Act:
   a) private sector employers with 10 or more employees
   b) government agencies
   c) private sector employers with 20 or more employees
   d) both b and c above

3. Which of the following are expressly prohibited by the Age Discrimination in Employment Act:
   a) early retirement plans
   b) specifying a maximum age in a help wanted advertisement
   c) asking a job applicant their age
   d) all of the above

4. The Age Discrimination in Employment Act generally allows employers to institute mandatory retirement plans as long as they are fair and reasonable.
   a) true
   b) false

5. Which federal agency enforces the provisions of the ADEA:
   a) the FBI
   b) the EEOC
   c) the Fair Labor Standards Act
   d) Fair Employment and Housing Administration
CHAPTER 7 – SOLUTIONS AND SUGGESTED RESPONSES

1. A: True is incorrect. The Age Discrimination in Employment Act protects individuals who are at least 40 years of age.

   **B: False is correct.** The law’s protections extend to persons who are at least 40 years old.

   (See page 7-1 of course material.)

2. A: Incorrect. Only private employers with 20 or more employees are subject to this law.

   B: Incorrect. Government agencies are subject to this law. However, this is not the best answer.

   C: Incorrect. The Act covers private employers with at least 20 employees. However, this is not the best answer.

   **D: Correct.** The act covers employers in B and C.

   (See page 7-1 of course material.)

3. A: Incorrect. An early retirement plan on its face does not violate the terms of the Act.

   **B: Correct.** An express limitation based on age does violate the provisions of the ADEA.

   C: Incorrect. Although it can create a discriminatory inference, there is nothing in the law that expressly forbids this.

   D: Incorrect. Only B is expressly forbidden by the Act.

   (See page 7-4 of course material.)

4. A: True is incorrect. With a few exceptions, such plans are generally illegal regardless of their fairness.

   **B: False is correct.** As originally enacted in 1967, the ADEA allowed employers to institute mandatory retirement ages. However, amendments enacted in 1978 generally preclude mandatory retirement on the basis of age. The amendments also removed a provision that denied protections of the ADEA to workers when they reached the age of 70. Accordingly, unless a specific exemption applies, an employer can no longer force retirement or otherwise discriminate on the basis of age against an individual because he or she is 70 years or older.

   (See pages 7-4 to 7-5 of course material.)
5. A: Incorrect. This is a civil statute and is not enforced by the FBI.

**B: Correct.** The Equal Employment Opportunity Commission is the federal agency charged with enforcing employment discrimination laws, including the ADEA.

C: Incorrect. The Fair Labor Standards Commission is charged with enforcing wage and hour laws and not employment discrimination laws.

D: Incorrect. They are not the federal enforcement agency for the ADEA.

(See page 7-11 of course material.)
Chapter 8: Sexual Harassment

I. Introduction and Overview

Sexual harassment is a form of sex discrimination that violates Title VII of the Civil Rights Act of 1964. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment.

<table>
<thead>
<tr>
<th>Sexual Harassment Do’s and Don’ts</th>
</tr>
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<tbody>
<tr>
<td>✓ Do take all allegations or complaints of sexual harassment seriously;</td>
</tr>
<tr>
<td>✓ Do have a clear written policy against sexual harassment;</td>
</tr>
<tr>
<td>✓ Do provide periodic training to all employees on your firm’s sexual harassment policy;</td>
</tr>
<tr>
<td>✓ Don’t discriminate against someone for making a complaint of harassment; and</td>
</tr>
<tr>
<td>✓ Don’t ever assume that sexual harassment was welcomed by the complaining employee.</td>
</tr>
</tbody>
</table>

A. CIRCUMSTANCES OF HARASSMENT

Sexual harassment can occur in a variety of circumstances. The victim as well as the harasser may be a woman or a man. The victim does not have to be of the opposite sex. The harasser can be the victim's supervisor, an agent of the employer, a supervisor in another area, a co-worker, or a non-employee. The victim does not have to be the person harassed but could be anyone affected by the offensive conduct. Unlawful sexual harassment can occur without economic injury to or discharge of the victim. The key with all of these examples is that the harasser's conduct must be unwelcome.

Caution!
When investigating allegations of sexual harassment, a manager should evaluate the whole record: the circumstances, such as the nature of the sexual advances, and the context in which the alleged incidents occurred. A determination on the allegations is made from the facts on a case-by-case basis.
B. AN OUNCE OF PREVENTION

Prevention is the best tool to eliminate sexual harassment in the workplace. Managers should take steps necessary to prevent sexual harassment from occurring. They should clearly communicate to employees that sexual harassment will not be tolerated. They can do so by providing sexual harassment training to their employees and by establishing an effective complaint or grievance process and taking immediate and appropriate action when an employee complains.

It is also unlawful to retaliate against an individual for opposing employment practices that discriminate based on sex or for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or litigation under Title VII.

C. DEFINING “SEXUAL HARASSMENT”

Title VII does not prohibit all conduct of a sexual nature in the workplace. Thus it is crucial to clearly define sexual harassment. The EEOC's guidelines and the courts have recognized two types of sexual harassment: "quid pro quo" and "hostile environment." The EEOC guidelines provide that "unwelcome" sexual conduct constitutes sexual harassment when "submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment."

"Quid pro quo harassment" occurs when "submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual," The Supreme Court has said that both types of sexual harassment are actionable under Title VII of the Civil Rights Act of 1964 as forms of sex discrimination.

Although "quid pro quo" and "hostile environment" harassment are theoretically distinct claims, the line between the two is not always clear and the two forms of harassment often occur together. For example, an employee's tangible job conditions are affected when a sexually hostile work environment becomes so bad that the employee feels compelled to quit. The result is considered a constructive discharge. Similarly, a supervisor who makes sexual advances toward a subordinate employee may communicate an implicit threat to adversely affect her job status if she does not comply.

Caution!

*Harassment that is targeted at an individual because of his or her sex violates Title VII even if it does not involve sexual comments or conduct. Thus, for example, frequent, derogatory remarks about women could constitute unlawful harassment even if the remarks are not sexual in nature.*

D. SEX-BASED HARASSMENT

Although sexual harassment law specifically addresses conduct that is sexual in nature, the EEOC has noted that sex-based harassment – that is, harassment not involving sexual activity or language – may also give rise to Title VII liability (just as in the case of harassment based on race, national origin or religion) if it is "sufficiently patterned or
pervasive” and directed at employees because of their sex. Acts of physical aggression, intimidation, hostility or unequal treatment based on sex may be combined with incidents of sexual harassment to establish the existence of discriminatory terms and conditions of employment.

E. CONSTRUCTIVE DISCHARGE

Claims of "hostile environment" sexual harassment often are coupled with claims of constructive discharge. If constructive discharge due to a hostile environment is proven, the claim will also become one of "quid pro quo" harassment.

The EEOC and a majority of courts have held that an employer is liable for constructive discharge when it imposes intolerable working conditions in violation of Title VII when those conditions foreseeably would compel a reasonable employee to quit, whether or not the employer specifically intended to force the victim's resignation.

An important factor to consider is whether the employer had an effective internal grievance procedure. If an employee knows that effective avenues of complaint and redress are available, then the availability of such avenues itself becomes a part of the work environment and overcomes, to the degree it is effective, the hostility of the work environment.

II. Hostile Work Environment Harassment: A Closer Look

In Harris v. Forklift Systems, Inc., the United States Supreme Court considered whether a plaintiff is required to prove psychological injury in order to prevail on a cause of action alleging hostile environment sexual harassment under Title VII of the Civil Rights Act of 1964. A unanimous court held that if a workplace is permeated with behavior that is severe or pervasive enough to create a discriminatorily hostile or abusive working environment, Title VII is violated regardless of whether the plaintiff suffers psychological injury.

In Harris, the plaintiff, Teresa Harris, brought a Title VII action against her former employer, Forklift Systems, Inc. ("Forklift"), an equipment rental company, alleging that Forklift had created a sexually hostile work environment. Harris had worked for Forklift as a manager from April 1985 to October 1987.

Evidence at trial showed that Forklift's president, Charles Hardy, subjected Harris to numerous offensive remarks and unwanted sexual innuendos. Specifically, the court found that Hardy had, on a number of occasions, asked plaintiff and other female employees to retrieve coins from his front pants pocket, asked plaintiff and other female employees to retrieve objects that he had thrown on the ground in front of them and commented, using sexual innuendo, about plaintiff's and other female employees' attire. On other occasions, he remarked to plaintiff in the presence of other employees, "You're a woman, what do you know," "You're a dumb ass woman," and "We need a man as the rental manager." In addition, he once remarked in the presence of other employees, as well as a client, that he and Harris should "go to the Holiday Inn to negotiate [Harris'] raise."

In August 1987, Harris complained to Hardy that she found his behavior offensive. Although Hardy apologized and promised to desist, in September 1987 he suggested in the presence of other employees that plaintiff had promised sexual favors to a customer in order to secure an account. Shortly thereafter, Harris tendered her resignation and filed a Title VII action against Forklift alleging hostile environment sexual harassment.

The Supreme Court reviewed the case to determine whether or not the plaintiff in a sexual harassment case is required to show that he or she was the victim of a psychological injury in order to make out a cause of action under Title VII. The court concluded that no such showing is required, although it noted that the severity of a victim’s harm is related to the question of damages.

Even though discriminatory incidents may not seriously affect an employee's psychological well-being, a discriminatorily abusive work environment may, among other things, affect an employee’s job performance or advancement, the Supreme Court concluded. The Court concluded that even if harassing conduct produces no tangible effects, a victim may claim a violation of Title VII if "the "discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin."

In assessing a hostile environment claim, according to the Supreme Court, the totality of the circumstances must be examined, including the following elements:

- The frequency of the discriminatory conduct;
- The severity of the discriminatory conduct;
- Whether it is physically threatening or humiliating, or a mere offensive utterance; and
- Whether it unreasonably interferes with an employee's work performance.

Thus, in evaluating welcomeness and whether conduct was sufficiently severe or pervasive to constitute a violation, a manager investigating a complaint should continue to look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred.

The factors that indicate a hostile or abusive environment may include the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, and whether it unreasonably interferes with an employee's work performance.

Although a victim is not required to prove that they were psychologically injured by the perpetrator’s conduct, they are required to show that a reasonable person would find the conduct sufficiently offensive to create a hostile work environment. This element exists to ensure that an overly sensitive individual is unable to make a successful claim for sexual harassment based on relatively harmless actions or statements.

In defining the hypothetical "reasonable person," the EEOC has emphasized that the focus should be on the victim's perspective rather than that of stereotyped notions of acceptable behavior.
Example.

Martina works in a thirty person accounting firm as an administrative assistant. She is one of three female employees at the firm. After she had worked at the firm for about eight months, she was promoted to office manager.

Following her promotion, two of her supervisors stopped by her office to inform her of her new responsibilities. During this visit, the supervisors insinuated that Martina was promoted because the firm needed to show potential clients "some good bodies" and "some nice legs" in higher positions.

They also asked Martina if she had slept with the head of personnel in order to obtain her promotion.

Thereafter, these supervisors as well as some of Martina’s co-workers continued to taunt her in front other co-workers and sometimes before clients, suggesting that Martina had been promoted because of her looks and because she was willing to succumb to the advances of clients and supervisors. Martina complained to management and subsequently filed a charge with the EEOC.

An investigator reviewing this charge should consider the behavior from the standpoint of the reasonable person in Martina’s position. A reasonable person in Martina’s position might take umbrage at the comments and thus might consider her co-workers’ and supervisors’ behavior to be hostile and offensive.

A victim of sexual harassment must also be able to show that they were in fact offended by the conduct in question. Even if a reasonable person would have been offended, the victim herself or himself must have actually been offended to be successful in a cause of action. As a practical matter, of course, it is not difficult to prove since the testimony of the victim is generally sufficient to establish this element of the case. Unless the alleged perpetrator produces evidence to the contrary, the subjective prong of the analysis will be satisfied.

Example.

Morgan, a woman, has worked for A Corporation for three years. When she first began working for A Corporation, she joined in when her co-workers and supervisors would have sexual discussions. She herself would make sexual comments and lewd references. After she had worked for A Corporation for about a year, Morgan’s supervisors allowed her co-workers to post sexually explicit pictures on their office walls and in the hallways. Even though Morgan had not been offended by her co-workers’ bawdy remarks, she believed that the posting of pornographic pictures demeaned women. She complained to her supervisor who refused to ask the employees to remove the pictures.
Shortly thereafter, more pictures were posted. After again receiving no response to her complaint, Morgan filed a charge.

Based on these facts, an investigator should find that the conduct was unwelcome, i.e., that Morgan subjectively considered the pornographic pictures to be abusive. Her willingness to engage in sexual banter is not material to assessing her perception of the pictures.

Note that an investigator may consider the prevalence of sexual banter in analyzing whether a hostile environment was created for other employees.

The upshot is that when evaluating a claim of hostile work environment sexual harassment, the following must be considered:

- The totality of the circumstances – Examine, among other things, the nature of the conduct (i.e., whether it was verbal or physical), the context in which the alleged incident(s) occurred, the frequency of the conduct, its severity and pervasiveness, whether it was physically threatening or humiliating, whether it was unwelcome, and whether it unreasonably interfered with an employee’s work performance;

- Whether a reasonable person in the same or similar circumstances would find the challenged conduct sufficiently severe or pervasive to create an intimidating, hostile or abusive work environment; and

- Whether the charging party perceived the environment to be hostile or abusive, i.e., whether the conduct was unwelcome. In making this analysis, the investigator should consider the charging party's behavior.

These issues are discussed in more detail below.

III. Investigating Complaints of Sexual Harassment

A. EFFECTIVE INVESTIGATIVE PROCESS

An employer should set up a mechanism for a prompt, thorough, and impartial investigation into alleged harassment. As soon as management learns about alleged harassment, it should determine whether a detailed fact-finding investigation is necessary. For example, if the alleged harasser does not deny the accusation, there would be no need to interview witnesses, and the employer could immediately determine appropriate corrective action.

1. Launch Investigations Immediately

If a fact-finding investigation is necessary, it should be launched immediately. The amount of time that it will take to complete the investigation will depend on the particular circumstances. If, for example, multiple individuals were allegedly harassed, then it will take longer to interview the parties and witnesses.
2. Intermediate Measures

It may be necessary to undertake intermediate measures before completing the investigation to ensure that further harassment does not occur. Examples of such measures are:

- Making scheduling changes so as to avoid contact between the parties;
- Transferring the alleged harasser; or
- Placing the alleged harasser on non-disciplinary leave with pay pending the conclusion of the investigation.

The complainant should not be involuntarily transferred or otherwise burdened, since such measures could constitute unlawful retaliation.

The employer should ensure that the individual who conducts the investigation will objectively gather and consider the relevant facts. The alleged harasser should not have supervisory authority over the individual who conducts the investigation and should not have any direct or indirect control over the investigation. Whoever conducts the investigation should be well-trained in the skills that are required for interviewing witnesses and evaluating credibility.

B. QUESTIONS TO ASK PARTIES AND WITNESSES

When detailed fact-finding is necessary, the investigator should interview the complainant, the alleged harasser, and third parties who could reasonably be expected to have relevant information. Information relating to the personal lives of the parties outside the workplace would be relevant only in unusual circumstances. When interviewing the parties and witnesses, the investigator should refrain from offering his or her opinion.

The following are examples of questions that may be appropriate to ask the parties and potential witnesses. Any actual investigation must be tailored to the particular facts.

1. Questions to Ask the Complainant:

- Who, what, when, where, and how: Who committed the alleged harassment? What exactly occurred or was said? When did it occur and is it still ongoing? Where did it occur? How often did it occur? How did it affect you?

- How did you react? What response did you make when the incident(s) occurred or afterwards?

- How did the harassment affect you? Has your job been affected in any way?

- Are there any persons who have relevant information? Was anyone present when the alleged harassment occurred? Did you tell anyone about it? Did anyone see you immediately after episodes of alleged harassment?
Did the person who harassed you harass anyone else? Do you know whether anyone complained about harassment by that person?

Are there any notes, physical evidence, or other documentation regarding the incident(s)?

How would you like to see the situation resolved?

Do you know of any other relevant information?

2. Questions to Ask the Alleged Harasser:

What is your response to the allegations?

If the harasser claims that the allegations are false, ask why the complainant might lie.

Are there any persons who have relevant information?

Are there any notes, physical evidence, or other documentation regarding the incident(s)?

Do you know of any other relevant information?

3. Questions to Ask Third Parties:

What did you see or hear? When did this occur? Describe the alleged harasser's behavior toward the complainant and toward others in the workplace.

What did the complainant tell you? When did s/he tell you this?

Do you know of any other relevant information?

Are there other persons who have relevant information?

C. CREDIBILITY DETERMINATIONS

If there are conflicting versions of relevant events, the employer will have to weigh each party's credibility. Credibility assessments can be critical in determining whether the alleged harassment in fact occurred. Factors to consider include:

Inherent plausibility: Is the testimony believable on its face? Does it make sense?

Demeanor: Did the person seem to be telling the truth or lying?

Motive to falsify: Did the person have a reason to lie?
Corroboration: Is there witness testimony (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at around the time that they occurred) or physical evidence (such as written documentation) that corroborates the party's testimony?

Past record: Did the alleged harasser have a history of similar behavior in the past?

None of the above factors are determinative as to credibility. For example, the fact that there are no eye-witnesses to the alleged harassment by no means necessarily defeats the complainant's credibility, since harassment often occurs behind closed doors. Furthermore, the fact that the alleged harasser engaged in similar behavior in the past does not necessarily mean that he or she did so again.

D. REACHING A DETERMINATION

Once all of the evidence is in, interviews are finalized, and credibility issues are resolved, management should make a determination as to whether harassment occurred. That determination could be made by the investigator, or by a management official who reviews the investigator's report. The parties should be informed of the determination.

In some circumstances, it may be difficult for management to reach a determination because of direct contradictions between the parties and a lack of documentary or eye-witness corroboration. In such cases, a credibility assessment may form the basis for a determination, based on factors such as those set forth above.

If no determination can be made because the evidence is inconclusive, the employer should still undertake further preventive measures, such as training and monitoring.

E. ASSURANCE OF IMMEDIATE AND APPROPRIATE CORRECTIVE ACTION

An employer should make clear that it will undertake immediate and appropriate corrective action, including discipline, whenever it determines that harassment has occurred in violation of the employer's policy. Management should inform both parties about these measures. Appropriate measures will be discussed in more detail below.

F. EVALUATING EVIDENCE OF HARASSMENT

Sexual conduct is often private and unacknowledged, with no eyewitnesses. Even sexual conduct that occurs openly in the workplace may appear to be consensual. As a result, the credibility of the parties often plays a crucial role whenever an allegation of sexual harassment is made. A manager investigating a claim should therefore question all of the parties involved in detail. A manager should seek out any evidence that corroborates the accuser's story, i.e. were there any other employees or customers present during the alleged incident. Supervisory and managerial employees, as well as co-workers, should be asked about their knowledge of the alleged harassment.
Even in the absence of eye-witnesses to the incident, further investigation is typically warranted. For example, managers should interview persons who observed the alleged victim’s demeanor immediately after an alleged incident of harassment. Persons with whom he or she discussed the incident – such as co-workers, a doctor or a counselor – should be interviewed. Other employees should be asked if they noticed changes in charging party’s behavior at work or in the alleged harasser's treatment of charging party. A contemporaneous complaint by the victim would be persuasive evidence both that the conduct occurred and that it was unwelcome. So too is evidence that other employees were sexually harassed by the same person.

The investigator should also determine whether the employer was aware of any other instances of harassment and if so what was the response.

Example.

Lorraine, a secretary in the accounting firm of Better & Best alleges that her supervisor made unwelcome sexual advances toward her on frequent occasions while they were alone in his office. The supervisor denies this allegation. No one witnessed the alleged advances.

Lorraine’s inability to produce eyewitnesses to the harassment does not defeat her claim. The resolution will depend on the credibility of her allegations versus that of her supervisor’s. Corroborating, credible evidence will establish her claim. For example, three co-workers state that Lorraine looked distraught on several occasions after leaving the supervisor’s office, and that she informed them on those occasions that he had sexually propositioned and touched her. In addition, the evidence shows that Lorraine had complained to the general manager of the office about the incidents soon after they occurred.

The corroborating witness testimony and her complaint to higher management would be sufficient to establish her claim. Her allegations would be further buttressed if other employees testified that the supervisor propositioned them as well.

G. DETERMINING WHETHER A WORK ENVIRONMENT IS “HOSTILE”

To rise to the level of a hostile work environment, the conduct of the perpetrator must be “sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment,” according to the Supreme Court. Since “hostile environment” harassment takes a variety of forms, many factors may affect this determination, including:

- Whether the conduct was verbal or physical, or both;
- How frequently it was repeated;
- Whether the conduct was hostile and patently offensive;
- Whether the alleged harasser was a co-worker or a supervisor;
Whether the others joined in perpetrating the harassment; and

Whether the harassment was directed at more than one individual.

In determining whether unwelcome sexual conduct rises to the level of a "hostile environment" in violation of Title VII, the central inquiry is whether the conduct unreasonably interferes with an individual's work performance or creates an intimidating, hostile, or offensive working environment. Thus, sexual flirtation or innuendo, even vulgar language that is trivial or merely annoying, would probably not establish a hostile environment.

1. Standard for Evaluating Harassment

In determining whether harassment is sufficiently severe or pervasive to create a hostile environment, the harasser's conduct should be evaluated from the objective standpoint of a "reasonable person." Conduct which would not be offensive to an average person does not rise to the level of illegal merely because it upsets an overly sensitive person. Thus, if the challenged conduct would not substantially affect the work environment of a reasonable person, no violation should be found.

Example.

An employee complains to her manager that a coworker made repeated unwelcome sexual advances toward her. The manager's investigation discloses that the alleged "advances" consisted of invitations to join a group of employees who regularly socialized at dinner after work. The coworker's invitations, viewed in that context and from the perspective of a reasonable person, would not have created a hostile environment and therefore did not constitute sexual harassment.

It is important at this point that the manager explain his or her findings to the complaining employee and try and find ways to resolve any remaining concerns, including a voluntary transfer or a discussion with the other workers. It is critical that the manager convey to the complaining employee that her concerns were taken seriously and investigated completely.

A "reasonable person" standard also should be applied to be a more basic determination of whether challenged conduct is of a sexual nature. Thus, in the above example, a reasonable person would not consider the co-worker's invitations sexual in nature, and on that basis as well no violation would be found.

This objective standard should not be applied in a vacuum, however. Consideration should be given to the context in which the alleged harassment took place. Likewise, the reasonable person standard should consider the victim's perspective and not stereotyped notions of acceptable behavior. For example, the Commission believes that a workplace in which sexual slurs, displays of "girlie" pictures, and other offensive conduct abound can constitute a hostile work environment even if many people deem it to be harmless or insignificant.
2. Isolated Instances of Harassment

Unless the conduct is quite severe, a single incident or isolated incidents of offensive sexual conduct or remarks generally do not create an abusive environment. Rather, a "hostile environment" claim generally requires a showing of a pattern of offensive conduct. In contrast, in "quid pro quo" cases a single sexual advance may constitute harassment if it is linked to the granting or denial of employment benefits.

But a single, unusually severe incident of harassment may be sufficient to constitute a Title VII violation; the more severe the harassment, the less need to show a repetitive series of incidents. This is particularly true when the harassment is physical.

Example.

Janice was driving with her supervisor, Richard, to a company lunch when he began talking to her about specific sexual activities in great detail and touched her in an offensive manner while they were inside a vehicle from which she could not escape. Although this was the first time Richard had made any advances towards Janice, the nature and severity of the incident might be enough to find a hostile work environment.

The EEOC typically presume that the unwelcome, intentional touching of a charging party's intimate body areas is sufficiently offensive to alter the condition of her working environment and constitute a violation of Title VII. Management must therefore take the same position. More so than in the case of verbal advances or remarks, a single unwelcome physical advance can seriously poison the victim's working environment.

When the victim is the target of both verbal and non-intimate physical conduct, the hostility of the environment is exacerbated and a violation is more likely to be found. Similarly, incidents of sexual harassment directed at other employees in addition to the person claiming sexual harassment are relevant to a showing of hostile work environment.

3. Non-physical Harassment

When the alleged harassment consists of verbal conduct, an investigation into the complaint should ascertain the nature, frequency, context, and intended target of the remarks. Questions to be explored might include:

- Did the alleged harasser single out the charging party?
- Did the charging party participate?
- What was the relationship between the charging party and the alleged harasser(s)?
- Were the remarks hostile and derogatory?
No one factor alone determines whether particular conduct violates Title VII. An investigator should therefore evaluate the totality of the circumstances. In general, a woman does not forfeit her right to be free from sexual harassment by choosing to work in an atmosphere that has traditionally included vulgar, anti-female language.

IV. Remedial Action

An effective preventive program should include an explicit policy against sexual harassment that is clearly and regularly communicated to employees and effectively implemented. Managers should affirmatively raise the subject with all supervisory and non-supervisory employees, express strong disapproval, and explain the sanctions for harassment. The EEOC’S Sexual Harassment Guidelines encourage employers to:

> Take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned².

However, in those instances (hopefully rare) when there has been sexual harassment in the workplace, it is necessary for employers to take prompt, appropriate remedial action.

A. ASSURANCE OF IMMEDIATE AND APPROPRIATE ACTION

An employer should make clear that it will undertake immediate and appropriate corrective action, including discipline, whenever it determines that harassment has occurred in violation of the employer's policy. Management should inform both parties about these measures.

1. Purpose of Action

Remedial measures should be designed to stop the harassment, correct its effects on the employee, and ensure that the harassment does not recur. These remedial measures need not be those that the employee requests or prefers, as long as they are effective.

In determining disciplinary measures, management should keep in mind that the employer could be found liable if the harassment does not stop. At the same time, management may have concerns that overly punitive measures may subject the employer to claims such as wrongful discharge, and may simply be inappropriate.

2. Proportionality of Punishment

To balance the competing concerns, disciplinary measures should be proportional to the seriousness of the offense. If the harassment was minor, such as a small number of "off-color" remarks by an individual with no prior history of similar misconduct, then counseling and an oral warning might be all that is necessary. On the other hand, if the harassment was severe or persistent, then suspension or discharge may be appropriate.

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² 29 C.F.R. § 1604.11(f).
3. Rights of Victim Should Be Protected

Remedial measures should not adversely affect the victim of harassment. Thus, for example, if it is necessary to separate the parties, then the harasser should be transferred (unless the complainant prefers otherwise). Remedial responses that penalize the complainant could constitute unlawful retaliation and are not effective in correcting the harassment.

Remedial measures also should correct the effects of the harassment. Such measures should be designed to put the employee in the position s/he would have been in had the misconduct not occurred.

B. EXAMPLES OF REMEDIAL MEASURES

1. Measures to Stop Harassment

The following are examples of remedial measures to stop the harassment and ensure that it does not recur:

- Oral or written warning or reprimand;
- Transfer or reassignment;
- Demotion;
- Reduction of wages;
- Suspension;
- Discharge;
- Training or counseling of harasser to ensure that s/he understands why his or her conduct violated the employer's anti-harassment policy; and
- Monitoring of harasser to ensure that harassment stops.

2. Measures to Correct the Effects of the Harassment

The following are examples of measures to correct the effects of sexual harassment:

- Restoration of leave taken because of the harassment;
- Expungement of negative evaluation(s) in employee's personnel file that arose from the harassment;
- Reinstatement;
- Apology by the harasser;
Monitoring treatment of employee to ensure that s/he is not subjected to retaliation by the harasser or others in the workplace because of the complaint; and

Correction of any other harm caused by the harassment (e.g., compensation for losses).

3. Other Preventive and Corrective Measures

An employer's responsibility to exercise reasonable care to prevent and correct harassment is not limited to implementing an anti-harassment policy and complaint procedure. As the Supreme Court has stated, "the employer has a greater opportunity to guard against misconduct by supervisors than by common workers; employers have greater opportunity and incentive to screen them, train them, and monitor their performance."

An employer's duty to exercise due care includes instructing all of its supervisors and managers to address or report to appropriate officials complaints of harassment regardless of whether they are officially designated to take complaints and regardless of whether a complaint was framed in a way that conforms to the organization's particular complaint procedures. For example, if an employee files an EEOC charge alleging unlawful harassment, the employer should launch an internal investigation even if the employee did not complain to management through its internal complaint process.

Furthermore, due care requires management to correct harassment regardless of whether an employee files an internal complaint, if the conduct is clearly unwelcome. For example, if there are areas in the workplace with graffiti containing racial or sexual epithets, management should eliminate the graffiti and not wait for an internal complaint.

An employer should ensure that its supervisors and managers understand their responsibilities under the organization's anti-harassment policy and complaint procedure. Periodic training of those individuals can help achieve that result. Such training should explain the types of conduct that violate the employer's anti-harassment policy; the seriousness of the policy; the responsibilities of supervisors and managers when they learn of alleged harassment; and the prohibition against retaliation.

An employer should keep track of its supervisors' and managers' conduct to make sure that they carry out their responsibilities under the organization's anti-harassment program. For example, an employer could include such compliance in formal evaluations.

Reasonable preventive measures include screening applicants for supervisory jobs to see if any have a record of engaging in harassment. If so, it may be necessary for the employer to reject a candidate on that basis or to take additional steps to prevent harassment by that individual.

Finally, it is advisable for an employer to keep records of all complaints of harassment. Without such records, the employer could be unaware of a pattern of harassment by the same individual. Such a pattern would be relevant to credibility assessments and disciplinary measures.
C. RECENT CASES

Recent court decisions illustrate appropriate and inappropriate responses by employers. In one case, the victim informed her employer that her co-worker had talked to her about sexual activities and touched her in an offensive manner. Within four days of receiving this information, the employer investigated the charges, reprimanded the guilty employee, placed him on probation, and warned him that further misconduct would result in discharge. A second co-worker who had witnessed the harassment was also reprimanded for not intervening on the victim's behalf or reporting the conduct. The court ruled that the employer's response constituted immediate and appropriate corrective action, and on this basis found the employer not liable.3

In a contrasting case, the court found the employer's policy against sexual harassment failed to function effectively. The victim's first-level supervisor had responsibility for reporting and correcting harassment at the company, yet he was the harasser. The employer told the victims not to go to the EEOC. While giving the accused harasser administrative leave pending investigation, the employer made the plaintiffs take sick leave, which was never credited back to them and was recorded in their personnel files as excessive absenteeism without indicating they were absent because of sexual harassment.4

In a similar case, co-workers harassed the plaintiff over a period of nearly four years in a manner the court described as "malevolent" and "outrageous." Despite the plaintiff's numerous complaints, her supervisor took no remedial action other than to hold occasional meetings at which he reminded employees of the company's policy against offensive conduct. The supervisor never conducted an investigation or disciplined any employees until the plaintiff filed an EEOC charge, at which time one of the offending co-workers was discharged and three others were suspended. The court held the employer liable because it failed to take immediate and appropriate corrective action.5

When an employer asserts it has taken remedial action, the EEOC will investigate to determine whether the action was appropriate and, more important, effective.

V. Vicarious Employer Liability for Unlawful Harassment by Supervisors

A. INTRODUCTION

The United States Supreme Court has made clear in several decisions6 that employers are subject to vicarious liability for unlawful harassment committed by supervisors. This rule is premised on two principles:

- An employer is responsible for the acts of its supervisors; and
- Employers should be encouraged to prevent harassment and employees should be encouraged to avoid or limit the harm from harassment.

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3 Barrett v. Omaha National Bank, 726 F.2d 424, 33 EPD ¶ 34,132 (8th Cir. 1984),
4 Yates v. Avco Corp., 819 F.2d 630, 43 EPD ¶ 37,086 (6th Cir. 1987),
5 Zabkowicz v. West Bend Co., 589 F. Supp. 780, 35 EPD ¶ 34,766 (E.D. Wis. 1984),
In order to accommodate these principles, the Supreme Court has held that an employer is always liable for a supervisor's harassment if it culminates in a tangible employment action. However, if it does not, the employer may be able to avoid liability or limit damages by establishing an affirmative defense that includes two necessary elements:

- The employer exercised reasonable care to prevent and correct promptly any harassing behavior, and
- The employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

This once again highlights the importance of having an effective anti-harassment policy in place for all employers.

B. PERSONS WHO QUALIFY AS A SUPERVISOR

1. Harasser in Supervisory Chain of Command

An employer is subject to vicarious liability for unlawful harassment if the harassment was committed by "a supervisor with immediate (or successively higher) authority over the employee."\(^7\) Thus, it is critical to determine whether the person who engaged in unlawful harassment had supervisory authority over the complainant.

The federal employment discrimination statutes do not contain or define the term "supervisor." The statutes make employers liable for the discriminatory acts of their "agents," and supervisors are agents of their employers. However, agency principles "may not be transferable in all their particulars" to the federal employment discrimination statutes.

The determination of whether an individual has sufficient authority to qualify as a "supervisor" for purposes of vicarious liability cannot be resolved by a purely mechanical application of agency law. Rather, the purposes of the anti-discrimination statutes and the reasoning of the Supreme Court decisions on harassment must be considered.

The Supreme Court has said that vicarious liability for supervisor harassment is appropriate because supervisors are aided in such misconduct by the authority that the employers delegated to them. Therefore, that authority must be of a sufficient magnitude so as to assist the harasser explicitly or implicitly in carrying out the harassment. The determination as to whether a harasser had such authority is based on his or her job function rather than job title (e.g., "team leader") and must be based on the specific facts. An individual qualifies as an employee's "supervisor" if: (1) the individual has authority to undertake or recommend tangible employment decisions affecting the employee; or (2) the individual has authority to direct the employee's daily work activities.

\(^7\) Ellerth, 118 S. Ct. at 2270; Faragher, 118 S. Ct. at 2293.
2. Authority to Undertake or Recommend Tangible Employment Actions

An individual qualifies as an employee's "supervisor" if he or she is authorized to undertake tangible employment decisions affecting the employee. "Tangible employment decisions" are decisions that significantly change another employee's employment status. Tangible employment actions are defined in more detail below.

An individual whose job responsibilities include the authority to recommend tangible job decisions affecting an employee qualifies as his or her supervisor even if the individual does not have the final say.

3. Authority to Direct Employee's Daily Work Activities

An individual who is authorized to direct another employee's day-to-day work activities qualifies as his or her supervisor even if that individual does not have the authority to undertake or recommend tangible job decisions. Such an individual's ability to commit harassment is enhanced by his or her authority to increase the employee's workload or assign undesirable tasks, and hence it is appropriate to consider such a person a "supervisor" when determining whether the employer is vicariously liable.

Example.

Roger was in charge of hiring new junior accountants for his accounting firm. Once hired, the junior accountants were assigned to a department where they were supervised by the department manager. Roger hired Alice, a recent college graduate, and assigned her to the auditing department. Once in the auditing department, Roger began to sexually harass Alice. Although he is not responsible for her day-to-day management, Roger will be considered a supervisor for purposes of determining the firm's liability for his actions.

4. Temporary Position

An individual who is temporarily authorized to direct another employee's daily work activities qualifies as his or her "supervisor" during that time period. Accordingly, the employer would be subject to vicarious liability if that individual commits unlawful harassment of a subordinate while serving as his or her supervisor.

On the other hand, someone who merely relays other officials' instructions regarding work assignments and reports back to those officials does not have true supervisory authority. Furthermore, someone who directs only a limited number of tasks or assignments would not qualify as a "supervisor." For example, an individual whose delegated authority is confined to coordinating a work project of limited scope is not a "supervisor."

5. Harasser Outside Supervisory Chain of Command

In some circumstances, an employer may be subject to vicarious liability for harassment by a supervisor who does not have actual authority over the employee. Such a result is appropriate if the employee reasonably believed that the harasser had such power. The employee might have such a belief because, for example, the chains of command are
unclear. Alternatively, the employee might reasonably believe that a harasser with broad delegated powers has the ability to significantly influence employment decisions affecting him or her even if the harasser is outside the employee's chain of command.

If the harasser had no actual supervisory power over the employee, and the employee did not reasonably believe that the harasser had such authority, then the standard of liability for co-worker harassment applies.

C. HARASSMENT THAT RESULTS IN TANGIBLE EMPLOYMENT ACTION

1. Standard of Liability

An employer is always liable for harassment by a supervisor on a prohibited basis that culminates in a tangible employment action. No affirmative defense is available in such cases. The Supreme Court has recognized that this result is appropriate because an employer acts through its supervisors, and a supervisor's undertaking of a tangible employment action constitutes an act of the employer.

2. Definition of "Tangible Employment Action"

A tangible employment action is any significant change in an individual's employment status. Unfulfilled threats are insufficient. Characteristics of a tangible employment action are:

- A tangible employment action is the means by which the supervisor brings the official power of the enterprise to bear on subordinates, as demonstrated by the following:
  - It requires an official act of the enterprise;
  - It usually is documented in official company records;
  - It may be subject to review by higher level supervisors; and
  - It often requires the formal approval of the enterprise and use of its internal processes.

- A tangible employment action usually inflicts direct economic harm.

- A tangible employment action, in most instances, can only be caused by a supervisor or other person acting with the authority of the company.

Examples of tangible employment actions include:

- Hiring and firing;
- Promotion and failure to promote;
- Demotion;
- Undesirable reassignment;
- A decision causing a significant change in benefits;
Compensation decisions; and

Work assignment.

Any employment action qualifies as "tangible" if it results in a significant change in employment status. For example, significantly changing an individual's duties in his or her existing job constitutes a tangible employment action regardless of whether the individual retains the same salary and benefits. Similarly, altering an individual's duties in a way that blocks his or her opportunity for promotion or salary increases also constitutes a tangible employment action.

Other forms of formal discipline would qualify as well, such as suspension. Any disciplinary action undertaken as part of a program of progressive discipline is "tangible" because it brings the employee one step closer to discharge.

On the other hand, an employment action does not reach the threshold of "tangible" if it results in only an insignificant change in the complaining party's employment status. For example, altering an individual's job title does not qualify as a tangible employment action if there is no change in salary, benefits, duties, or prestige, and the only effect is a bruised ego. However, if there is a significant change in the status of the position because the new title is less prestigious and thereby effectively constitutes a demotion, a tangible employment action would be found.

If a supervisor undertakes or recommends a tangible job action based on a subordinate's response to unwelcome sexual demands, the employer is liable and cannot raise the affirmative defense. The result is the same whether the employee rejects the demands and is subjected to an adverse tangible employment action or submits to the demands and consequently obtains a tangible job benefit. Such harassment previously would have been characterized as "quid pro quo."

If a challenged employment action is not "tangible," it may still be considered, along with other evidence, as part of a hostile environment claim that is subject to the affirmative defense.

3. Link Between Harassment and Tangible Employment Action

When harassment culminates in a tangible employment action, the employer cannot raise any affirmative defense. This sort of claim is analyzed like any other case in which a challenged employment action is alleged to be discriminatory. If the employer produces evidence of a non-discriminatory explanation for the tangible employment action, a determination must be made whether that explanation is a pretext designed to hide a discriminatory motive.

Example.

If an employee alleged that she was demoted because she refused her supervisor's sexual advances, a determination would have to be made whether the demotion was because of her response to the advances, and hence because of her sex.
A strong inference of discrimination will arise whenever a harassing supervisor undertakes or has significant input into a tangible employment action affecting the victim. However, if the employer produces evidence of a non-discriminatory reason for the action, the employee will have to prove that the asserted reason was a pretext designed to hide the true discriminatory motive.

If it is determined that the tangible action was based on a discriminatory reason linked to the preceding harassment, relief could be sought for the entire pattern of misconduct culminating in the tangible employment action, and no affirmative defense is available. However, the harassment preceding the tangible employment action must be severe or pervasive in order to be actionable. If the tangible employment action was based on a non-discriminatory motive, then the employer would have an opportunity to raise the affirmative defense to a claim based on the preceding harassment.

D. HARASSMENT BY SUPERVISOR THAT DOES NOT RESULT IN TANGIBLE EMPLOYMENT ACTION

1. Standard of Liability

When harassment by a supervisor creates an unlawful hostile environment but does not result in a tangible employment action, the employer can raise an affirmative defense to liability or damages, which it must prove by a preponderance of the evidence. The defense consists of two necessary elements:

- The employer exercised reasonable care to prevent and correct promptly any harassment; and
- The employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

2. Effect of Standard

If an employer can prove that it discharged its duty of reasonable care and that the employee could have avoided all of the harm but unreasonably failed to do so, the employer will avoid all liability for unlawful harassment. For example, if an employee was subjected to a pattern of disability-based harassment that created an unlawful hostile environment, but the employee unreasonably failed to complain to management before she suffered emotional harm and the employer exercised reasonable care to prevent and promptly correct the harassment, then the employer will avoid all liability.

If an employer cannot prove that it discharged its duty of reasonable care and that the employee unreasonably failed to avoid the harm, the employer will be liable. For example, if unlawful harassment by a supervisor occurred and the employer failed to exercise reasonable care to prevent it, the employer will be liable even if the employee unreasonably failed to complain to management or even if the employer took prompt and appropriate corrective action when it gained notice.

In most circumstances, if employers and employees discharge their respective duties of reasonable care, unlawful harassment will be prevented and there will be no reason to consider questions of liability. An effective complaint procedure encourages employees to report harassing conduct before it becomes severe or pervasive, and if an employee
promptly utilizes that procedure, the employer can usually stop the harassment before actionable harm occurs.

In some circumstances, however, unlawful harassment will occur and harm will result despite the exercise of requisite legal care by the employer and employee. For example, if an employee's supervisor directed frequent, egregious racial epithets at him that caused emotional harm virtually from the outset, and the employee promptly complained, corrective action by the employer could prevent further harm but might not correct the actionable harm that the employee already had suffered.

Alternatively, if an employee complained about harassment before it became severe or pervasive, remedial measures undertaken by the employer might fail to stop the harassment before it reaches an actionable level, even if those measures are reasonably calculated to halt it. In these circumstances, the employer will be liable because the defense requires proof that it exercised reasonable legal care and that the employee unreasonably failed to avoid the harm.

In some cases, an employer will be unable to avoid liability completely, but may be able to establish the affirmative defense as a means to limit damages. The defense only limits damages where the employee reasonably could have avoided some but not all of the harm from the harassment. In the example above, in which the supervisor used frequent, egregious racial epithets, an unreasonable delay by the employee in complaining could limit damages but not eliminate liability entirely. This is because a reasonably prompt complaint would have reduced, but not eliminated, the actionable harm.

3. First Prong of Affirmative Defense: Employer's Duty to Exercise Reasonable Care

The first prong of the affirmative defense requires a showing by the employer that it undertook reasonable care to prevent and promptly correct harassment. Such reasonable care generally requires an employer to establish, disseminate, and enforce an anti-harassment policy and complaint procedure and to take other reasonable steps to prevent and correct harassment. The steps described below are not mandatory requirements – whether or not an employer can prove that it exercised reasonable care depends on the particular factual circumstances and, in some cases, the nature of the employer's workforce. Small employers may be able to effectively prevent and correct harassment through informal means, while larger employers may have to institute more formal mechanisms.

There are no "safe harbors" for employers based on the written content of policies and procedures. Even the best policy and complaint procedure will not alone satisfy the burden of proving reasonable care if, in the particular circumstances of a claim, the employer failed to implement its process effectively. If, for example, the employer has an adequate policy and complaint procedure and properly responded to an employee's complaint of harassment, but management ignored previous complaints by other employees about the same harasser, then the employer has not exercised reasonable care in preventing the harassment.

Similarly, if the employer has an adequate policy and complaint procedure but an official failed to carry out his or her responsibility to conduct an effective investigation of a harassment complaint, the employer has not discharged its duty to exercise reasonable
care. Alternatively, lack of a formal policy and complaint procedure will not defeat the defense if the employer exercised sufficient care through other means.

a. Policy and Complaint Procedure

It generally is necessary for employers to establish, publicize, and enforce anti-harassment policies and complaint procedures. An employer should provide every employee with a copy of the policy and complaint procedure, and redistribute it periodically. The policy and complaint procedure should be written in a way that will be understood by all employees in the employer's workforce. Other measures to ensure effective dissemination of the policy and complaint procedure include posting them in central locations and incorporating them into employee handbooks. If feasible, the employer should provide training to all employees to ensure that they understand their rights and responsibilities. An anti-harassment policy and complaint procedure should contain, at a minimum, the following elements:

- A clear explanation of prohibited conduct;
- Assurance that employees who make complaints of harassment or provide information related to such complaints will be protected against retaliation;
- A clearly described complaint process that provides accessible avenues of complaint;
- Assurance that the employer will protect the confidentiality of harassment complaints to the extent possible;
- A complaint process that provides a prompt, thorough, and impartial investigation; and
- Assurance that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred.

b. Prohibition Against Harassment

An employer's policy should make clear that it will not tolerate harassment based on sex (with or without sexual conduct), race, color, religion, national origin, age, disability, and protected activity (i.e., opposition to prohibited discrimination or participation in the statutory complaint process). This prohibition should cover harassment by anyone in the workplace – supervisors, co-workers, or non-employees. Management should convey the seriousness of the prohibition. One way to do that is for the mandate to "come from the top," i.e., from upper management.

The policy should encourage employees to report harassment before it becomes severe or pervasive. While isolated incidents of harassment generally do not violate federal law, a pattern of such incidents may be unlawful. Therefore, to discharge its duty of preventive care, the employer must make clear to employees that it will stop harassment before it rises to the level of a violation of federal law.
4. Second Prong of Affirmative Defense: Employee's Duty to Exercise Reasonable Care

The second prong of the affirmative defense requires a showing by the employer that the aggrieved employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

This element of the defense arises from the general theory that a victim has a duty to use such means as are reasonable under the circumstances to avoid or minimize the damages that result from violations of the statute.

Thus an employer who exercised reasonable care as described in subsection V(C), above, is not liable for unlawful harassment if the aggrieved employee could have avoided all of the actionable harm. If some but not all of the harm could have been avoided, then an award of damages will be mitigated accordingly.

A complaint by an employee does not automatically defeat the employer's affirmative defense. If, for example, the employee provided no information to support his or her allegation, gave untruthful information, or otherwise failed to cooperate in the investigation, the complaint would not qualify as an effort to avoid harm. Furthermore, if the employee unreasonably delayed complaining, and an earlier complaint could have reduced the harm, then the affirmative defense could operate to reduce damages.

Proof that the employee unreasonably failed to use any complaint procedure provided by the employer will normally satisfy the employer's burden. However, it is important to emphasize that an employee who failed to complain does not carry a burden of proving the reasonableness of that decision. Rather, the burden lies with the employer to prove that the employee's failure to complain was unreasonable.

5. Failure to Complain

A determination as to whether an employee unreasonably failed to complain or otherwise avoid harm depends on the particular circumstances and information available to the employee at that time. An employee should not necessarily be expected to complain to management immediately after the first or second incident of relatively minor harassment. Workplaces need not become battlegrounds where every minor, unwelcome remark based on race, sex, or another protected category triggers a complaint and investigation. An employee might reasonably ignore a small number of incidents, hoping that the harassment will stop without resorting to the complaint process. The employee may directly say to the harasser that s/he wants the misconduct to stop, and then wait to see if that is effective in ending the harassment before complaining to management. If the harassment persists, however, then further delay in complaining might be found unreasonable.

There might be other reasonable explanations for an employee's delay in complaining or entire failure to utilize the employer's complaint process. For example, the employee might have had reason to believe that:

- Using the complaint mechanism entailed a risk of retaliation;
- There were obstacles to complaints; and
- The complaint mechanism was not effective.
To establish the second prong of the affirmative defense, the employer must prove that the belief or perception underlying the employee's failure to complain was unreasonable.

6. Risk of Retaliation

An employer cannot establish that an employee unreasonably failed to use its complaint procedure if that employee reasonably feared retaliation. Surveys have shown that employees who are subjected to harassment frequently do not complain to management due to fear of retaliation. To assure employees that such a fear is unwarranted, the employer must clearly communicate and enforce a policy that no employee will be retaliated against for complaining of harassment.

7. Obstacles to Complaints

An employee's failure to use the employer's complaint procedure would be reasonable if that failure was based on unnecessary obstacles to complaints. For example, if the process entailed undue expense by the employee, inaccessible points of contact for making complaints, or unnecessarily intimidating or burdensome requirements, failure to invoke it on such a basis would be reasonable.

An employee's failure to participate in a mandatory mediation or other alternative dispute resolution process also does not constitute unreasonable failure to avoid harm. While an employee can be expected to cooperate in the employer's investigation by providing relevant information, an employee can never be required to waive rights, either substantive or procedural, as an element of his or her exercise of reasonable care. Nor must an employee have to try to resolve the matter with the harasser as an element of exercising due care.

8. Perception That Complaint Process Was Ineffective

An employer cannot establish the second prong of the defense based on the employee's failure to complain if that failure was based on a reasonable belief that the process was ineffective. For example, an employee would have a reasonable basis to believe that the complaint process is ineffective if the procedure required the employee to complain initially to the harassing supervisor. Such a reasonable basis also would be found if he or she was aware of instances in which co-workers' complaints failed to stop harassment. One way to increase employees' confidence in the efficacy of the complaint process would be for the employer to release general information to employees about corrective and disciplinary measures undertaken to stop harassment.

9. Other Efforts to Avoid Harm

Generally, an employer can prove the second prong of the affirmative defense if the employee unreasonably failed to utilize its complaint process. However, such proof will not establish the defense if the employee made other efforts to avoid harm.

For example, a prompt complaint by the employee to the EEOC or a state fair employment practices agency while the harassment is ongoing could qualify as such an effort. A union grievance could also qualify as an effort to avoid harm. Similarly, a staffing firm worker who is harassed at the client's workplace might report the harassment either to the staffing firm or to the client, reasonably expecting that either
would act to correct the problem. Thus the worker’s failure to complain to one of those entities would not bar him or her from subsequently bringing a claim against it.

With these and any other efforts to avoid harm, the timing of the complaint could affect liability or damages. If the employee could have avoided some of the harm by complaining earlier, then damages would be mitigated accordingly.

**E. HARASSMENT BY “ALTER EGO” OF EMPLOYER**

1. **Standard of Liability**

An employer is liable for unlawful harassment whenever the harasser is of a sufficiently high rank to fall "within that class . . . who may be treated as the organization's proxy." In such circumstances, the official's unlawful harassment is imputed automatically to the employer. Thus the employer cannot raise the affirmative defense, even if the harassment did not result in a tangible employment action.

2. **Officials Who Qualify as "Alter Egos" or "Proxies"**

The Supreme Court has cited the following examples of officials whose harassment could be imputed automatically to the employer:

- President;
- Owner;
- Partner; or
- Corporate officer.

**F. CONCLUSION**

In conclusion, the Supreme Court's rulings create an incentive for employers to implement and enforce strong policies prohibiting harassment and effective complaint procedures. The rulings also create an incentive for employees to alert management about harassment before it becomes severe and pervasive. If employers and employees undertake these steps, unlawful harassment can often be prevented, thereby effectuating an important goal of the anti-discrimination statutes.

**VI. LIABILITY FOR HARASSMENT OF CO-WORKERS**

The prior section explained the rationale for holding an employer for the illegal actions of persons they place in a management position. However, an employer can also become liable for the sexual harassment perpetrated by a mere co-worker of the victim if they fail to act correctly.

**A. LIABILITY IN GENERAL**

As a general rule, employers assume liability for the actions of their employees when employees act within the “scope” of their employment. For example, if a delivery driver is asked to deliver some goods to his employer’s customer, and while en route causes an
accident, the driver’s employer is liable for any damages suffered by third parties as a result of the accident. The theory is commonly referred to as “respondeat superior” or more generally as “vicarious liability.”

**B. FEDERAL STANDARD FOR LIABILITY**

In the context of sexual harassment law, employers are not automatically liable for sexual harassment perpetrated by one employee on a fellow employee. Co-workers are not in the same position as a supervisor-employee, as discussed above.

Federal regulations, which have been upheld by the courts, hold employers liable for the sexual harassment in the workplace perpetrated by one co-worker against another “where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.”

An employer may also be responsible for the acts of non-employees, according to the regulations, “where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action.”

In reviewing these cases, courts and the EEOC will consider both the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

As with management employees, this means that the best way for an employer to avoid being liable for sexual harassment is to prevent it from occurring by, among other means:

- Addressing the subject with employees, including managers;
- Expressing strong disapproval;
- Developing appropriate sanctions;
- Informing employees of their right to raise and how to raise the issue of harassment under title VII; and
- Developing methods to sensitize all concerned.

**C. LIABILITY FOR HARASSMENT OF CLIENTS**

An employer can also be liable for the sexual harassment perpetrated by third parties, including clients, if similar to co-worker liability, they become aware of the conduct and fail to take prompt, corrective action.

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8 29 Code of Federal Regulations 1604.11.
Example.

Sally was an auditor for the accounting firm of Thomas & Wilson. Her manager, Roger, assigned Sally to conduct an audit of one of its most important new clients, ABC, Inc. Sally arrived at ABC’s offices the first day of her assignment and was greeted by the company’s vice president of finance, John. John gave Sally a place to work and said he would pick her up for lunch at noon. While at lunch, John told Sally how happy he was that the firm sent him “such a hot accountant” and that he was glad the audit would take a long time to complete. The next day, John had roses delivered to Sally’s desk at ABC. Sally told John she felt embarrassed by the flowers and that she preferred to keep the relationship professional.

The relationship remained cordial until the next week when John insisted that Sally accompany him to a social event. Sally refused. The next day, John asked Sally to lunch. When Sally refused, John told her that such rebuffs were not good for her career. Later that afternoon, Sally received an e-mail from John which contained pornographic material.

Early the next morning, Sally met with the senior partner at her firm and reported John’s conduct. She also asked to be removed from the audit team and reassigned. Concerned about angering such an important client, the partner told Sally to “just stick it out and be as nice to John as possible.”

The firm’s refusal to take appropriate action once it was made aware of the client’s conduct could subject it to liability for sexual harassment.

VII. A Note on Sexual Favoritism

Sexual favoritism is, in a way, the opposite of sexual harassment. It occurs when someone who has submitted to sexual advances or requests is given a job or benefit over someone who has not.

Subsection (g) of EEOC's Guidelines provides:

Where employment opportunities or benefits are granted because of an individual’s submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but were denied that employment opportunity or benefit.

In some circumstances, sexual favoritism in the workplace which adversely affects the employment opportunities of third parties may take the form of implicit "quid pro quo" harassment and/or "hostile work environment" harassment.

A. ISOLATED INSTANCES OF FAVORITISM NOT PROHIBITED

Not all types of sexual favoritism violate Title VII. It is the EEOC’s position that Title VII does not prohibit isolated instances of preferential treatment based upon consensual
romantic relationships. An isolated instance of favoritism toward a "paramour" (or a spouse, or a friend) may be unfair, but it does not discriminate against women or men in violation of Title VII, since both are disadvantaged for reasons other than their genders. A female charging party who is denied an employment benefit because of such sexual favoritism would not have been treated more favorably had she been a man nor, conversely, was she treated less favorably because she was a woman.

B. FAVORITISM BASED UPON COERCED SEXUAL CONDUCT

If a female employee is coerced into submitting to unwelcome sexual advances in return for a job benefit, other female employees who were qualified for but were denied the benefit may be able to establish that sex was generally made a condition for receiving the benefit. Thus, in order for a woman to have obtained the job benefit at issue, it would have been necessary to grant sexual favors, a condition that would not have been imposed on men. This is substantially the same as a traditional sexual harassment charge alleging that sexual favors were implicitly demanded as a "quid pro quo" in return for job benefits.

Example.

Carol was engaged in a consensual affair with her supervisor and was granted a promotion as a result of her submission to the relationship. Evidence showed that the supervisor made telephone calls to proposition several female employees at home, phoned employees at work to describe his supposed sexual encounters with female employees under his supervision, and engaged in suggestive behavior at work.

Many times, a third party female will not be able to establish that sex was generally made a condition for the benefit in question. For example, a supervisor may have been interested in only one woman and, thus, have coerced only her. Nevertheless, in such a case, both women and men who were qualified for but were denied the benefit would have standing to challenge the favoritism on the basis that they were injured as a result of the discrimination leveled against the woman who was coerced.

C. WIDESPREAD FAVORITISM

If favoritism based upon the granting of sexual favors is widespread in a workplace, both male and female colleagues who do not welcome this conduct can establish a hostile work environment in violation of Title VII regardless of whether any objectionable conduct is directed at them and regardless of whether those who were granted favorable treatment willingly bestowed the sexual favors. In these circumstances, a message is implicitly conveyed that the managers view women as "sexual playthings," thereby creating an atmosphere that is demeaning to women. Both men and women who find this offensive can establish a violation if the conduct is sufficiently severe or pervasive to alter the conditions of their employment and create an abusive working environment.

An analogy can be made to a situation in which supervisors in an office regularly make racial, ethnic or sexual jokes. Even if the targets of the humor "play along" and in no way display that they object, co-workers of any race, national origin or sex can claim that this conduct, which communicates a bias against protected class members, creates a hostile work environment for them.
Caution!

Managers who engage in widespread sexual favoritism may also communicate a message that the way for women to get ahead in the workplace is by engaging in sexual conduct or that sexual solicitations are a prerequisite to their fair treatment. This can form the basis of an implicit "quid pro quo" harassment claim for female employees, as well as a hostile environment claim for both women and men who find this offensive.

Example.

Jill, an accountant with a large firm, alleged that two of her supervisors had engaged in sexual relationships with two secretaries who received promotions, cash awards, and other job benefits. Another of her supervisors allegedly promoted the career of an accountant with whom he socialized extensively and to whom he was noticeably attracted. In addition, there were isolated instances of sexual harassment directed at Jill, including an incident in which her supervisor became drunk at an office party, untied her sweater, and kissed her.

A court in this case would likely find that the conduct of these supervisors created an atmosphere of hostile work environment offensive to the plaintiff and several other witnesses. Likewise, the supervisors' conduct in bestowing preferential treatment upon those who submitted to their sexual advances undermined the plaintiff's motivation and work performance and deprived her and other female employees of promotions and job opportunities. It could also therefore constitute quid pro quo harassment.

VIII. Sample Sexual Harassment Policies and Procedures

As you should appreciate by this point in the chapter, it is imperative for employers to have in place a clear and effective anti-harassment policy, to communicate that policy to all employees, including managers, and to have periodic review and/or training of that policy.

The following example was prepared by the state of South Dakota. While this might not be appropriate for your company or organization, it is illustrative of the areas that should be covered in an anti-harassment policy.

South Dakota Division of Human Rights
Sample Sexual Harassment Policy

It is the policy of (business/organization name) that all employees are responsible for ensuring that the workplace is free from sexual harassment. Because of (business/organization name) strong disapproval of offensive or inappropriate sexual behavior at work, all employees must avoid any action or conduct which could be viewed as sexual harassment.
Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual harassment nature, when: (1) submission to the harassment is made either explicitly or implicitly a term or condition of employment; (2) submission to or rejection of the harassment is used as the basis for employment decisions affecting the individual; or (3) the harassment has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.

Any employee who has a complaint of sexual harassment at work by anyone, including supervisors, co-workers or visitors, should first clearly inform the harasser that his/her behavior is offensive or unwelcome and request that the behavior stop. If the behavior continues, the employee must immediately bring the matter to the attention of his/her supervisor. If the immediate supervisor is involved in the harassing activity, the violation should be reported to that supervisor’s immediate supervisor, the department personnel officer, or the employee relations coordinator, who can be reached at (phone number).

If a supervisor or personnel officer knows of an incident of sexual harassment, they shall take appropriate remedial action immediately. If the alleged harassment involves any type of threats of physical harm to the victim, the alleged harasser may be suspended with pay. During such suspension, an investigation will be conducted by (business/organization name). If the investigation supports charges of sexual harassment, disciplinary action against the alleged harasser will take place and may include termination. If the investigation reveals that the charges were brought falsely and with malicious intent, the charging party may be subject to disciplinary action, including termination.

The following sample harassment policy was prepared by the State of Wisconsin. This sample is a composite of various harassment policies. It is intended as a guide for Wisconsin employers in developing their own policy. Its components are valuable for employers in every state.

Sample Harassment Policy

This defines the harassment policy of __________________(employer).

The most productive and satisfying work environment is one in which work is accomplished in a spirit of mutual trust and respect. Harassment is a form of discrimination that is offensive, impairs morale, undermines the integrity of employment relationships and causes serious harm to the productivity, efficiency and stability of our organization.

All employees have a right to work in an environment free from discrimination and harassing conduct, including sexual harassment. Harassment on the basis of an employee’s race, color, creed, ancestry, national origin, age (40 and over), disability, sex, arrest or conviction record, marital status, sexual orientation, membership in the military reserve or use or nonuse of lawful products away from work is expressly prohibited under this policy. Harassment on any of these bases is also illegal under Section 111.31-111.39, Wisconsin Statutes.

This policy will be issued to all current employees and during orientation of new employees.
Definitions

In general, harassment means persistent and unwelcome conduct or actions on any of the bases underlined above. Sexual harassment is one type of harassment and includes unwelcome sexual advances, unwelcome physical contact of a sexual nature or unwelcome verbal or physical conduct of a sexual nature.

Unwelcome verbal or physical conduct of a sexual nature includes, but is not limited to:

- The repeated making of unsolicited, inappropriate gestures or comments; and
- The display of offensive sexually graphic materials not necessary for our work.

Harassment on any basis (race, sex, age, disability, etc.) exists whenever:

- Submission to harassing conduct is made, either explicitly or implicitly, a term or condition of an individual's employment.
- Submission to or rejection of such conduct is used as the basis for an employment decision affecting an individual.
- The conduct interferes with an employee's work or creates an intimidating, hostile or offensive work environment.

Recognizing Harassment

Harassment may be subtle, manipulative and is not always evident. It does not refer to occasional compliments of a socially acceptable nature. It refers to behavior that is not welcome and is personally offensive. All forms of gender harassment are covered. Men can be sexually harassed; men can harass men. Women can harass other women. Offenders can be managers, supervisors, co-workers, and non-employees such as clients or vendors.

Some examples:

Verbal: Jokes, insults and innuendoes (based on race, sex, age, disability, etc.), degrading sexual remarks, referring to someone as a stud, hunk or babe; whistling; cat calls; comments on a person's body or sex life; or pressures for sexual favors.

Non-Verbal: Gestures, staring, touching, hugging, patting, blocking a person's movement, standing too close, brushing against a person's body, or display of sexually suggestive or degrading pictures, racist or other derogatory cartoons or drawings.

Grievance Procedure

Any employee who believes he or she is being harassed, or any employee, who becomes aware of harassment, should promptly notify his or her supervisor. If the employee believes that the supervisor is the harasser, the supervisor's supervisor should be notified. If an employee is uncomfortable discussing harassment with
his or her supervisor, the employee should contact ________________ of the personnel department. Information on your right to file a state or federal harassment complaint is also available from ________________.

Upon notification of a harassment complaint, a confidential and impartial investigation will be promptly commenced and will include direct interviews with involved parties and where necessary with employees who may be witnesses or have knowledge of matters relating to the complaint. The parties of the complaint will be notified of the findings and their options.

**Non-retaliation**

This policy also expressly prohibits retaliation of any kind against any employee bringing a complaint or assisting in the investigation of a complaint. Such employees may not be adversely affected in any manner related to their employment. Such retaliation is also illegal under s.111.322 (2m), Wis. Stats.

**Disciplinary Action**

The company views harassment and retaliation to be among the most serious breaches of workplace behavior. Consequently, appropriate disciplinary or corrective action, ranging from a warning to termination, can be expected.

The Department of Workforce Development is an equal opportunity employer and service provider. If you have a disability and/or have civil rights questions and need this information in an alternate format or need it translated to another language, please contact us.

**IX. A Note on State Law**

As we have discussed several times in this course, some states have laws that impose stricter requirements on employers than those mandated by federal law. Not surprisingly, California is one of those states. California law mandates that employers provide information about sexual harassment to their employees through one of two means:

- Employers can provide employees with a fact sheet on sexual harassment prepared by the state or;

- Employers can provide employees with its own fact sheet that contains, at a minimum, the following information:
  - The illegality of sexual harassment;
  - The definition of sexual harassment under applicable state and federal law;
  - A description of sexual harassment, utilizing examples;
  - The internal complaint process of the employer available to the employee;
  - The legal remedies and complaint process available through the state Department of Fair Employment and Housing; and
  - The protection against retaliation provided under California law.
Effective January 1, 2006, California employers with 50 or more employees were mandated to provide at least two hours of classroom or other effective interactive training and education regarding sexual harassment for all supervisory employees who were employed as of July 1, 2005, and to all new supervisory employees within 6 months of their assumption of a supervisory position. The training must include:

- Information and practical guidance regarding the federal and state statutory provisions concerning the prohibition against sexual harassment;
- Prevention of sexual harassment; and
- Remedies available to the victims of sexual harassment.

The training must also include practical examples aimed at instructing supervisors in the prevention of harassment, discrimination and retaliation. The instruction must be provided by persons with knowledge and expertise in the field.

Employers in other states should be sure to comply with any applicable state laws.

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9 California Labor Code § 12950.1.
CHAPTER 8 – REVIEW QUESTIONS

The following questions are designed to ensure that you have a complete understanding of the information presented in the assignment. They do not need to be submitted in order to receive CPE credit. They are included as an additional tool to enhance your learning experience.

We recommend that you answer each review question and then compare your response to the suggested solution before answering the final exam questions related to this assignment.

1. Which of the following factors are central to establishing a case of sexual harassment:
   a) that the alleged victim was a woman
   b) that the alleged victim and the harasser were of the opposite sex
   c) that the conduct in question was unwelcome
   d) both a and c above

2. Which of the following is the best way to limit sexual harassment in the workplace:
   a) avoid hiring men
   b) promote only women to supervisory positions
   c) training all employees
   d) training managers

3. Title VII does not prohibit all conduct of a sexual nature in the workplace.
   a) true
   b) false

4. What type of harm does a victim of sexual harassment need to prove before they can recover monetary damages from the perpetrator:
   a) only that they sought psychological counseling or intervention
   b) no tangible psychological damage of any type is required to recover
   c) that they suffered severe psychological harm
   d) that they sought any type of medical intervention

5. A victim of sexual harassment must be able to show that they were actually offended by the conduct in order to recover damages.
   a) true
   b) false
6. When should employers begin to investigate a complaint of sexual harassment:

   a) only after giving the complaining person time to work it out themselves with the alleged harasser
   b) only after reporting the complaint to law enforcement authorities
   c) immediately
   d) after the parties have had time to cool off and reflect on what occurred, to make sure the person complaining really wants to press forward with his or her accusations

7. Witness credibility is extremely important when investigating complaints of sexual harassment.

   a) true
   b) false

8. What is the standard used to determine if conduct was sufficient to constitute sexual harassment:

   a) if the victim felt harassed and a reasonable person in the victim's shoes would also have felt harassed
   b) if the victim himself or herself felt severely harassed
   c) if there was any conduct of a sexual nature occurring in the workplace
   d) if the conduct occurred regularly

9. Employers should regularly remind employees of their policy prohibiting sexual harassment.

   a) true
   b) false

10. The only remedy an employer has when an employee has been committing sexual harassment is the discharge of that employee.

    a) true
    b) false

11. Employers should never keep internal records of sexual harassment.

    a) true
    b) false

12. Why should an employer be legally responsible if one employee sexually harasses another in the workplace:

    a) because they should be responsible for solving all of their employee's problems, including those that originate in the workplace
    b) because they should be responsible for what their supervisors do
    c) because it encourages them to prevent and stop illegal actions
    d) both b and c above
13. An example of a tangible employment action is demotion.

   a) true
   b) false

14. Employers should provide only managers and supervisors with a copy of their sexual harassment policy and complaint procedures.

   a) true
   b) false

15. When can an employer ever be liable for the acts of a customer or client perpetrated against an employee:

   a) the employer can be liable for acts perpetrated by a customer only if the employer asked that the conduct in question be performed
   b) the employer can be liable only if the employer knew about and assented to the conduct
   c) an employer is never liable for the acts of a customer or client
   d) in certain cases the employer can be liable for the acts of a client or customer

16. Which of the following statements about sexual favoritism is correct:

   a) any type of sexual favoritism violates Title VII
   b) no type of sexual favoritism violates Title VII
   c) sexual favoritism can in some, but not all, cases violate Title VII
   d) sexual favoritism violates Title VII only if the favoritism is shown by a man towards a woman
CHAPTER 8 – SOLUTIONS AND SUGGESTED RESPONSES

1. A: Incorrect. A victim of sexual harassment can be male or female.

   B: Incorrect. Same sex harassment is actionable. The key is whether the conduct was of a sexual nature and was unwelcome by the victim.

   C: Correct. This is the hallmark of any sexual harassment case; it is not dependent on the gender of the harasser or the victim.

   D: Incorrect. Because A is not true, D cannot be correct.

   (See page 8-1 of the course material.)

2. A: Incorrect. Both men and women can be guilty of sexual harassment. This is a silly and impossible solution.

   B: Incorrect. Again, both men and women are guilty of harassment and harassment can be committed by both co-workers and supervisors. This would also be illegal sex discrimination.

   C: Correct. Training all employees, rank and file and managers, in the facts of sexual harassment in order to prevent it is the best course of action.

   D: Incorrect. All employees, not just supervisors, need to be trained in sexual harassment in order to best prevent it from occurring in the workplace.

   (See page 8-2 of the course material.)

3. A: True is correct. Only unwelcome sexual conduct that is a term or condition of employment constitutes a violation of Title VII.

   B: False is incorrect. Only that conduct which rises to the level of constituting harassment is prohibited by Title VII.

   (See page 8-2 of the course material.)
4. **A: Incorrect.** Even if a victim had not sought psychological assistance, they can still recover in the case of a hostile work environment. That is in essence the damage for which they are seeking recovery.

**B: Correct.** The U.S. Supreme Court has ruled that a victim is not required to prove specific damage beyond the creation of the hostile environment in order to receive damages.

**C: Incorrect.** No specific harm is required, as the Supreme Court has ruled.

**D: Incorrect.** No specific medical intervention is required to seek recovery, whether psychological or medical in general.

(See pages 8-3 to 8-4 of the course material.)

5. **A: True is correct.** A hostile work environment does not exist unless the victim is in fact bothered by the offending conduct.

**B: False is incorrect.** A victim of sexual harassment must also be able to show that they were in fact offended by the conduct in question. Even if a reasonable person would have been offended, the victim herself or himself must have actually been offended to be successful in a cause of action.

(See page 8-5 of course material.)

6. **A: Incorrect.** While in some cases employer intervention is not required, a prompt investigation should always occur following a complaint to limit the employer’s potential liability and make sure the conduct has ended.

**B: Incorrect.** Law enforcement generally has no role in a civil investigation.

**C: Correct.** Employers are strongly encouraged to investigate immediately reports of illegal harassment.

**D: Incorrect.** Once again, the investigation should occur immediately so the employer has all the facts in hand and can ensure that the actions do not continue.

(See page 8-6 of the course material.)

7. **A: True is correct.** If there are conflicting versions of relevant events, the employer will have to weigh each party’s credibility. Credibility assessments can be critical in determining whether the alleged harassment in fact occurred.

**B: False is incorrect.** Factors to consider include the demeanor of the witnesses and whether a witness had a motive to lie.

(See page 8-8 of the course material.)
8. A: **Correct.** There is both an objective and a subjective component to making a successful claim of sexual harassment. The victim must have actually felt harassed and a reasonable person in his or her shoes also would have felt actually harassed.

   B: Incorrect. This is the subjective requirement, but an objective requirement must also be met in order to recover. Otherwise, an extremely sensitive person could claim sexual harassment in situations that should not be illegal.

   C: Incorrect. Title VII does not preclude all types of sexual conduct in the workplace. It does not mandate a totally sterile workplace.

   D: Incorrect. While frequency of conduct is important in determining whether conduct is illegal, it is only a portion of the objective determination of hostility.

   (See page 8-12 of the course material.)

9. A: **True is correct.** An effective preventive program should include an explicit policy against sexual harassment that is clearly and regularly communicated to employees and effectively implemented. Managers should affirmatively raise the subject with all supervisory and non-supervisory employees, express strong disapproval, and explain the sanctions for harassment.

   B: False is incorrect. This is an important component of a program to prevent harassment in the workplace.

   (See page 8-13 of the course material.)

10. A: True is incorrect. While discharge might be required in a particular circumstance, there are a variety of options open to employers.

    B: **False is correct.** Other potentially appropriate measures include demotion, transfer or reassignment, written or oral warnings, or suspension. The punishment should be proportionate to the offending conduct and should be aimed at preventing the reoccurrence.

    (See page 8-14 of the course material.)

11. A: True is incorrect. Records can be important in protecting the employer from liability.

    B: **False is correct.** It is advisable for an employer to keep records of all complaints of harassment. Without such records, the employer could be unaware of a pattern of harassment by the same individual. Such a pattern would be relevant to credibility assessments and disciplinary measures.

    (See page 8-15 of the course material.)
12. A: Incorrect. Employers are generally not liable for all of their employees’ problems, not even for all workplace problems.

B: Incorrect. When an employer places an individual in a position of authority over others, they should assume a degree of responsibility for that person’s actions. However, this is not the best answer.

C: Incorrect. Employers are better positioned than others to prevent and stop illegal activities in their workplace. However, this is not the best answer.

D: Correct. Both of these are reasons employers are held liable for illegal sexual harassment in many, but not all, circumstances.

(See pages 8-16 to 8-17 of the course material.)

13. A: True is correct. This is a classic example of a tangible employment action, namely one that imposes a significant change in an individual’s employment status.

B: False is incorrect. Other examples include firing, failure to promote, or undesirable reassignment.

(See pages 8-19 to 8-20 of the course material.)

14. A: True is incorrect. It is important that employers provide such documents to all employees.

B: False is correct. An employer should provide every employee with a copy of the policy and complaint procedure, and redistribute it periodically. The policy and complaint procedure should be written in a way that will be understood by all employees in the employer’s workforce.

(See page 8-23 of the course material.)

15. A: Incorrect. Knowledge of illegal conduct and failure to stop it can also lead to employer liability for the acts of clients or customers.

B: Incorrect. While knowledge is key to holding an employer liable for the acts of third parties, assent to the conduct is not required.

C: Incorrect. Employers can become liable for the acts of third parties they are aware of and fail to correct.

D: Correct. An employer can also be liable for the sexual harassment perpetrated by third parties, including clients, if they become aware of the conduct and fail to take prompt, corrective action. Actual assent to or approval of such conduct is not required.

(See page 8-27 of the course material.)
16. A: Incorrect. Sexual favoritism does not expressly violate Title VII, although in certain cases it can be illegal.

   B: Incorrect. In some circumstances, sexual favoritism that adversely affects the employment of one or more people of a certain sex can constitute a violation of Title VII.

   C: **Correct.** When the case is extreme and employees of one sex are adversely affected based on sexual favoritism, it does violate Title VII.

   D: Incorrect. There is no such sex-based distinction in the law.

   (See page 8-30 of the course material.)
Chapter 9: Compensation Discrimination

I. Introduction and Overview

Despite longstanding prohibitions against compensation discrimination under the federal EEO laws, pay disparities persist between workers in various demographic groups. For example, in 1999, women who worked full-time had median weekly earnings that were 75.7% of the median for men. Median earnings for African Americans working at full-time jobs were 75.9% of the median for whites. The median earnings of Hispanics were 65.9% of the median for whites and 86.8% of the median for African Americans. There also is evidence that median earnings for individuals with disabilities are significantly lower than median earnings for individuals without disabilities.

While some compensation disparities certainly are attributable to differences in occupations, skills, and experience, as well as differences in other legitimate factors, not all disparities can be explained by such factors. In 1998, the President's Council of Economic Advisers issued a report on the gender wage gap in which it stated that one rough but plausible measure of the extent of pay discrimination is the unexplained difference in pay. The Council determined that after accounting for measurable factors, there still is an unexplained 12% gap between the pay of men and women. In a 2000 report, the Council also estimated an unexplained 12% pay gap between men and women in the field of information technology. In terms of race, a private study has estimated that only about half of the wage gap between African-American and white women is explainable by differences in occupation, education, and other legitimate factors.

When it is due to innocuous factors, such as differences in skill or experience, there is nothing illegal about paying one person less than another for performing the same or similar jobs. However, in some cases, differences in compensation are deemed to violate Title VII of the Civil Rights Act (Title VII), the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), or the Equal Pay Act (EPA). It is critical for managers to understand the circumstances under which disparate pay scales or rates are potentially illegal.

Title VII, the ADEA, and the ADA prohibit compensation discrimination based on race, color, sex, religion, national origin, age, disability, or protected activity. A claim of compensation discrimination can be brought under one of these statutes even if no person outside the protected class holds a "substantially equal," higher paying job. Furthermore, Title VII, the ADEA, and the ADA prohibit discriminatory practices that indirectly affect compensation – such as limiting groups protected by these statutes to lower paying jobs. These practices are not covered by the EPA.

The EPA is more targeted. The EPA requires employers to pay male and female employees at the same establishment equal wages "for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." ¹ The jobs that are compared need be only substantially equal, not identical. Unequal compensation can be justified only if the

employer shows that the pay differential is attributable to a bona fide seniority, merit, or incentive system, or any other factor other than sex.

A claim of unequal compensation based on sex can be brought under either the EPA or Title VII. While there is considerable overlap in the coverage of the two statutes, they are not identical. Title VII broadly prohibits discriminatory compensation practices, while the EPA only prohibits sex-based differentials in compensation for substantially equal jobs in the same establishment. Therefore, not all compensation practices that violate Title VII also violate the EPA. On the other hand, in most cases a practice that violates the EPA also will violate Title VII.

All of the anti-discrimination statutes prohibit retaliation for opposing violations of the statutes or participating in the statutory complaint process. The anti-retaliation provisions protect persons who take steps to oppose compensation discrimination, or who participate in complaint proceedings addressing allegations of compensation discrimination.

II. Compensation Discrimination in Violation of Title VII, ADEA or ADA

A. APPLICATION OF STATUTES TO COMPENSATION

Title VII, the ADEA, and the ADA prohibit discrimination in "compensation" based on race, color, religion, sex, national origin, age, disability, or protected activity. The term "compensation" includes any payments made to, or on behalf of, an employee as remuneration for employment. Compensation discrimination in violation of Title VII, the ADEA, or the ADA can exist in a number of forms:

- An employer pays employees inside a protected class less than similarly situated employees outside the protected class, and the employer's explanation (if any) does not satisfactorily account for the differential;
- An employer maintains a neutral compensation policy or practice that has an adverse impact on employees in a protected class and cannot be justified as job-related and consistent with business necessity;
- An employer sets the pay for jobs predominantly held by protected class members below that suggested by the employer's job evaluation study, while the pay for jobs predominantly held by employees outside the protected class is consistent with the level suggested by the job evaluation study;
- A discriminatory compensation system has been discontinued, but salary disparities caused by the system have not been eradicated; or

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2 "Compensation" has the same meaning as "wages" under the EPA. The terms include (but are not limited to) payments whether paid periodically or at a later date, and whether called wages, salary, overtime pay; bonuses; vacation and holiday pay; cleaning or gasoline allowances; hotel accommodations; use of company car; medical, hospital, accident, life insurance; retirement benefits; stock options, profit sharing, or bonus plans; reimbursement for travel expenses, expense account, benefits, or some other name. Specific issues related to discrimination in life and health insurance benefits, long-term and short-term disability benefits, severance benefits, pension or other retirement benefits, and early retirement incentives are covered in the Manual Section on Employee Benefits (available at www.eeoc.gov).
The compensation of one or more employees in a protected class is artificially depressed because of a discriminatory employer practice that affects compensation, such as steering employees in a protected class to lower paid jobs than persons outside the class, or discriminating in promotions, performance appraisals, procedures for assigning work, or training opportunities.

B. DISCRIMINATORY PRACTICES AFFECTING COMPENSATION

Compensation disparities also can arise because of discriminatory practices that affect compensation indirectly. For example, the so-called "glass ceiling" phenomenon – i.e., artificial barriers to the advancement of individuals within protected classes – can depress the compensation of members of protected classes. These types of unlawful practices can include, for example, discriminatory promotion decisions, performance appraisals, procedures for assigning work, or training opportunities, or a company practice of steering protected class members into low paying jobs or limiting their opportunity to transfer to better jobs. These practices violate Title VII, the ADEA, and the ADA in their own right, in addition to affecting employee compensation.

Example 1.

Lisa, a Hispanic administrative assistant, filed a charge alleging that she receives less pay than the office manager even though in her opinion they perform similar work. The investigator concludes that Lisa is not similarly situated to the office manager due to the difference in responsibility associated with the jobs. Nevertheless, the investigation reveals that all but one of the employer's Hispanic employees hold lower paying clerical, secretarial, and low-level administrative positions. Many of these employees testified to the lack of promotional opportunities into higher paying jobs.

The employer asserted that it does not employ Hispanics in higher paying jobs because of a lack of qualified applicants. The investigator determines that qualified Hispanic employees have applied for these jobs but nearly all, like Lisa, have not been promoted. "Cause" is therefore found with respect to steering Hispanics into the lower-paying positions and denying them promotions.

Example 2.

Candice has worked six months in her employer's human resources department as a recruiter when she files a charge alleging that she receives a lower salary than a male counterpart. The investigator analyzes the two jobs and concludes that they are not similar because Candice recruits for low level positions whereas the male recruits for upper level positions and thus has more responsibility. However, the investigation also reveals that at the same time Candice applied for a job in her employer's human resources department, she also applied for an opening in its marketing department.
Candice was qualified for both jobs, but the marketing job was her first choice. The investigator obtains an e-mail authored by the person who rejected Candice for the marketing job that states that Candice is a "better fit" for human resources because women "tend not to be assertive enough for the marketing department." The investigator also uncovers, through further investigation, evidence that other women were unlawfully steered away from jobs in line departments to less lucrative jobs in support departments such as human resources. Based on this evidence, the investigator finds "cause" to believe that the employer had a practice of unlawfully steering women into lower-paying jobs.

If you are a manager and you are trying to determine whether persons are being paid in a non-discriminatory manner, there are a number of objective factors that can be evaluated. For example, minimum objective qualifications, such as a specialized license or certification should be taken into account. Persons in jobs requiring certain minimum objective qualifications should not be grouped together with persons in jobs that do not require those qualifications, even though the jobs otherwise are similar.

Differences in job titles, departments, or other organizational units may reflect meaningful differences in job content or other factors that preclude direct pay comparisons between employees. If a compensation differential exists, a manager needs to determine if there are legitimate, non-discriminatory reasons for the differential.

III. Compensation Discrimination in Violation of the Equal Pay Act

In addition to Title VII, the ADEA, and the ADA, the Equal Pay Act (EPA) also prohibit discrimination in compensation. The EPA, however, is a different statute with its own scheme. Moreover, it is targeted only at pay discrimination between men and women performing substantially equal work in the same establishment.

A. ELEMENTS OF A CLAIM

A prima facie EPA violation is established by showing that a male and a female receive unequal compensation for substantially equal jobs within the same establishment. A complainant cannot compare herself or himself to a hypothetical male or female; rather, the complainant must show that a specific employee of the opposite sex earned higher compensation for a substantially equal job.

There is no requirement that the complainant show a pattern of sex-based compensation disparities in a job category. In other words, if a woman is paid less than male employees performing the same work, the lack of other women with low salaries in the job category does not preclude finding an EPA violation as to the complainant. However, the employer's treatment of other women is relevant to the complainant's case -- if other women are paid the same as or more than males, this may indicate that a factor other than sex explains the complainant's compensation.
The comparators need not have held their jobs at the same time. For example, a prima facie violation of the EPA can be established if a male employee is replaced with a lower paid female, or a female employee is replaced with a higher paid male. On the other hand, if there have never been any men performing substantially the same work as women in a work establishment, or vice versa, it is not possible to establish an EPA violation.

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**EPA in a Nutshell**

- **Prima Facie Case:** (1) the complainant receives a lower wage than paid to an employee of the opposite sex in the same establishment; and (2) the employees perform substantially equal work (in terms of skill, effort, and responsibility) under similar working conditions.

- **Affirmative Defense:** If the respondent cannot defeat the showing of unequal pay for substantially equal work, it must prove that the compensation difference is based on a seniority, merit, or incentive system, or on any other factor other than sex.

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The models of proof under Title VII, the ADEA, and the ADA do not apply to the EPA. The complainant need only demonstrate a sex-based wage disparity in substantially equal jobs in the same establishment. If the employer cannot rebut that showing, it must prove that the wage disparity is based on one of the four affirmative defenses.

**B. DEFINITION OF “WAGES” AND “WAGE RATE”**

1. **Wages**

"Wages" include "all payments made to [or on behalf of] an employee as remuneration for employment."³ The term encompasses all forms of compensation, including fringe benefits. Wages include payments whether paid periodically or at a later date, and include (but are not limited to):

- Wages;
- Salary;
- Overtime pay;
- Bonuses;
- Vacation or holiday pay;

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³ 29 C.F.R. 1620.10.
Cleaning or gasoline allowances;

Hotel accommodations;

Use of company car;

Medical, hospital, accident, life insurance;

Retirement benefits;

Stock options, profit sharing, or bonus plans; and

Reimbursement for travel expenses, expense account, and benefits.

Thus, for example, if male and female employees performing substantially equal work receive equal salaries but unequal fringe benefits, an EPA violation can be established.

2. Wage Rate

"Wage rate" is the measure by which an employee's compensation is determined. It encompasses rates of pay calculated on a time, commission, piece, job incentive, profit sharing, bonus, or other basis. An employer that pays different wages to a male than to a female performing substantially equal work does not violate the EPA if the wage rate is the same. For example, if a male and a female employee performing substantially equal sales jobs are paid on the basis of the same commission rate, then a difference in the total commissions earned by the two workers would not violate the Act. Conversely, if the commission rates are different, then a prima facie violation could be established even if the total compensation earned by both workers is the same.

Equal wages must be paid in the same form. For example, a male and female who are paid on an hourly basis for substantially equal work must receive the same hourly wage. The employer cannot pay a higher hourly wage to one of those employees and then attempt to equalize the difference by periodically paying a bonus to the employee of the opposite sex.

Example

A male tennis instructor and a female tennis instructor at a particular health club provide tennis lessons that are substantially equal. The male instructor is paid a weekly salary, but the female instructor is paid by the lesson. Even if the two instructors receive essentially the same pay per week, there is a violation because the male and female are not paid in the same form for substantially equal work.

C. DEFINITION OF “ESTABLISHMENT”

The prohibition against compensation discrimination under the EPA applies to jobs "within any establishment." An "establishment" is "a distinct physical place of business rather than . . . an entire business or 'enterprise' which may include several separate
places of business. For example, separate facilities of a chain store generally cannot be compared to each other.

In certain circumstances, however, physically separate places of business should be treated as one establishment. This would be the case if a central administrative unit hires the employees, sets the compensation, and assigns work locations.

**Example**

Caroline, a female, works for a computer services firm that has offices in numerous cities. She alleges that she is paid less than a male who performs the same job in a different branch office. The employer claims that the separate offices are separate establishments and that, therefore, the compensation rates in each office cannot be compared. The evidence shows that while the headquarters of the company exercises some control over the branches, the specific salaries offered to job applicants are determined by supervisors in each local office. The local offices therefore constitute separate establishments, and Caroline’s salary cannot be compared to the salary of an employee in a different office.

In narrow circumstances two or more portions of a business enterprise that are located in a single place of business may constitute separate establishments. This would be the case if, for example, portions of the enterprise are physically segregated, engage in functionally separate operations, and have separate administrative structures, employees, and record keeping.

**D. PRIMA FACIE CASE: APPROPRIATE COMPARISON**

1. **Comparison of Work**

The important comparison in determining whether the "equal work" requirement is met is the comparison of the jobs, not the people performing the jobs. Thus, a difference between the comparators has no bearing on whether the jobs are equal. The critical question at this point in the analysis is whether the jobs involve equal work. However, a difference between the comparators could qualify as a defense to a compensation disparity.

The EPA speaks in terms of "equal work," but the word "equal" in the EPA does not require that the jobs that are compared be identical, only that they be substantially equal. Thus, minor differences in the job duties, or the skill, effort, or responsibility required for the jobs will not render the work unequal. In comparing two jobs for purposes of the EPA, consideration should be given to the actual duties that the employees are required to perform. Job content, not job titles or classifications, determines the equality of jobs. The fact that jobs are in different departments is not determinative, although in some cases it may be indicative of a difference in job content.

In evaluating whether two jobs are substantially equal, an inquiry should first be made as to whether the jobs have the same "common core" of tasks, i.e., whether a significant portion of the tasks performed is the same. If the common core of tasks is not

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4 42. 29 C.F.R. 1620.9.

5 Such a comparison might, however, be appropriate under Title VII, the ADEA, and the ADA.
substantially the same, no further examination is needed and "no cause" can be found on the EPA violation.6

If a significant portion of the tasks performed in the two jobs is the same, an inquiry should be made as to whether the comparators perform extra duties which make the work substantially different. Jobs with the same common core of tasks are equal, even though the comparators perform extra duties, if the extra duties are insubstantial.

Example

Glenda manages insurance claims for an insurance brokerage firm. She investigates claims, submits claims to insurance companies, and advises clients with respect to their claims. Glenda alleges that she is paid less than male account executives in violation of the EPA. The male comparators do brokerage work, negotiating appropriate insurance coverage between insurance carriers and the firm's clients. Glenda does not do brokerage work and the male comparators do not manage claims. The differences in job tasks render the two jobs unequal.

If the jobs to be compared share the same common core of tasks, consideration should be given to whether, in terms of overall job content, the jobs require substantially equal skill, effort, and responsibility and whether the working conditions are similar.

2. Skill

Two jobs require equal skill for purposes of the EPA if the experience, ability, education, and training required are substantially the same for each job. In comparing the skill required to perform two jobs, the characteristics of the jobs should be compared. Possession of a skill not needed to meet the requirements of the job should not be considered.

If two jobs generally share a common core of tasks, the fact that one of the jobs includes certain duties that entail a lower level of skill would not defeat a finding that the jobs are equal. For example, if two people work as bookkeepers, and one of the individuals performs clerical duties in addition to bookkeeping tasks, the skill required to perform the two jobs would be substantially equal.

On the other hand, if the jobs require different experience, ability, education, or training, then the jobs are not equal. For example, a vice president of a trade association could not show that her work was equal to the work performed by other vice presidents, where they performed key policymaking for the association, a skill that her position did not require. The proper analysis is the functional one – the analysis of the skills the jobs actually require.

Example 1

Roger, a male, works for a telephone company diagnosing problems with customer lines. He alleges that he is paid less than his female predecessor in violation of the EPA. The evidence shows that the job of Roger's predecessor required expert training in diagnostic techniques and a high degree of specialized computer skill. The respondent switched to a

6 A Title VII violation can be found even without a finding of "substantially equal work" under the EPA.
newer, more advanced computer testing system after Roger's predecessor resigned. The job now requires much less overall skill, including computer skill, than was required when Roger's predecessor held it. Therefore, the skill is not equal, and no violation is found.

Example 2

Leslie, a sales person in the women's clothing department of the respondent's store, alleges that she is paid less than a male sales person in the men's clothing department. The employer asserts that differences in skills required for the two jobs make them unequal. The investigation reveals, however, that the sale of clothing in the two departments requires the same skills: customer contact, fitting, knowledge of products, and inventory control. Therefore, the skill required for the two jobs is substantially equal.

3. Effort

Effort is the amount of physical or mental exertion needed to perform a job. Job factors that cause physical or mental fatigue or stress are to be considered in determining the effort required for a job. Differences in the kind of effort exerted do not justify a compensation differential if the amount of effort is substantially the same.

Example

Rhonda alleges that she and other female grocery store workers are paid less than males who perform substantially equal work. Most of the tasks performed by the males and females are the same. In addition to those same tasks, the male employees place heavy items on the store shelves, while the female employees arrange displays of small items. The extra task performed by the men requires greater physical effort, but the extra task performed by the women is more repetitive, making the amount of effort required to perform the jobs substantially the same.

4. Responsibility

Responsibility is the degree of accountability required in performing a job. Factors to be considered in determining the level of responsibility in a job include:

- The extent to which the employee works without supervision;
- The extent to which the employee exercises supervisory functions; and
- The impact of the employee's exercise of his or her job functions on the employer's business.

Differences in job responsibilities do not depend on job titles. Thus, designation of an employee as a "supervisor" will not, by itself, defeat a comparison under the EPA with an employee who is not designated as such. Moreover, the mere fact that an employee has assistants does not necessarily demonstrate that he or she has a more responsible position than one who does not have assistants. In addition, investigators should
consider whether employees of the lower paid sex are being discriminatorily denied the opportunity to assume the additional responsibilities borne by the employees of the higher paid sex.

If one employee in a group performing otherwise equal jobs is given a different task that requires a significant degree of responsibility, then the level of responsibility in that person's job is not equal to the others.

Example

Kelly, a female sales clerk, claims that a male sales clerk performs substantially equal work for higher compensation. The evidence shows that the male comparator, in addition to performing the tasks that Kelly performs, is solely responsible for determining whether to accept personal checks from customers. That extra duty is significant because of potential losses if bad checks are accepted. The two jobs are not substantially equal due to the difference in responsibility.

5. Working Conditions

Working conditions consist of two factors:

- Surroundings; and
- Hazards.

"Surroundings" take into account the intensity and frequency of environmental elements encountered in the job, such as heat, cold, wetness, noise, fumes, odors, dust, and ventilation. "Hazards" take into account the number and frequency of physical hazards and the severity of injury they can cause. The time of day or night in which each of the jobs is performed is not a working condition for purposes of determining whether the jobs are substantially equal within the meaning of the EPA. The fact that jobs are performed in different physical surroundings does not necessarily defeat a finding that the working conditions are similar.

Comparability of "working conditions" is measured by a more flexible standard than skill, effort, or responsibility, because the statute only requires that the working conditions be "similar," not "equal." Similarity of working conditions is seldom in dispute because employees who perform jobs requiring substantially equal skill, effort, and responsibility are likely to be performing them under similar working conditions.

Example

R is a company that occupies a large office park. Leslie, a female, delivers intra-office mail for R. Leslie files a charge alleging she is being paid less than a male who also delivers mail. The investigator discovers, however, that the male's job involves extended periods of time outside, carrying mail between buildings in the office park, often under extreme weather conditions (heat in the summer; cold and snow in the winter). Leslie, on the other hand, delivers mail only within one building. There is no evidence that the company bars women, including Leslie, from obtaining the more lucrative position when there is an opening. The
investigator determines that the jobs are not equal because of different working conditions (there may also be a difference in the effort required in the two jobs).

E. DEFENSES

If the evidence establishes a prima facie violation of the EPA, then the employer must prove that the compensation disparity is based on one of the four affirmative defenses in the statute. The burden is a heavy one, because the employer must show that sex played no part in the compensation differential. A sex-based compensation difference in substantially equal jobs is justified if it is based on:

- A seniority system;
- A merit system;
- A system which measures earnings by quantity or quality of production ("incentive system"); or
- Any other factor other than sex.

1. Seniority, Merit, or Incentive System Must Be Bona Fide

An employer may lawfully compensate employees differently on the basis of a bona fide seniority, merit, or incentive system. A seniority system rewards employees according to the length of their employment. A merit system rewards employees for exceptional job performance. An incentive system provides compensation on the basis of the quality or quantity of production. To be a bona fide system, it must not have been adopted with discriminatory intent; it must be based on predetermined criteria; it must have been communicated to employees; and it must have been applied consistently and even-handedly to employees of both sexes.

A seniority, merit, or incentive system must be bona fide to operate as an EPA defense. This means it:

- Was not adopted with discriminatory intent;
- Is an established system containing predetermined criteria for measuring seniority, merit, or productivity;
- Has been communicated to employees;
- Has been consistently and even-handedly applied to employees of both sexes; and
- Is in fact the basis for the compensation differential.

A seniority system allocates rights, benefits, and compensation according to length of employment. It should be consistently applied to all employees unless there are defined exceptions which are known and understood by the employees.

A merit system, to operate as a defense, must be a structured procedure in which employees are evaluated at regular intervals according to predetermined criteria, such as efficiency, accuracy, and ability. The merit system can be based on an objective
measurement such as a test, or a subjective rating. However, a merit system that is subjective should be strictly scrutinized to assure that it is consistently applied.

**Example**

*Cindy, a bank teller, alleges that she is paid less than a male bank teller who performs the same job. The respondent claims that the compensation disparity is justified because wages are paid under a merit system. That alleged merit system is unstructured, based on a manager's "gut feeling." Furthermore, the respondent offers no objective evidence to support Cindy's lower compensation under its merit system. In this case, the merit system is not bona fide and does not justify the compensation disparity.*

An incentive or productivity system is designed to encourage employees to work more productively and efficiently. For example, an employer might pay word processors a certain amount of money for every document produced. Similarly, a store may pay sales people by commission, based on their volume of sales. A seniority, merit, or incentive system operates as a defense only to the extent that it accounts for the compensation disparity.

**Example**

*Kathy, a high school teacher, alleges that she is paid $5,000 less than a male teacher who performs substantially equal work. The school district states that the compensation difference is due to its seniority system and that the male teacher has greater seniority. The investigation reveals that the male has worked at the school three years longer than Kathy, which would only justify a $3,000 difference in pay under the seniority system. An EPA violation is found.*

2. "Factor Other Than Sex"

The EPA permits a compensation differential based on a factor other than sex. While this defense encompasses a wide array of possible factors, the employer must establish that a gender-neutral factor, applied consistently, in fact explains the compensation disparity. An employer asserting a "factor other than sex" defense also must show that the factor is related to job requirements or otherwise is beneficial to the employer's business. Moreover, the factor must be used reasonably in light of the employer's stated business purpose as well as its other practices.

The following are examples of justifications that employers have asserted as factors other than sex, along with a discussion of the appropriate analysis.

**a. Education, Experience, Training, and Ability**

While the relative education, experience, training, and/or ability of individual jobholders are not relevant to determining whether their jobs require equal skill, these factors can, in some cases, justify a compensation disparity. Employers can offer higher compensation to applicants and employees who have greater education, experience, training, or ability where the qualification is related to job performance or otherwise benefits the employer's business.
Such a qualification would not justify higher compensation if the employer was not aware of it when it set the compensation, or if the employer does not consistently rely on such a qualification. Furthermore, the difference in education, experience, training, or ability must correspond to the compensation disparity. Thus, a very slight difference in experience would not justify a significant compensation disparity. Moreover, continued reliance on pre-hire qualifications is less reasonable the longer the lower paid employee has performed at a level substantially equal to, or greater than, his or her counterpart.

Example

Grace had been employed as an office manager. Her starting salary was $42,000. She resigned one year later. Her male successor was hired at a starting salary of $50,000. Grace filed a charge claiming that the difference in starting salaries violated the EPA. The employer proves that the salary difference was based on the successor’s extensive experience as an office manager, as compared to Grace’s lack of any job-related experience. The difference in experience qualifies as a factor other than sex justifying the compensation disparity.

b. Participation in Training Program

A compensation disparity attributable to participation in a bona fide training program is permissible. While an organization might offer numerous types of training programs, a bona fide training program that can justify a compensation disparity must be a structured one with a specific course of activity. Elements of a legitimate training program include:

- Employees in the program are aware that they are trainees;
- The training program is open to both sexes; and
- The employer identifies the position to be held at the program’s completion. If the training involves rotation through different jobs, the compensation of an employee in such a training program need not be revised each time he or she rotates through jobs of different skill levels.

Example

Esther, a bank teller, alleges that she is paid less than a male bank teller who performs substantially equal work. The bank alleges that the male comparator is a participant in a management training program that is open to both sexes. The evidence shows, however, that the program is not bona fide because it is not a formal one, no other employees are identified as participants in the program, and the comparator does not receive any formal instruction or even know that he is in a management training program. An EPA violation therefore is found.

c. Shift Differential

While a difference between night and day work is not a difference in “working conditions,” it could constitute a “factor other than sex” that justifies a compensation differential. A shift differential operates as a defense only if both sexes have an equal
opportunity to work either shift, if sex was not the reason the employer established the compensation differential, and if there is a business purpose that the shift differential is being used reasonably to serve.

Example

Monica, a female security guard, gets paid less than male security guards whose jobs are substantially equal to Monica’s job in terms of skill, effort, responsibility, and similar working conditions. The male comparators work night shifts, while Monica works a day shift, and the respondent’s pay scale provides for higher compensation for night shift jobs. Other male security guards who work day shifts get paid the same rate as Monica.

There is no evidence that the pay differential had its origins in discrimination, that sex plays any role in shift assignments, or that women are steered to the lower paying shift. The employer’s justification for the differential is that it pays a premium for night shift work because it is less desirable and a harder shift for which to recruit employees. The charge is dismissed without a finding of an EPA violation.

d. Job Classification Systems

An employer’s assertion that its compensation rates are based on a job classification system does not, by itself, justify a compensation disparity between men and women performing substantially equal work. The employer must prove that the job classification system accurately reflects job duties and/or job-related employee qualifications and is uniformly applied to men and women. For example, a store might have a job classification system under which head cashiers are paid more than cashiers. If the classification system accurately reflects job duties and/or job-related employee qualifications, the compensation disparity is justified.

Example

Lynn works as a cleaner in an elementary school. Most of the cleaners are female. Lynn establishes that her job is substantially equal to that of "custodians" in the school who are paid more and who are mostly male. The school fails to prove that the different classifications for the two jobs accurately reflect differences in job duties or job-related employee qualifications. Therefore, an EPA violation is found.

e. "Red Circle" Rates; Temporary Reassignments

"Red circling" means that an employee is paid a higher than normal compensation rate for a particular reason. Such a practice does not violate the EPA if sex is not a factor and it is supported by a valid business reason. For example, an employer might transfer a long-time employee who can no longer perform his regular duties because of deteriorating health to an otherwise lower paid job, but maintain the employee's higher salary in gratitude for his long tenure of service.
Similarly, an employer might assign employees in skilled jobs to less demanding work temporarily until the need for the higher skill arises again. As with all factors other than sex, the investigator should determine whether the red-circle rate is consistent with the respondent's business justification or whether, instead, the employer's reason is pretextual. If the red-circling defense is satisfied, the employer may continue to pay the employees their original salaries, even though opposite sex employees perform the same work for lower pay.7

An employer may temporarily assign an employee to work in a higher paid job, without changing his or her compensation. However, investigators should scrutinize such situations to determine whether sex is the real reason for the differential.

f. Revenue Production

An employer may be able to justify a compensation disparity by proving that the higher paid employee generates more revenue for the employer than the lower paid employee. However, the Commission will scrutinize this defense carefully to determine whether the employer has provided reduced support for revenue production to the lower paid employee. If that is the case, then the difference in revenue will not justify the compensation disparity. Furthermore, a mere assumption that the higher paid employee will produce greater revenue will not justify the compensation disparity.

Example

Missy, an associate attorney at a mid-size law firm, claims that she was hired at a lower starting salary than a male attorney who performs the same work. The employer proves that it offered a higher salary to the male because he brought clients to the firm who generated substantial revenue, while Missy brought in no clients. This evidence establishes that a factor other than sex justified the compensation disparity.

g. Market Factors

Employers have sometimes asserted that they must pay more to a male employee than a female employee performing the same job because of the male employee's market value. Of course, payment of lower wages to women based on an assumption that women are available for employment at lower compensation rates does not qualify as a factor other than sex that would justify unequal compensation for substantially equal work. As one court stated, "the argument that supply and demand dictates that women qua women may be paid less is exactly the kind of evil that the [EPA] was designed to eliminate, and has been rejected." Market value qualifies as a factor other than sex only if the employer proves that it assessed the marketplace value of the particular individual's job-related qualifications, and that any compensation disparity is not based on sex.

7 "Red circling" only justifies a compensation disparity where an existing employee's higher compensation is maintained for a valid business reason. It does not justify higher payment to a new employee. See Mulhall, 19 F.3d at 596 ("red circling" did not apply to situation where new employees who were formerly owners or principals in businesses purchased by the defendant were hired at salaries that were set as part of the negotiated sale of the businesses).
Prior salary cannot, by itself, justify a compensation disparity. This is because prior salaries of job candidates can reflect sex-based compensation discrimination. Thus, permitting prior salary alone as a justification for a compensation disparity "would swallow up the rule and inequality in compensation among genders would be perpetuated." However, if the employer can prove that sex was not a factor in its consideration of prior salary, and that other factors were also considered, then the justification can succeed. The employer could, for example, show that it:

- Determined that the prior salary accurately reflected the employee's ability based on his or her job-related qualifications; and
- Considered the prior salary, but did not rely solely on it in setting the employee's current salary.

If the employer did not bargain with the higher-paid comparator it will cast doubt on the employer's argument that it had to offer a higher salary to compete for him/her. And even if there was bargaining, the investigator should consider whether the employer bargains differently with men than with women (e.g., responds more favorably to men's demands than to women's demands).

Example

Stacey, a certified public accountant (CPA), claims that her accounting firm violated the EPA by offering her a lower starting salary than it offered a male accountant. The firm proves that it offered a higher salary to the male because he had very favorable job references based on his productivity and successful track record in providing tax advice to clients; he received other job offers at the higher salary; and he relied on those job offers as a bargaining tool for negotiating the higher salary.

The firm began salary discussions with Stacey with the same opening offer as given to the male, and indicated it was "willing to go higher if necessary." But Stacey did not bargain as assertively as the male CPA, and ended up with a lower starting salary. There is no evidence that the firm treated Stacey any differently than the male in salary negotiations. The firm has proved that the compensation disparity is based on a factor other than sex, and therefore no EPA violation is found.

A difference in the relative market value of employees at the time of their hire may not accurately reflect their relative market value in later years. Thus, if an employee has made out a prima facie case under the EPA, the employer's continued reliance on market value to justify the pay disparity should be evaluated to determine whether such reliance is reasonable.
h. Part-time/Temporary Job Status

Labor force data show that substantially more women than men perform part-time work. Women also disproportionately fill temporary jobs. Thus, payment of disproportionately lower wages and benefits to part-time and temporary workers affects women more than men. For this reason, investigators should scrutinize closely employer assertions of part-time or temporary status as a factor other than sex that explains a compensation disparity. Part-time or temporary status, of course, operates as a defense only if sex was not the reason the employer established the compensation differential and both sexes have an equal opportunity to work under either arrangement (e.g., no evidence of steering).

Example

Susan does editing and proofreading for a company that publishes newsletters. She works 3 days each week, but is paid less than half the salary of full-timers performing the same job. She also receives no health insurance, while full-timers do receive that benefit. Susan claims that the disparity between her compensation and that provided to male full-time employees performing the same job violates the EPA.

The investigator discovers that all part-timers are women and no part-timers in recent history have moved into full time status, despite numerous attempts. A violation of the EPA is found. The investigator also finds cause to believe the respondent has violated Title VII, both on pure unequal pay grounds (see 29 C.F.R. 1620.27(a)) and by unlawfully limiting women's access to full time jobs.

Like any "factor other than sex," if the employee can make out a prima facie case, an employer can justify paying part-time or temporary workers disproportionately less than full-time or permanent workers only if it can show that this justification is related to a legitimate business purpose and is used reasonably in light of that purpose. The classifications "part-time" or "temporary" also must be accurate. Thus, if workers designated as "part-time" work substantially the same number of hours as full-timers, or "temporary" workers appear not to be temporary, the investigator should not give credence to the employer's assertion that these designations satisfy the "factor other than sex" defense.


i. Error

If a compensation disparity is sex-based, the employer cannot defend the disparity on an assertion that it resulted from an erroneous belief that the jobs in question were different, or general assertions of good faith. However, an employer's proof of good-faith and reasonable grounds to believe it did not violate the EPA may serve as a basis for the employer to avoid an award of liquidated damages.

j. Collective Bargaining Agreement

An employer's assertion that a compensation differential is attributable to a collective bargaining agreement does not constitute a defense under the EPA. If the union contributed to the creation of a compensation differential, the union should be added as a respondent.

F. MEASURE OF DAMAGES

1. Back Pay and Raises

Damages for violation of the EPA include a salary increase and back pay in the amount of the unlawful difference between the wages of the lower and higher paid workers. It should also include attorneys' fees and costs, and appropriate damages. If the violation involved segregated job categories, the employer cannot correct the violation merely by opening the higher-paid category to all. Instead, the pay of the employees in the lower-paid job category must be raised to an equal level, and back pay must be provided. Furthermore, the employer cannot equalize an unlawful compensation differential by periodically paying the underpaid employees bonuses.

Because systemic compensation discrimination often is a "continuing violation," relief for a systemic violation generally is available for all discriminatory actions that occurred in furtherance of the policy or practice (e.g., each paycheck), including those that occurred outside the charge filing period, subject to generally applicable limitations on remedies.

2. Compensatory Damages

In addition to back pay and a raise, Title VII and the ADA permit recovery of compensatory damages for intentional discrimination and recovery of punitive damages for discrimination that is intentional and engaged in with malice or reckless indifference to the federally protected rights of an individual. The ADEA does not allow for compensatory or punitive damages, but does provide for liquidated damages for willful violations. The EPA also provides for liquidated damages, at an amount equal to back pay, unless the respondent proves that it acted in "good faith" and had reasonable grounds to believe that its actions did not violate the EPA.

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10 Under Title VII and the ADA, a charging party may recover back pay for two years prior to the filing of the charge. 42 U.S.C. 2000e-5(g)(1). Back pay under the EPA dates back to two years prior the date conciliation is reached or suit is filed. In cases of willful violations, the back pay period is three years. It is the Commission's position that the ADEA contains no back pay limitation period.

11 The EPA explicitly prohibits lowering the pay of any employee to correct a discriminatory pay differential. See 29 U.S.C. 206(d)(1). Title VII, the ADEA, and the ADA do not contain an analogous provision.
3. Filing a Suit

Unlike Title VII, the ADEA, and the ADA, an individual alleging a violation of the EPA may go directly to court without filing an EEOC charge beforehand. Moreover, filing a charge does not toll the time frame for going to court. This means the limitations period continues to run even after the charge has been filed, and during the investigation. Thus, investigators should investigate EPA charges expeditiously so the charging party and/or the Commission can file suit with the benefit of a completed investigation, and so that relief for the charging party is not unduly limited.

4. Liquidated Damages

Liquidated damages under the EPA are compensatory in nature. Therefore, in sex-based pay cases under both the EPA and Title VII, a charging party cannot obtain both liquidated damages under the EPA and compensatory damages under Title VII for the same injury because that would amount to a double recovery. Nevertheless, relief should be computed to give each individual the highest benefit which entitlement under either statute would provide. Thus, the charging party may receive the greater of the liquidated damages available under the EPA or compensatory damages available under Title VII. The availability of EPA liquidated damages does not affect the availability of punitive damages under Title VII.

5. Injunctive Relief

Injunctive relief also is available. For example, because the EPA is an amendment to the Fair Labor Standards Act (FLSA), the Commission may seek an injunction against any person for violating the FLSA's so-called "hot goods" provision. The hot goods provision prohibits any person from transporting or selling goods produced in violation of the EPA. Companies are exempted from the hot goods provision in two circumstances:

- Common carriers transporting in the regular course of their business goods they did not produce; and
- Purchasers who acquired goods without notice of a violation and in good faith reliance on a written assurance from the goods' producer that they were produced in compliance with the EPA.

Thus, if goods were produced in violation of the EPA, the Commission may seek an injunction in federal district court to prevent the respondent, and others not exempt, from transporting or selling the goods in interstate commerce.

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12 29 U.S.C. 215(a)(1) (making it unlawful "to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 206 . . . of this title").
Example

Emily, a female sales representative for a thriving pharmaceutical company, establishes that her annual salary is $5,000 less than a male who performs substantially equal work and is otherwise similarly situated. Emily and her comparator had both been receiving 5% annual bonuses. Also, the employer makes a 10% matching contribution into sales representatives' pension plan.

The investigation finds that the compensation disparity violates the EPA and Title VII. The investigator concludes that the EPA violation is willful because the respondent ignored Emily’s complaints about her compensation. The investigator seeks the following remedies: an increase in Emily's salary and benefits to the level of her comparator; back pay of $17,250 reflecting the three-year difference in salary, bonuses, and pension contributions ($5,000 salary difference + $250 bonus difference + $500 pension difference, multiplied by three); and liquidated damages of $17,250. Emily's total monetary relief, therefore, would equal $34,500.

G. RETALIATION

It is unlawful for an employer to retaliate against an employee because he or she opposed compensation discrimination under any of the EEO statutes or participated in complaint proceedings. Although the EPA does not specify that retaliation based on "opposition" is unlawful, employees are protected against retaliation for making either formal or informal complaints about unequal compensation.

Compensatory and punitive damages are available for retaliation claims brought under the EPA and the ADEA, as well as under Title VII and the ADA. Compensatory and punitive damages for retaliation obtained under the EPA and the ADEA are not subject to statutory caps because the EPA and ADEA borrow their remedies provision for retaliation from the Fair Labor Standards Act, which contains no provision capping compensatory or punitive damages for retaliation.
CHAPTER 9 – REVIEW QUESTIONS

The following questions are designed to ensure that you have a complete understanding of the information presented in the assignment. They do not need to be submitted in order to receive CPE credit. They are included as an additional tool to enhance your learning experience.

We recommend that you answer each review question and then compare your response to the suggested solution before answering the final exam questions related to this assignment.

1. Under that circumstances is it legal to pay men and women who perform the same job different wages:
   a) it is okay to pay men more because they are generally the prime wage earner in a family
   b) it is never okay to pay people different wages if they have the same job title
   c) when the difference is based on differences in experience and job skill
   d) when the employer believes one employee has a greater financial need

2. Wage discrimination is illegal:
   a) only if it is based on sex
   b) only if it is based on sex or race
   c) when it is based on race, sex, religion, national origin, age, disability, or national origin
   d) only in cases of age, race, or sex

3. A prima facie EPA violation is established by showing that a male and a female receive unequal compensation for substantially equal jobs within the same establishment.
   a) true
   b) false

4. For purposes of the Equal Pay Act, the term “wages” refers only to an employee’s salary and bonus.
   a) true
   b) false

5. Employers have no defense to a violation of the Equal Pay Act.
   a) true
   b) false
6. Employers are entitled to pay men more than women for the same job when men work the tougher shift.
   
   a) true
   b) false

7. An employer can pay a male more than a female in the same position if the male employee generates more revenue.
   
   a) true
   b) false

8. What is the punishment for an employer that violates the Equal Pay Act:
   
   a) a raise for the victim of discrimination
   b) back pay
   c) attorney’s fees
   d) all of the above
CHAPTER 9 – SOLUTIONS AND SUGGESTED RESPONSES

1. A: Incorrect. This is just the type of outdated stereotype that makes such differential treatment illegal in many cases.

B: Incorrect. It is not the job title that is determinative but the specific work being performed. Even then, there are circumstances where differential wages are permissible.

C: Correct. If one person has more experience or skill, it is permissible to recognize that in the form of a higher wage.

D: Incorrect. This is not an acceptable criterion for differential pay rates between men and women.

(See page 9-1 of the course material.)

2. A: Incorrect. Wage discrimination is illegal based on sex and many other factors, including race and age.

B: Incorrect. Wage discrimination is illegal based on not only sex and race, but other factors such as age, disability, and national origin.

C: Correct. The Equal Pay Act, the Age Discrimination in Employment Act, and Title VII of the Civil Rights Act all prohibit discrimination in wages based on a number of protected classes, including those listed in this answer.

D: Incorrect. There are other classes protected against wage discrimination under federal law.

(See page 9-2 of the course material.)

3. A: True is correct. The comparison must be made to an existing male employee with the same company.

B: False is incorrect. A complainant cannot compare herself or himself to a hypothetical male or female; rather, the complainant must show that a specific employee of the opposite sex earned higher compensation for a substantially equal job.

(See page 9-4 of the course material.)
4. A: True is incorrect. The term “wages” has a much broader meaning under the Equal Pay Act.

**B: False is correct.** Under the Equal Pay Act, the term “wages” includes all payments received by an employee, including fringe benefits. This includes wages, overtime, bonuses, vacation pay, retirement benefits, and stock options.

(See pages 9-5 to 9-6 of the course material.)

5. A: True is incorrect. There are a variety of defenses available.

**B: False is correct.** Defenses include the existence of seniority or merit system. The employer has a heavy burden to show that the difference in pay is based on something other than sex.

(See page 9-11 of the course material.)

6. A: True is incorrect. This is only true under some circumstances.

**B: False is correct.** A shift differential operates as a defense only if both sexes have an equal opportunity to work either shift, if sex was not the reason the employer established the compensation differential, and if there is a business purpose that the shift differential is being used reasonably to serve.

(See pages 9-13 to 9-14 of the course material.)

7. A: True is correct. An employer may be able to justify a compensation disparity by proving that the higher paid employee generates more revenue for the employer than the lower paid employee.

B: False is incorrect. The employer must demonstrate that the higher paid employee has produced more revenue.

(See page 9-15 of the course material.)
8. A: Incorrect. One of the most common penalties is to increase the salary or rate of pay of the aggrieved party. However, there are other penalties and so this is not the best answer.

B: Incorrect. Providing the victim with the money they should have made but for the illegal discrimination is also a common penalty. However, this is not the best answer.

C: Incorrect. Providing the victim with the cost of their attorney is a common remedy. However, this is not the best answer.

D: Correct. All of the above are common penalties associated with violations of the EPA. Others include compensatory damages and, in extreme cases, punitive damages.

(See page 9-18 of the course material.)
Chapter 10: Employee Privacy and Drug Testing

I. Introduction and Overview of Issues

There are few issues affecting employment law that are more “hot” than employee privacy. Whether it is monitoring employee emails, Internet “surfing,” or trying to prevent employee drug or alcohol use, employers are constantly challenging the amount of control they have over their employees, both in the workplace and outside of the workplace.

Both state and federal laws play a role in limiting the rights of employers to both monitor their employees and control their on-work and off-work activities. It is therefore impossible to provide managers with a comprehensive list of “do’s and don’ts” in this area. It is, however, possible and important to highlight some of the areas where litigation has become frequent so you can take steps to limit the risk of being sued.

Privacy Do’s and Don’ts

- Do provide a clear policy on monitoring to all employees;
- Do provide accommodation from dress and grooming standards for employees with certain religious beliefs;
- Do be familiar with applicable state drug testing laws; and
- Don’t forget that employees have privacy rights in the workplace.

Union contracts may provide limits on the rights of employers to engage in certain types of monitoring. Managers with unionized employees must therefore be sure to be thoroughly familiar with their collective bargain agreement. Public sector employees (those who work for the government) also have constitutional protections based on the 4th Amendment. This is a subject that is well beyond the scope of this course. Remember, however, that if you manage government employees that their rights are generally much greater than those of private sector employees. Finally, some states provide even private sector employees some constitutional protection for their privacy rights. California, for example, has a state constitutional right of privacy that applies to private sector employees.

A. EMPLOYEE MONITORING

More than anything else, employers want to be able to ensure that their employees are doing what they are paid to be doing. Monitoring, particularly with the advent of new technologies, has become an ever more popular way of achieving that goal. Technology allows for many different types of monitoring, including the following:

- Telephones;
- Computer terminals,
Email;
Voice mail;
Internet access.

An essential component of avoiding liability for invasion of your employee's privacy is notice: letting employees know ahead of time that managers may be listening or otherwise monitoring. Therefore, employers are encouraged to provide a clear policy to their employees that they reserve the right to monitor all electronic communications of every sort.

1. Email and Voice Mail

There are almost no regulations limiting the ability of employers to monitor employee email and voice mail. Once again, notice is key so employees do not develop an expectation of privacy.

2. Telephone Monitoring

In most instances, employers may listen to the live phone conversations of their employees. For example, employers may monitor calls with clients or customers for reasons of quality control. However, when the parties to the call are all in California, state law requires that they be informed that the conversation is recorded or monitored by either putting a beep tone on the line or playing a recorded message. Make sure there are no similar laws or regulations in your jurisdiction before monitoring telephone calls.

Federal law provides that when an employer realizes the call is personal, he or she must immediately stop monitoring the call. On the other hand, when employees are told not to make personal calls from specified business phones, the employee then takes the risk that calls on those phones may be monitored.

3. Computer Monitoring

There are several types of computer monitoring. Employers can use computer software that enables them to see what is on the screen or stored in the employees' computer terminals and hard disks. People involved in intensive word-processing and data entry jobs may also be subject to keystroke monitoring. Such systems tell the manager how many keystrokes per hour each employee is performing. Another computer monitoring technique allows employers to keep track of the amount of time an employee spends away from the computer or idle time at the terminal.

Once again, since the employer owns the computer, these types of monitoring are generally permissible. As always, however, it is advisable to give employees notice that their actions may be subject to monitoring.

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1 California Public Utilities Commission General Order 107-B.
2 Watkins v. L.M. Berry & Co., 704 F.2d 577, 583 (11th Cir. 1983)).
B. PERSONAL APPEARANCE

How much control do employers have over the personal appearance of their employees? May a manager send an employee home for being unprofessionally dressed, for being unclean?

In most cases, employers are generally free to set reasonable guidelines concerning neatness, dress, appearance, and hygiene. However, such codes are always in danger of legal attack, usually on the grounds that they are discriminatory or violate a person’s right to privacy. In some states, employers requiring uniforms may be required to supply or compensate employees for the uniform.

1. Religious Discrimination

The most common grounds for challenging dress codes are that they discriminate on the basis of religion. Employers subject to Title VII of the Civil Rights Act of 1964 (discussed in detail in Chapter 5) are required to reasonably accommodate the religious beliefs and practices of their employees. If an employer’s dress code interferes with an employee’s religious beliefs, the employer may be required to make an exception.

Example

Sara is a secretary for the accounting firm of Kyle & Austin. The firm has a general policy that precludes employees from wearing hats or other head coverings while at work. Sara’s religion requires women to have their heads covered whenever they are outside the home. The firm is required to accommodate Sara’s religious beliefs unless it can demonstrate that to do so would constitute an undue hardship. It is virtually impossible for the firm to do so under these circumstances.

2. Sex Discrimination Claims

Sex discrimination claims typically are not successful unless the dress policy has no basis in social customs, differentiates significantly between men and women, or imposes a greater burden on women. For example, a policy that requires female managers to wear uniforms while male managers are allowed to wear "professional dress" may be discriminatory.

One interesting note is that California has a law that prohibits employers from implementing a dress code that does not allow women to wear pants in the workplace.3

3. Race and Disability Discrimination

Race discrimination claims are very difficult to make out. One area where race claims have been successful is in attacking no facial hair policies for men. A few courts have determined that a policy that requires all male employees to be clean-shaven may

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3 According to Section 12947.5 of the California Government Code, it is an unlawful employment practice for an employer to prohibit an employee from wearing pants because of the sex of the employee. The California law does make exceptions so employees in certain occupations can be required to wear uniforms.
discriminate if it does not accommodate individuals with pseudofolliculitis barbae (PFB), a skin condition aggravated by shaving that occurs almost exclusively among African-American males.

No-beard rules also may violate disability discrimination laws. A few courts have ruled that PFB is a disabling condition and thus requires reasonable accommodation under state disability laws.

4. NLRA Claims

Dress code claims also may be filed under the National Labor Relations Act (NLRA). To comply with the NLRA, employers, even in nonunion workplaces, may not universally ban the wearing of union insignia. An employer may set neutral policies that, when uniformly enforced, prohibit employees from wearing certain items of clothing that also have union insignias on them, such as T-shirts with union logos if the policy prohibits all T-shirts. However, several courts have determined that employees have the right to wear union buttons and pins to work, unless the wearing of these items creates a safety hazard or, in the case of workers with public contact, the employees consistently are required to wear uniforms without buttons and pins.

5. Tattoos and Body Piercing

While tattoos and piercings may be examples of employee self-expression, they generally are not recognized as indications of religious or racial expression and, therefore, are not protected under federal discrimination laws. Accordingly, as with most personal appearance and grooming standards, employers have wide latitude to set policy regarding tattoos and body piercings.

C. OFF-DUTY CONDUCT

In most states, employers may discipline or terminate employees for off-duty behavior that might embarrass the company or disrupt its operations (note, however, that some methods of obtaining information about off-duty conduct may infringe on privacy rights). Some states, such as Michigan and Illinois, restrict employers from gathering information regarding an employee's off-duty behavior. As usual, employers must be familiar with the laws in their jurisdiction before taking any adverse action against an employee for actions that occur outside of the workplace.

D. PSYCHOLOGICAL AND PERSONALITY TESTS

Federal law does not prohibit an employer from requiring an employee or prospective employee to take a psychological or personality test. However, depending on the types of questions that are asked, the test could violate either privacy laws or anti-discrimination laws. They should therefore be used sparingly and only after a thorough review of the laws of your jurisdiction.

E. SEARCHES

Private employers may generally conduct on-premises searches of employer-owned vehicles, equipment, desks, lockers, briefcases, and other items. In most states, searches of an employee's personal items may be legal if the employee has no
reasonable expectation of privacy. Public employees enjoy constitutional protections that guard against many kinds of searches.

II. **Employee Drug Testing**

### A. PURPOSE AND SCOPE OF DRUG TESTING

Some employers decide to drug test employees for a variety of reasons, such as deterring and detecting drug use, as well as providing concrete evidence for intervention, referral to treatment and/or disciplinary action. The most common reasons employers implement drug testing are:

- To deter employees from abusing drugs and alcohol;
- To prevent hiring individuals who use illegal drugs;
- To provide early identification and referral of employees who have drug and/or alcohol problems;
- To provide a safe workplace for other employees; and
- To ensure general public safety and instill consumer confidence that employees are working safely.

Before deciding to conduct testing, employers should consider a few factors, including:

- **Who will be tested?** Options may include all staff, job applicants and/or employees in safety-sensitive positions.
- **When will tests be conducted?** Possibilities including pre-employment, upon reasonable suspicion or for cause, post-accident, randomly, periodically and post-rehabilitation.
- **Which drugs will be tested for?** Options including testing applicants and employees for illegal drugs and testing employees for a broader range of substance, including alcohol and certain prescription drugs.
- **How will tests be conducted?** Different testing modes are available, and many states have laws that dictate which may and may not be used.

### B. LEGAL ISSUES

Each of these questions poses potential legal problems. Employers also must be familiar with any local, state and federal laws or any collective bargaining agreements that may impact when, where and how testing is performed. It is strongly recommended that legal counsel be sought before starting any testing program. There are a number of federal laws that affect drug testing.
1. ADA & Rehabilitation Act

The Americans with Disabilities Act (ADA) prohibits employment discrimination against employees and applicants with disabilities in organizations that employ 15 or more employees. The term "disability" means an individual has a physical or mental impairment that substantially limits one or more of his/her major life activities or there is a record of such an impairment or an individual is regarded as having such an impairment. The Equal Employment Opportunity Commission (EEOC) oversees application of the ADA. Section 503 of the Rehabilitation Act of 1973 also prohibits discrimination against qualified individuals with disabilities by contractors and subcontractors with the Federal government. The requirements regarding drug and alcohol use under the two laws are identical.

The ADA and the Rehabilitation Act of 1973 affect drug and alcohol policies. Individuals currently engaging in the illegal use of drugs are not "individuals with a disability" when the employer acts on the basis of such use. "Currently" means that the illegal use of drugs "occurred recently enough to justify the employer's reasonable belief that involvement with drugs is an ongoing problem."

The following is a brief outline of aspects of the ADA and the Rehabilitation Act of 1973 that are related to employees who have problems with drugs and alcohol:

- Employers may prohibit the illegal use of drugs and the use of alcohol in the workplace;
- The ADA is not violated by tests for illegal use of drugs (but remember to meet state requirements);
- Employers may discharge or deny employment to persons who currently engage in the illegal use of drugs;
- Employers may not discriminate against drug addicts who are not currently using drugs and have been rehabilitated or have a history of drug addiction;
- Employers may not discriminate against drug addicts who are currently in a rehabilitation program. (The EEOC has clarified that a rehabilitation program includes inpatient or outpatient programs, Employee Assistance Programs, or recognized self-help programs such as Narcotics Anonymous.);
- Reasonable accommodation efforts, such as allowing time off for medical care, self-help programs, etc., must be extended to rehabilitated drug addicts or individuals undergoing rehabilitation;
- A person who is an alcoholic may be an "individual with a disability" under the ADA;
- Employers may discipline, discharge or deny employment to alcoholics whose use of alcohol impairs job performance or conduct to the same extent that such conduct would result in disciplinary action for other employees;
- Employees who use drugs and alcohol may be required to meet the same standards of performance and conduct set for other employees;

- Employees may be required to follow the Drug-Free Workplace Act of 1988 and rules set by Federal agencies pertaining to alcohol and drug use in the workplace; and

- The ADA does not protect casual drug users; but individuals with a record of addiction, or who are erroneously perceived as being addicts, would be covered by the guidelines.

2. Family and Medical Leave Act

The Family and Medical Leave Act of 1993 (FMLA) applies to all public agencies and private-sector employers who employ 50 or more employees in 20 or more workweeks. Employees who are eligible for FMLA benefits must:

- Work for a covered employer;

- Have been an employee of the covered employer for a total of 12 months;

- Have worked for the employer for at least 1,250 hours over the previous 12 months; and

- Work at a location in the United States or in any United States territory where the employer employs at least 50 employees within 75 miles.

FMLA affects drug-free workplace programs, because a covered employer must grant an eligible employee up to a total of 12 workweeks of unpaid leave during any 12-month period when the employee is unable to work because of a serious health condition. A serious health condition includes:

- Any period of incapacity or treatment connected to inpatient care such as substance abuse treatment, or

- Continuing treatment by a health care provider, which includes any period of incapacity (i.e., inability to work) due to a health condition (including treatment thereof, or recovery from) lasting more than three consecutive days, and any subsequent treatment or period of incapacity relating to the same condition.

The majority of employers across the United States are not required to test and many state and local governments have statutes that limit or prohibit workplace testing, unless required by state or federal regulations for certain jobs. On the other hand, most private employers have the right to test for a wide variety of substances.

Drug testing is not required under the Drug-Free Workplace Act of 1988. The Drug-Free Workplace Act of 1988 requires some Federal contractors and all federal grantees to agree that they will provide drug-free workplaces as a precondition of receiving a contract or grant from a federal agency.
Caution!
It is very important that before designing a drug-testing program you familiarize yourself with the various state and federal regulations that may apply to your organization.

It is important to note that court decisions have supported:

1. Following the Substance Abuse and Mental Health Services Administration’s (SAMHSA) Mandatory Guidelines for Federal Workplace Drug Testing, which include having a Medical Review Officer to evaluate tests; and

2. Testing only for those drugs identified in the SAMHSA guidelines (marijuana, cocaine, opiates, amphetamines and phencyclidine) for which drug laboratories are certified.

Following the guidelines developed for federal agencies will help your organization stay on safe legal ground. The procedures that are recommended in the guidelines have been implemented by many employers and have withstood challenges.

The current law in the private sector generally permits non-union companies to require applicants and/or employees to take drug tests. Employers can test for a variety of substances, although only a few have established testing protocols. All employers should consult with legal advisors to ensure that they comply with any applicable state or local laws and design their testing programs to withstand legal challenges. In unionized workforces, the implementation of testing programs must be negotiated. Even when testing is required by Federal regulations, the disciplinary consequences of testing positive need to be determined and are subject to collective bargaining.

C. SUGGESTIONS FOR IMPLEMENTATION OF TESTING PLAN

Perhaps the most important component in implementing a drug-testing program is employee education. Organizations should educate their employees about the problems associated with alcohol and drug abuse, the reasons for testing and the nature of the testing programs. These education programs should be designed through a cooperative effort with employee representatives.

1. Supervisor Training

After developing a drug-free workplace policy, an organization should train those individuals closest to its workforce – supervisors. Training should ensure that supervisors understand:

- The drug-free workplace policy;
- Ways to recognize and deal with employees who have performance problems that may be related to alcohol and other drugs; and
- How to refer employees to available assistance.
In relation to a drug-free workplace program, supervisors' responsibilities should include monitoring employees’ performance, staying alert to and documenting performance problems, and enforcing the policy. Supervisors should not, however be expected to diagnose alcohol- and drug-related problems or provide counseling to employees who may have them.

Note that if supervisors are responsible for making referrals for drug testing based on reasonable suspicion, they also must be trained on how to make that determination.

2. **Employee Education**

A drug and alcohol education program provides employees with the information they need to fully understand, cooperate with and benefit from their company's drug-free workplace program.

Effective employee education programs provide company-specific information, such as the details of the drug-free workplace policy, as well as generalized information about the nature of alcohol and drug addiction; its impact on work performance, health and personal life; and types of help available for individuals with related problems.

All employees should participate, and the message should be ongoing basis through a variety of means. Forums for employee education may include home mailings, workplace displays, brown-bag lunches, guest speakers, seminars and sessions at new employee orientation.

3. **Employee Assistance**

A critical component of a drug-free workplace program is providing assistance or support to employees who have problems with alcohol and other drugs.

Employee Assistance Programs (EAPs) are generally the most effective vehicle for addressing poor workplace performance that may stem from an employee’s personal problems, including the abuse of alcohol or other drugs. EAPs are an excellent benefit to employees and their families and clearly demonstrate the employers’ respect for their staff. They also offer an alternative to dismissal and minimize an employer's legal vulnerability by demonstrating efforts to support employees. In addition to counseling and referrals, many EAPs offer other related services, such as supervisor training and employee education.

At a minimum, businesses should maintain a resource file from which employees can access information about community-based resources, treatment programs and help lines.

4. **Sample Drug Policy**

Provided at the end of this section is a sample employer drug policy. It is not intended to be an example of a policy that meets the needs of every employer or the laws of every state. It is intended to be an example of the type of issues that should be addressed in an employee drug policy. One should only be created after consultation with competent legal counsel.
D. STATE DRUG TESTING LAWS

Below is a sampling of some of the state laws that affect employee drug testing.

1. Alaska

The Alaska Voluntary Drug Testing Act is a voluntary law which provides legal protection to employers who establish a drug and alcohol policy and testing program in compliance with the act. In order to receive the benefits of the law, employers must implement a comprehensive policy and must adhere to specific collection, testing, and confidentiality procedures.

Testing must be performed by laboratories certified by the U.S. Department of Health and Human Services, the College of American Pathologists, or the American Association of Clinical Chemists. There are no restrictions placed on the types of testing that may be conducted (pre-employment, random, etc.). The act also permits the use of on-site testing provided the tests are administered by a certified test administrator and the testing products are approved by the FDA.

2. Arizona

The Arizona "Private-Sector Drug Testing and Alcohol Impairment Act" is a voluntary law which provides legal protection to employers for acting in good faith based on the results of a positive drug or alcohol test provided the employers policy and program meets the requirements of the act. If an employer conducts drug or alcohol testing, all officers, directors, and supervisors must be included. The Act permits all types of testing, and requires a comprehensive written policy and compliance with specific drug testing procedures.

3. California

The California Department of Health interprets the state's laboratory licensing law to prohibit any drug test not performed in a certified laboratory or by a licensed physician. Alcohol and Drug Rehabilitation Employers with 25 or more employees must accommodate employees who wish to participate in a substance abuse treatment program, provided the accommodation does not place an undue hardship on the employer. Employees are not entitled to time off with pay for these purposes although the employee may use accrued sick time. Employers must make a reasonable effort to safeguard the employees' privacy.

A San Francisco ordinance prohibits drug testing under most circumstances including random, periodic, and post-accident tests. Pre-employment, reasonable suspicion, and rehabilitation testing are permitted when specific conditions are met.

The California Drug-Free Workplace Act of 1990 requires all state contractors and grantees to implement a drug-free workplace policy and establish an employee drug awareness education program.
4. **Colorado**

A Boulder ordinance places significant restrictions on the types of testing that may be conducted within the city as well as specific testing procedures that must be followed when testing is permitted.

5. **Connecticut**

Connecticut's drug testing law prohibits certain types of testing and includes significant and specific procedural restrictions on the types of testing that are permitted. In general, testing is limited to situations in which the employee works in a "high risk" position or where reasonable suspicion exists.

6. **Florida**

The Florida Drug-Free Workplace Act provides that any state agency may test certain employees and job applicants for the use of drugs. The law does not require the testing of employees or applicants, but mandates that any agency which does choose to test do so in accordance with specified methods and procedures outlined in the Act. The law is very comprehensive.

State law also provides that in situations where two or more bids of equal merit are submitted to win a state contract, the business certifying that it has implemented a Drug-Free Workplace program will be given preference in being awarded the contract.

7. **Georgia**

The Georgia Drug-Free Workplace Act provides that contractors (and their subcontractors) who receive state contracts in the amount of $25,000 or more must certify that they have implemented a substance abuse prevention program. At a minimum, the program must include a written policy and an employee drug-awareness program. The Act does not address drug testing. The state's law provides that public employees in high-risk jobs may be subject to random drug testing. Refusal to submit to a random test, or testing positive, results in termination from employment.

8. **Hawaii**

Hawaii’s law includes comprehensive procedural guidelines regarding workplace substance abuse testing. Although the requirements are primarily the responsibility of the laboratory, there are some provisions which directly impact employers. For example, employers who choose to test must use a laboratory that is certified by the Hawaii Department of Health or the Substance Abuse and Mental Health Services Administration of the U.S. Department of Health and Human Services.

9. **Idaho**

The "Private Employer Alcohol and Drug-Free Workplace Act" is a voluntary law which:

- Permits employers to test employees and applicants for drugs and alcohol,
- Provides requirements for collection and testing;
- Limits employer liability for establishing a testing program in compliance with the provisions of the Act, or for taking any disciplinary action based on its established substance abuse policy; and

- Establishes that an employee who is discharged for (1) a confirmed positive drug or alcohol test, (2) refusing to be tested, or (3) adulterating or attempting to adulterate a test sample, would be discharged for misconduct for the purposes of receiving unemployment compensation benefits.

All testing must be conducted in compliance with federal regulations. On-site testing is permitted for initial screens but must be confirmed by GC/MS if positive. A workers' compensation premium discount is available to employers who implement and maintain a program in accordance with this act. A law relating to employee assistance programs clarifies that information communicated in an EAP session is privileged and confidential, and that employers do not have a right to this information, nor can they be held liable for information communicated during an EAP session.

10. Illinois

The Illinois Drug-Free Workplace Act Provides that employers who are awarded a state contract or grant must adopt an anti-drug policy and program, and provide a copy of its policy. This law does not specifically address drug testing.

11. Iowa

The state's drug testing law was amended in 1999 to authorize most types of drug and alcohol testing provided that specific procedural and policy requirements are met. Furthermore, employers who develop, implement and maintain programs in accordance with the provisions of the act are provided with immunity against any causes of action arising against the employer for actions taken pursuant to the program.

12. Kansas

While there are no restrictions on the types of testing that may be conducted, there are guidelines governing testing procedures. Certified laboratories must be used and confidentiality procedures maintained.

13. Louisiana

State law places no restrictions on the types of testing that may be conducted, but does provide specific requirements with regard to drug testing procedures (requires DHHS-certified laboratory, use of an MRO, etc.). The statute also provides protection against certain causes of action if the employer establishes and maintains a drug and alcohol testing program in compliance with the act.

State law prohibits an employer from requiring an employee or applicant to pay for a drug test. However, an employer may withhold the cost of a pre-employment drug test if the employee resigns within ninety days of starting work. State law includes a provision whereby employers may be eligible for a tax credit against their state income tax in the amount of five percent of the "qualified treatment expenses" incurred by the employer for substance abuse treatment services.
14. **Maine**

There is a comprehensive statute which governs workplace drug testing in Maine. There are restrictions on all types of testing and specific requirements that must be met with regard to drug testing procedures. All substance abuse programs must be approved by the Maine Department of Labor. Prior to conducting any type of drug testing, the employer must provide an employee assistance program or participate in an EAP consortium.

15. **Maryland**

State law does not place any restrictions on the types of testing that may be conducted, but does require that specific technical procedures be followed with regard to drug testing. All testing must be conducted at laboratories certified by the Maryland Department of Health and Mental Hygiene. Hair testing is permitted for pre-employment testing only.

16. **Minnesota**

The state drug testing law includes significant restrictions on the types of testing that may be conducted, and places specific requirements on drug testing procedures and components of the program. An employer may not discharge an employee solely on the basis of a first-time positive drug test. The opportunity for rehabilitation must be offered. An employer may only inquire about an employee's use of over-the-counter or prescription medications after an employee tests positive on a drug test.

17. **Mississippi**

Compliance with the state drug testing law is voluntary. Employers choosing to comply with its provisions are protected from civil liability with regard to their drug and alcohol program and testing. The law permits all types of testing (with some restrictions) and includes specific requirements with regard to testing procedures. Employers choosing to implement a testing program not in accordance with the act are governed by applicable principles of contract or common law.

18. **Montana**

Montana's drug testing statute was repealed in 1997 and replaced with new provisions. Drug testing (restrictions apply) is permitted of employees "engaged in the performance, supervision, or management of work in a hazardous work environment, security position, position affecting public safety, or fiduciary position... ." All drug and alcohol testing procedures must be performed in accordance with federal Department of Transportation regulations.

19. **Nebraska**

The state's drug testing law permits drug and alcohol testing provided certain technical procedures are followed. A positive test result, refusing to be tested, or tampering with a test specimen are all grounds for disciplinary action including termination. The law applies to employers with six or more employees.
20. North Carolina

The state's drug testing law does not restrict the types of testing that may be conducted, but does require that certain procedures be followed with regard to the actual drug testing process. All testing of employees must be conducted at approved laboratories. Applicants, however, may be tested on site for the initial screen. Positive tests must be confirmed at approved laboratories.

21. Oklahoma

The state's drug testing law permits most types of drug testing provided certain conditions are met. The foremost condition is that prior to conducting any drug or alcohol tests, the employer must make an employee assistance program available to employees. The statute also requires that the employer establish a comprehensive policy which explains all aspects of the testing program. There also are specific requirements regarding testing procedures that must be followed.

22. Oregon

The state's drug testing law permits all types of drug testing, but does require that all tests be analyzed at state-approved laboratories and in accordance with specific provisions. On-site testing is permitted provided certain conditions are met. The law only permits alcohol testing, however, when the employee consents or there is reasonable suspicion that the employee is under the influence of alcohol while on the job. It also requires private employers with public improvement contracts to "demonstrate that an employee drug testing program is in place."

23. Rhode Island

The state's drug testing law places many restrictions on workplace drug testing. The law permits testing only "if the employer has reasonable grounds to believe based on specific aspects of the employee's job performance and on specific contemporaneous observations, capable of being articulated, concerning the employee's appearance, behavior or speech that the employee's use of controlled substances is impairing his or her ability to perform his or her job". An employee may not be terminated following a first positive drug test unless he or she refuses rehabilitation. Employees must be referred to a rehabilitation program following a positive drug test result. Additional procedural requirements also exist.

24. South Carolina

State law requires that every individual or business receiving a state grant or state contract for $50,000 or more must implement a drug-free workplace program in accordance with the state Drug-Free Workplace Act. Requirements include establishing and distributing a written substance abuse policy to all employees and establishing an employee drug education awareness program.
25. **Tennessee**

Employers with five or more paid employees who contract with state or local government to provide construction services must submit an affidavit stating that the employer has a drug-free workplace program that complies with certain requirements. Any private employer that certifies compliance only to the extent required by this Act, will not receive any reduction in workers’ compensation premiums and will not be entitled to other benefits set forth in Title 50, Chapter 9. Employers must obtain a certificate of compliance from the Department of Labor and Workforce Development. Various consequences apply to employers who do not comply with the requirements of the Act.

26. **Utah**

The Voluntary Drug and Alcohol Testing Act provides that no cause of action may be brought against any employer who establishes a drug and alcohol testing program in compliance with the act. Employers are specifically authorized to conduct any type of testing in order to maintain the safety of employees and the public or to maintain productivity and quality of services and products. If a testing program is implemented, all management personnel must also be subject to testing. The law requires that specific requirements be met with regard to drug testing procedures.

27. **Vermont**

The state’s drug testing law significantly restricts workplace drug testing. Pre-employment testing is permitted provided that ten days notice is given and it is conducted in conjunction with a physical examination. For-cause testing also is permitted if the employer has probable cause to believe that an employee is under the influence of drugs while on the job. Employees testing positive must be given the opportunity to participate in an EAP. The law also includes comprehensive requirements relating to drug testing procedures.

28. **Virginia**

The Drug-Free Workplace Act requires all public bodies to include in every contract over $10,000 the following provisions: 1) the contractor must provide a drug-free workplace for the contractor’s employees; 2) s/he must post a statement notifying employees that the unlawful manufacture, sale, distribution, dispensation, possession, or use of a controlled substance or marijuana is prohibited in the contractor’s workplace and specifying the consequences for policy violations; 3) s/he must state in all solicitations or advertisements for employees that the contractor maintains a drug-free workplace, and 4) s/he must include the drug-free workplace clauses from this Act in every subcontract or purchase order over $10,000 so that the provisions are binding on the subcontractor or vendor.

### E. SAMPLE DRUG AND ALCOHOL POLICY

**PURPOSE**

ABC Co. is committed to achieving and maintaining a safe and productive work place. Employees must be able to perform their jobs safely and productively, free from physical and emotional problems or inappropriate use or abuse of alcohol and other drug
substances. Employees who are affected in their ability to perform their jobs jeopardize the integrity, safety, and productivity of their work place.

In addition, federal law requires the company, as a federal contractor, to maintain a drug free work place in compliance with the Drug-Free Workplace Act of 1988.

POLICY STATEMENT

ABC intends to provide a drug free, healthful, safe, and secure work environment. Thus each employee is expected and required to report to work in an appropriate mental and physical condition to perform his/her assigned duties.

Use of alcoholic beverages and/or use, sale or possession of mind altering or illegal drugs are prohibited on, in, and around ABC General Construction jobsites, property, vehicles, or equipment and may be cause for immediate dismissal. Being under the influence of drugs or alcohol, warrants an automatic referral to the Employee Assistance Program (EAP) for an assessment or may be cause for termination.

In accordance with the Drug-Free Workplace Act, employees must immediately report any work place drug conviction to their supervisor.

DRUG TESTING

Drug testing will occur in the following situations:

- **Pre-employment**: Urine drug tests will be performed on all job applicants who are being considered for employment. Any persons who test positive may re-apply after 90 days without discrimination.

- **For-Cause**: Any employee determined by the company to have caused an accident or injury, disregarded a safety rule, or otherwise acted in an unsafe manner may be required to have a urine and/or blood test immediately.

- **Random or unannounced**: Random testing will occur beginning 60 days after the program implementation date of February 1, 1991 and is applicable to all ABC employees. Selection will be based on a computer-based generated system that selects individuals to be tested using the employee’s social security number.

ABC will test at least 25% of all their employees per calendar year. Information on the dates, locations, and names of those to be tested will be kept in the strictest confidence. Persons being tested shall be notified the morning of the test date.

Contractual Stipulations: When additional drug testing is required by contract, ABC personnel are obligated to comply with requirements as defined. The company will bear the cost of such tests. If the employee refuses, s/he will be subject to immediate termination.

Any employee who tests positive will be put on suspension until an alcohol/drug evaluation is completed through the Employee Assistance Program and said employee
is cleared through the EAP administrator. The employee is expected to follow through with the recommendations of the EAP. An individual who tests positive may also be subject to termination.

**DRUG TESTING PROCEDURES**

The procedures by which ABC will implement the drug testing plan must meet specified requirements to ensure both reliability, integrity and confidentiality.

ABC has contracted with various labs, clinics or hospitals which are at least NIDA (National Institute on Drugs and Alcohol) certified to conduct the testing. These test sites will be convenient to all ABC job site locations.

**RESULTS**

Assistance Program Director. Results will be available to the employee within 48 hours of testing unless test occurs on a Friday. In such case, results will be available the following Monday. On the day of testing, a random selection of number(s) will be generated by the Employee Assistance Administrator. The EAP Administrator will notify said employee’s immediate supervisor or job site superintendent. The supervisor or superintendent will confidentially notify the employee(s) to be tested, providing them with the necessary information and releases pertinent to the testing procedure.

The employee(s) is required to submit to screening at the designated test site by 6 PM of the same day. The results will be reported by the lab to the Employee.

The results of the drug screening will be maintained as confidential in the Employee Assistance Program office. The Employee Assistance Administrator of ABC will be notified of any positive test that may result in rehabilitation with the appropriate releases.

**IMPAIRMENT**

Any employee who is observed coming to or returning to the job in an obviously impaired condition shall be removed from the jobsite at once. A responsible supervisor shall provide or arrange for transportation home for the employee. Local police will be notified if the employee insists on driving themselves while in an impaired condition.

This situation warrants an automatic referral to the Employee Assistance Program and may be cause for termination.

**REHABILITATION**

ABC recognizes that alcohol/drug addiction is a treatable illness and will make every effort to support an employee who is in need of treatment. Acceptance of such treatment will not hinder employment at ABC unless job performance continues to deteriorate. Persons who complete treatment will be subject to random drug screening for a period of two years at the employer’s discretion. Any positive test results will be cause for immediate termination.
ABC provides an Employee Assistance Program through which alcohol and/or drug evaluations and assessments are provided. Referral for such may occur upon knowledge of a positive drug test result, or observation of impaired behavior.

III. Sample Privacy Policy

The following sample employee privacy policy is not intended as a comprehensive and legally effective policy to be used by all employers. It is provided as an example of the types of issues that should or could be included in an employee policy. Employers considering the adoption of such a policy should only do so in concert with competent legal counsel.

XYZ, Co.'s Employee Privacy Policy

At XYZ, Co. we are committed to maintaining the accuracy, confidentiality and security of your personal information. This Privacy Policy describes the personal information that XYZ collects from or about you, and how we use and to whom we disclose that information.

XYZ has adopted a series of Privacy Policies in order to address the specific privacy concerns of certain groupings of individuals and specific issues relating to the use of our website. This Privacy Policy applies to the personal information of all individuals who seek to be, are or were employed by XYZ (collectively, an "employee"), unless the personal information is collected, used or disclosed while using the XYZ website.

If you are unsure of which Privacy Policy applies to you, please contact the office of our Privacy Officer for more information.

It is XYZ's policy to comply with the privacy legislation within each jurisdiction in which we operate. Sometimes the privacy legislation and/or an individual's right to privacy are different from one jurisdiction to another. This Privacy Policy covers only those activities that are subject to the provisions of federal and state privacy laws, as applicable.

This Privacy Policy has a limited scope and application and the rights and obligations contained in this Privacy Policy may not be available to all individuals or in all jurisdictions. If you are unsure if or how this Privacy Policy applies to you, please contact the office of our Privacy Officer for more information.

What Is Personal Information?

For the purposes of this Privacy Policy, personal information is any information about an identifiable individual, other than the person's business title or business contact information when used or disclosed for the purpose of business communications. Personal information does not include anonymous or non-personal information (i.e., information that cannot be associated with or tracked back to a specific individual).
What Personal Information Do We Collect?

We collect and maintain different types of personal information in respect of those individuals who seek to be, are, or were employed by us, including the personal information contained in:

- resumes and/or applications;
- references and interview notes;
- photographs and video;
- letters of offer and acceptance of employment;
- mandatory policy acknowledgement sign-off sheets;
- payroll information, including but not limited to social security identification number, and pay check deposit information;
- wage and benefit information;
- forms relating to the application for, or in respect of changes to, employee health and welfare benefits, including, short and long term disability, medical and dental care; and
- beneficiary and emergency contact information.

In addition to the examples listed above, personal information also includes identification information such as name, home address, telephone, personal email address, date of birth, employee identification number and marital status, and any other information necessary to XYZ's business purposes, which is voluntarily disclosed in the course of an employee's application and employment with XYZ.

As a general rule, XYZ collects personal information directly from you. In most circumstances where the personal information that we collect about you is held by a third party, we will obtain your permission before we seek out this information from such sources (such permission may be given directly by you, or implied from your actions).

From time to time, we may utilize the services of third parties and may also receive personal information collected by those third parties in the course of the performance of their services for us or otherwise. Where this is the case, we will take reasonable steps to ensure that such third parties have represented to us that they have the right to disclose your personal information to us.

Where permitted or required by applicable law or regulatory requirements, we may collect information about you without your knowledge or consent.
Why Do We Collect Personal Information?

The personal information collected is used and disclosed for our business purposes, including establishing, managing or terminating your employment relationship with XYZ. Such uses include:

- determining eligibility for initial employment, including the verification of references and qualifications;
- administering pay and benefits;
- processing employee work-related claims (e.g. worker compensation, insurance claims, etc.);
- establishing training and/or development requirements;
- performance reviews and determining performance requirements;
- assessing qualifications for a particular job or task;
- gathering evidence for disciplinary action, or termination;
- establishing a contact point in the event of an emergency (such as next of kin);
- complying with applicable labor or employment statutes;
- compiling directories;
- ensuring the security of company-held information; and
- such other purposes as are reasonably required by XYZ.

Monitoring

The work output of XYZ's employees, whether in paper record, computer files, or in any other storage format belongs to us, and that work output, whether it is stored electronically, on paper or in any other format, and the tools used to generate that work product, are always subject to review and monitoring by XYZ.

In the course of conducting our business, we may monitor employee activities and our property. For example, some of our locations are equipped with surveillance cameras. These cameras are generally in high-risk areas or plant sites. Where in use, surveillance cameras are there for the protection of employees and third parties, and to protect against theft, vandalism and damage to XYZ's goods and property. Generally, video tapes recording images are routinely destroyed and not shared with third parties unless there is suspicion of a crime, in which case they may be turned over to the police or other appropriate government agency or authority. Pursuant to our 'Personal Computers and Software' and 'E-mail and Internet' policies, we have the capability to monitor all employees' computer and e-mail use.
This section is not meant to suggest that all employees will in fact be monitored or their actions subject to constant surveillance. We have no duty to so monitor. It is meant to bring to your attention the fact that such monitoring may occur and may result in the collection of personal information from employees (e.g. through their use of our resources). When using XYZ equipment or resources employees should not have any expectation of privacy with respect to their use of such equipment or resources.

How Do We Use Your Personal Information?

We use your personal information:

- For the purposes described in this Privacy Policy; or
- For any additional purposes that we advise you of and where your consent is required by law we have obtained your consent in respect of the use or disclosure of your personal information.

We may use your personal information without your knowledge or consent where we are permitted or required by applicable law or regulatory requirements to do so.

When Do We Disclose Your Personal Information?

We share your personal information with our employees, contractors, consultants and other parties (including other members of the XYZ Group) who require such information to assist us with administering our employment relationship with you, including third parties that provide services to us or on our behalf; third parties that collaborate with XYZ in the provision of services to you; and, third parties whose services we use to perform our services.

In addition, personal information may be disclosed or transferred to another party (including to another member of the XYZ Group or an affiliate of XYZ outside of Canada) in the event of a change in ownership of, or a grant of a security interest in, all or a part of XYZ through, for example, an asset or share sale, or some other form of business combination, merger or joint venture, provided that such party is bound by appropriate agreements or obligations and required to use or disclose your personal information in a manner consistent with the use and disclosure provisions of this Privacy Policy, unless you consent otherwise. Further, your personal information may be disclosed:

- as permitted or required by applicable law or regulatory requirements. In such a case, we will endeavor to not disclose more personal information than is required under the circumstances;
- to comply with valid legal processes such as search warrants, subpoenas or court orders;
- as part of XYZ’s regular reporting activities to other members of the XYZ Group and to other XYZ affiliates outside Canada;
- to protect the rights and property of XYZ;
• during emergency situations or where necessary to protect the safety of a person or group of persons;

• where the personal information is public; or

• with your consent where such consent is required by law.

**Notification and Consent**

By reviewing this Privacy Policy or providing personal information to XYZ, unless an employee advises us otherwise, such employee will be deemed to have given consent, where such consent is required, to the collection, use, or disclosure of such personal information in accordance with and for the purposes stated in this Privacy Policy (including any other purposes stated or reasonably implied at the time such personal information was provided to XYZ, or for which you have subsequently or otherwise received notice, and where your consent is required by law, we have obtained your consent).

At any time, each employee may withdraw their consent, where such consent was required by law, subject to legal or contractual restrictions and reasonable notice. All communications with respect to such withdrawal or variation of consent should be in writing and addressed to our Privacy Officer.

**How Is Your Personal Information Protected?**

XYZ endeavors to maintain physical, technical and procedural safeguards that are appropriate to the sensitivity of the personal information in question. These safeguards are designed to prevent your personal information from loss and unauthorized access, copying, use, modification or disclosure.

**How Long Is Your Personal Information Retained?**

Except as otherwise permitted or required by applicable law or regulatory requirements, XYZ endeavors to retain your personal information only for as long as it believes is necessary to fulfill the purposes for which the personal information was collected (including, for the purpose of meeting any legal, accounting or other reporting requirements or obligations). We may, instead of destroying or erasing your personal information, make it anonymous such that it cannot be associated with or tracked back to you.

**Updating Your Personal Information**

It is important that the information contained in our records is both accurate and current. If your personal information happens to change during the course of your employment, please keep us informed of such changes.

In some circumstances we may not agree with your request to change your personal information and will instead append an alternative text to the record in question.
Access to Your Personal Information

You can ask to see the personal information that we hold about you. If you want to review, verify or correct your personal information, please contact the office of our Privacy Officer using the contact information set out below. Please note that any such communication must be in writing.

When requesting access to your personal information, please note that we may request specific information from you to enable us to confirm your identity and right to access, as well as to search for and provide you with the personal information that we hold about you. We may charge you a fee to access your personal information; however, we will advise you of any fee in advance. If you require assistance in preparing your request, please contact the office of our Privacy Officer.

Your right to access the personal information that we hold about you is not absolute. There are instances where applicable law or regulatory requirements allow or require us to refuse to provide some or all of the personal information that we hold about you. In addition, the personal information may have been destroyed, erased or made anonymous in accordance with our record retention obligations and practices.

In the event that we cannot provide you with access to your personal information, we will endeavor to inform you of the reasons why, subject to any legal or regulatory restrictions.

Inquiries or Concerns?

If you have any questions about this Privacy Policy or concerns about how we manage your personal information, please contact the office of our Privacy Officer by telephone, in writing or by e-mail. We will endeavor to answer your questions and advise you of any steps taken to address the issues raised by you. If you are unsatisfied with our response, you may be entitled to make a written submission to the Privacy Commissioner applicable for your jurisdiction.

Revisions to This Privacy Policy

XYZ may from time to time make changes to this Privacy Policy to reflect changes in its legal or regulatory obligations or in the manner in which we deal with your personal information. We will post any revised version of this Privacy Policy on our website http://agroutes.XYZ.com, and we encourage you to refer back to it on a regular basis. Any changes to this Privacy Policy will be effective from the time they are posted, provided that any change that relates to why we collect, use or disclose your personal information will not apply to you, where your consent is required to such collection, use or disclosure, until we have obtained your consent to such change.
Interpretation of This Privacy Policy

Any interpretation associated with this Privacy Policy will be made by the Privacy Officer. This Privacy Policy includes examples but is not intended to be restricted in its application to such examples, therefore where the word 'including' is used, it shall mean 'including without limitation.

This Privacy Policy does not create or confer upon any individual any rights, or impose upon XYZ any rights or obligations outside of, or in addition to, any rights or obligations imposed by federal and state privacy laws, as applicable. Should there be, in a specific case, any inconsistency between this Privacy Policy and federal and state privacy laws, as applicable, this Privacy Policy shall be interpreted, in respect of that case, to give effect to, and comply with, such privacy laws.
CHAPTER 10 – REVIEW QUESTIONS

The following questions are designed to ensure that you have a complete understanding of the information presented in the assignment. They do not need to be submitted in order to receive CPE credit. They are included as an additional tool to enhance your learning experience.

We recommend that you answer each review question and then compare your response to the suggested solution before answering the final exam questions related to this assignment.

1. The most important reason for employers to be able to monitor their employees is to:

   a) ensure that employees are doing what they are being paid to do
   b) make sure employees are not stealing
   c) find reasons to fire employees
   d) to see if employees are using drugs

2. Federal law strictly prohibits employers from monitoring employee e-mail and voice mail.

   a) true
   b) false

3. Which of the following statements about an employer’s right to regulate employee appearances is most correct:

   a) in general, employers can control the appearance of men but not women as such control would constitute sexual harassment
   b) employees can only control employee appearance if they give employees uniforms
   c) employers can generally regulate employee appearance so long as it is done in a non-discriminatory manner
   d) only employees with union contracts are subject to regulation of their appearance

4. In most states, are employers allowed to discipline employees for activities that occur outside of the workplace:

   a) no, because federal law prohibits all employer involvement in non-work activities of their employees
   b) only to the extent that activity is dangerous and could result in the employee becoming sick or injured and therefore unavailable for work
   c) employers are permitted, in most states, to take adverse action against an employee for conduct outside of the workplace
   d) no, with the exception of government employees because they are on the public payroll
5. Employers may prohibit employees from using drugs or alcohol in the workplace.
   a) true
   b) false

   a) true
   b) false

7. What is the most important thing employers need to do when implementing a drug-testing program:
   a) background checks
   b) train supervisors in recognizing signs of drug use
   c) educate the employees
   d) search employee lockers and personal belongings

8. A critical component of a drug-free workplace program is providing assistance or support to employees who have problems with alcohol and other drugs.
   a) true
   b) false
CHAPTER 10 – SOLUTIONS AND SUGGESTED RESPONSES

1. **A: Correct.** First and foremost, when employees are on the clock it is imperative that employers be able to ensure that they receive what they are paying for. Employees are less likely to slack off on company time if they know they are being monitored.

   B: Incorrect. This is important but not as large an issue in most cases.

   C: Incorrect. Employers are generally not interested in looking to fire people but really want to make sure work in being performed.

   D: Incorrect. Again, this is important but is not a large issue for most employers.

   (See page 10-1 of the course material.)

2. **A: True is incorrect.** There are very few federal laws even addressing this issue.

   **B: False is correct.** There are almost no federal laws or regulations limiting the ability of employers to monitor employee e-mail and voice mail.

   (See page 10-2 of the course material.)

3. **A: Incorrect.** Employers are generally free to regulate appearance of all employees, men and women, so long as it is done in a non-discriminatory manner.

   **B: Incorrect.** Employers may generally regulate the appearance of employees and may also mandate uniforms.

   **C: Correct.** This includes dress standards and grooming standards of both men and women.

   **D: Incorrect.** Union contracts may limit employer’s rights to regulate dress. No permission from a contract is required.

   (See page 10-3 of the course material.)
4. A: Incorrect. There is no such federal prohibition with respect to private sector employees.

B: Incorrect. The laws do not differentiate between dangerous and non-dangerous activities. As a general rule, there is no such basis for prohibition off-duty conduct.

C: Correct. In most states, an employer may discipline or fire an employee for off-duty conduct such as actions that embarrass the employer.

D: Incorrect. To the contrary, government employees are entitled to greater protections because of the U.S. Constitution that limits the actions of government even in its capacity as an employer.

(See page 10-4 of the course material.)

5. A: True is correct. The Americans with Disabilities Act and other laws give employers leeway to prohibit drug and alcohol use in the workplace. Employers may therefore prohibit such conduct and discharge persons who violate such policies.

B: False is incorrect. Neither the Americans with Disabilities Act nor any other federal law prohibit such policies.

(See page 10-6 of the course material.)


B: False is correct. The Drug-Free Workplace Act of 1988 requires some federal contractors and all federal grantees to agree that they will provide drug-free workplaces as a precondition of receiving a contract or grant from a Federal agency. However, the Act does not mandate testing.

(See page 10-7 of the course material.)

7. A: Incorrect. Background checks are expensive and involve privacy issues and are therefore certainly not recommended for all applicants.

B: Incorrect. This is important but not more important than educating the rank and file employees.

C: Correct. Employees should be educated about the danger of drug use and abuse, as well as the overall program that is being implemented in the workplace.

D: Incorrect. Searches are legally problematic and, while they may be part of the program, are certainly not the first step in implementation.

(See page 10-8 of the course material.)
8. **A: True is correct.** Employee Assistance Programs (EAPs) are generally the most effective vehicle for addressing poor workplace performance that may stem from an employee's personal problems, including the abuse of alcohol or other drugs. EAPs are an excellent benefit to employees and their families and clearly demonstrate employers' respect for their staff.

B: False is incorrect. Assistance is key to the success of any program.

(See page 10-9 of the course material.)
I. Introduction and Overview

Since 1940, federal law has protected a military service member’s right to reemployment after completion of military training or service. The law was originally known as the Veterans’ Reemployment Rights (VRR). On October 13, 1994, President Bill Clinton signed the Uniformed Services Employment and Reemployment Rights Act1 (“USERRA”) – a comprehensive revision of the VRR, which became fully effective December 12, 1994. The Act provides reemployment protection and other benefits for veterans and employees who perform military service. It clarifies the rights and responsibilities of National Guard and Reserve members, as well as their civilian employers. It applies almost universally to all employers, including the federal government, regardless of the size of their business.

**USERRA Do’s and Don’ts**

- Do understand your obligations to reemploy workers who leave to perform military duty;
- Do maintain benefits for workers on leave in the military as mandated by law; and
- Don’t discriminate against workers who are members of the armed services.

A. GUARANTEED REEMPLOYMENT

Under USERRA, if a military member leaves his civilian job for service in the uniformed services, he is entitled to return to the job, with accrued seniority, provided he or she meets the law’s eligibility criteria. USERRA applies to voluntary as well as involuntary service, in peacetime as well as wartime.

USERRA represents the minimum rights of persons who serve or have served in the uniformed services. USERRA does not supersede, nullify, or diminish any federal or state law (including a local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to persons protected by USERRA or is in addition to rights and benefits accorded to those persons by USERRA. USERRA does supersede any state law (including a local law or ordinance), contract, agreement, policy, practice, or other matter that reduces, limits, or eliminates USERRA rights and benefits or that imposes additional prerequisites upon the exercise of such rights or the receipt of such benefits.

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1 The Act is contained in 38 USCA §§ 4301-4333.
B. UNIFORMED SERVICES

Under USERRA, service in the "uniformed services" gives rise to rights. These services include the Army, Navy, Marine Corps, Air Force, Coast Guard, and Public Health Service commissioned corps, as well as the reserve components of each of these services. Federal training or service in the Army National Guard and Air National Guard gives rise to rights under USERRA, but state service, pursuant to a call from the governor of the state, is not protected by the federal law, although it may be protected by state law.

C. ELIGIBILITY CRITERIA

In order to have reemployment rights following a period of service in the uniformed services, a military member must meet five eligibility criteria (discussed separately below):

- They must have held a civilian job;
- They must have informed their employer that they were leaving the job for service in the uniformed services;
- The period of service must not have exceeded five years;
- They must have been released from service under "honorable conditions"; and
- They must have reported back to your civilian employer in a timely manner or have submitted a timely application for reemployment.

II. Reemployment Rights

A. ELIGIBLE PERSONS

USERRA significantly strengthened and expanded the employment and reemployment rights of all uniformed service members that existed prior to its passage. The "uniformed services" consist of the following:

- Army, Navy, Marine Corps, Air Force, or Coast Guard;
- Army Reserve, Naval Reserve, Marine Corps Reserve, Air Force Reserve, or Coast Guard Reserve;
- Army National Guard or Air National Guard;
- Commissioned Corps of the Public Health Service; and
- Any other category of persons designated by the President in time of war or emergency.
Reemployment rights extend to persons who have been absent from a position of employment because of "service in the uniformed services." "Service in the uniformed services" means the performance of duty on a voluntary or involuntary basis in a uniformed service, including:

- Active duty;
- Active duty for training;
- Initial active duty for training;
- Inactive duty training;
- Full-time National Guard duty;
- Absence from work for an examination to determine a person’s fitness for any of the above types of duty; or
- Funeral honors duty performed by National Guard or reserve members.

1. "Brief Nonrecurrent" Positions

The law provides an exemption for pre-service positions that are "brief or nonrecurrent and that cannot reasonably be expected to continue indefinitely or for a significant period."

2. Advance Notice

The law requires all employees to provide their employers with advance notice of military service. Notice may be either written or oral. It may be provided by the employee or by an appropriate officer of the branch of the military in which the employee will be serving. However, no notice is required if:

- Military necessity prevents the giving of notice; or
- The giving of notice is otherwise impossible or unreasonable.

"Military necessity" for purposes of the notice exemption is to be defined in regulations of the Secretary of Defense. These regulations are immune from court review.

3. Disqualifying Service

When would service be disqualifying? Federal law lists four circumstances:

- Separation from the service with a dishonorable or bad conduct discharge;
- Separation from the service under other than honorable conditions. Regulations for each military branch specify when separation from the service would be considered "other than honorable";
B. DURATION OF SERVICE

The cumulative length service that causes a person's absences from a position may not exceed five years. Most types of service will be cumulatively counted in the computation of the five-year period.

1. Exceptions

Eight categories of service are exempt from the five-year limitation.

- Service required beyond five years in which to complete an initial period of obligated service. Some military specialties, such as the Navy's nuclear power program, require initial active service obligations beyond five years;

- Service from which a person, through no fault of the person, is unable to obtain a release within the five-year limit. For example, the five-year limit will not be applied to members of the Navy or Marine Corps whose obligated service dates expire while they are at sea. Nor will it be applied when service members are involuntarily retained on active duty beyond the expiration of their obligated service date. This was the experience of some persons who served in Operations Desert Shield and Storm;

- Required training for reservists and National Guard members. The two-week annual training sessions and monthly weekend drills mandated by statute for reservists and National Guard members are exempt from the five-year limitation. Also excluded are additional training requirements certified in writing by the Secretary of the service concerned to be necessary for individual professional development;

- Service under an involuntary order to, or to be retained on, active duty during domestic emergency or national security related situations;

- Service under an order to, or to remain on, active duty (other than for training) because of a war or national emergency declared by the President or Congress. This category includes service not only by persons involuntarily ordered to active duty, but also service by volunteers who receive orders to active duty;

- Active duty (other than for training) by volunteers supporting "operational missions" for which Selected Reservists have been ordered to active duty without their consent. Such operational missions involve circumstances other than war or national emergency for which, under presidential authorization, members of the Selected Reserve may be involuntarily ordered to active duty. This exemption for the five-year limitation covers persons who are called to active duty after volunteering to support operational missions. Persons involuntarily ordered to active duty for operational missions would be covered by the fourth exemption above;
Service by volunteers who are ordered to active duty in support of a "critical mission or requirement" in times other than war or national emergency and when no involuntary call up is in effect. The Secretaries of the various military branches each have authority to designate a military operation as a critical mission or requirement; and

Federal service by members of the National Guard called into action by the President to suppress an insurrection, repel an invasion, or to execute the laws of the United States.

C. REPORTING BACK TO WORK

1. **Time Limits**

Time limits for returning to work now depend, with the exception of fitness-for-service examinations, on the duration of a person’s military service.

**a. Service of 1 to 30 Days**

The person must report to his or her employer by the beginning of the first regularly scheduled workday that would fall eight hours after the end of the calendar day. For example, an employer cannot require a service member who returns home at 10:00 p.m. to report to work at 12:30 a.m. that night. But the employer can require the employee to report for the 8:00 a.m. shift the next morning. If, due to no fault of the employee, timely reporting back to work would be impossible or unreasonable, the employee must report back to work as soon as possible.

The time limit for reporting back to work for a person who is absent from work in order to take a fitness-for-service examination is the same as the one above for persons who are absent for 1 to 30 days. This period will apply regardless of the length of the person’s absence.

**b. Service of 31 to 180 Days**

An application for reemployment must be submitted no later than 14 days after completion of a person’s service. If submission of a timely application is impossible or unreasonable through no fault of the person, the application must be submitted as soon as possible. If the 14th day falls on a day when the offices are not open, or there is otherwise no one available to accept the application, the time extends to the next business day.

**c. Service of 181 or More Days**

An application for reemployment must be submitted no later than 90 days after completion of a person’s military service. If the 90th day falls on a day when the offices are not open, or there is otherwise no one available to accept the application, the time extends to the next business day.
2. Disability Incurred or Aggravated

The reporting or application deadlines are extended for up to two years for persons who are hospitalized or convalescing because of a disability incurred or aggravated during the period of military service. The two-year period will be extended by the minimum time required to accommodate a circumstance beyond an individual’s control that would make reporting within the two-year period impossible or unreasonable.

3. Unexcused Delay

Are a person’s reemployment rights automatically forfeited if the person fails to report to work or to apply for reemployment within the required time limits? No. But the person will then be subject to the employer’s rules governing unexcused absences.

4. Documentation Upon Return

An employer has the right to request that a person who is absent for a period of service of 31 days or more provide documentation showing that:

- The person’s application for reemployment is timely;
- The person has not exceeded the five-year service limitation; and
- The person’s separation from service was other than disqualifying.

If a person does not provide satisfactory documentation because it is not readily available or does not exist, the employer still must promptly reemploy the person. However, if, after reemploying the person, documentation becomes available that shows one or more of the reemployment requirements were not met, the employer may terminate the person. The termination would be effective as of that moment. It would not operate retroactively.

If a person has been absent for military service for 91 or more days, an employer may delay making retroactive pension contributions until the person submits satisfactory documentation. However, contributions will still have to be made for persons who are absent for 90 or fewer days.

D. PLACING ELIGIBLE PERSONS IN A JOB

Except with respect to persons who have a disability incurred in or aggravated by military service, the position into which a person is reinstated is based on the length of a person’s military service.
1. 1 to 90 Days

A person whose military service lasted 1 to 90 days must be "promptly reemployed" in the following order of priority:

- (1) In the job the person would have held had the person remained continuously employed, so long as the person is qualified for the job or can become qualified after reasonable efforts by the employer to qualify the person; or, (2) in the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, only if the person is not qualified to perform the duties of the position referred to in subparagraph (1) after reasonable efforts by the employer to qualify the person;

- If the employee cannot become qualified for either position described above (other than for a disability incurred in or aggravated by the military service) even after reasonable employer efforts, the person is to be reemployed in a position that is the nearest approximation to the positions described above (in that order) which the person is able to perform, with full seniority.

With respect to the first two positions, employers do not have the option of offering other jobs of equivalent seniority, status, and pay.

2. 91 or More Days

The law requires employers to promptly reemploy persons returning from military service of 91 or more days in the following order of priority:

- (1) In the job the person would have held had the person remained continuously employed, or a position of like seniority status and pay, so long as the person is qualified for the job or can become qualified after reasonable efforts by the employer to qualify the person; or, (2) in the position of employment in which the person was employed on the date of the commencement of the service in the uniformed services, or a position of like seniority, status, and pay the duties of which the person is qualified to perform, only if the person is not qualified to perform the duties of the position referred to in subparagraph (1) after reasonable efforts by the employer to qualify the person; or

- If the employee cannot become qualified for the position either in (1) or (2) above, in any other position of lesser status and pay, but that most nearly approximates the above positions (in that order) that the employee is qualified to perform with full seniority.

3. "Escalator" Position

The reemployment position with the highest priority in the reemployment schemes reflects the "escalator" principle that has been a key concept in federal veterans' reemployment legislation. The escalator principle requires that each returning service member actually step back onto the seniority escalator at the point the person would have occupied if the person had remained continuously employed.
The position may not necessarily be the same job the person previously held. For instance, if the person would have been promoted with reasonable certainty had the person not been absent, the person would be entitled to that promotion upon reinstatement. On the other hand, the position could be at a lower level than the one previously held, it could be a different job, or it could conceivably be in layoff status.

4. Qualification Efforts

Employers must make reasonable efforts to qualify returning service members who are not qualified for reemployment positions that they otherwise would be entitled to hold for reasons other than a disability incurred or aggravated by military service.

Employers must provide refresher training, and any training necessary to update a returning employee’s skills in a situation where the employee is no longer qualified due to technological advances. Training will not be required if it is an undue hardship for the employer, as discussed below.

If reasonable efforts fail to qualify a person for the first and second reemployment positions in the above schemes, the person must be placed in a position of equivalent or nearest approximation and pay that the person is qualified to perform (the third reemployment position in the above schemes).

5. "Prompt" Reemployment

The law specifies that returning service members be "promptly reemployed." What is prompt will depend on the circumstances of each individual case. Reinstatement after weekend National Guard duty will generally be the next regularly scheduled working day. On the other hand, reinstatement following five years on active duty might require giving notice to an incumbent employee who has occupied the service member’s position and who might possibly have to vacate that position.

6. Reemployment of Persons with Disabilities

Special rules govern reemployment of persons with disabilities incurred or aggravated while in military service. The following three-part reemployment scheme is required for persons with disabilities incurred or aggravated while in military service:

- The employer must make reasonable efforts to accommodate a person’s disability so that the person can perform the position that person would have held if the person had remained continuously employed;
- If, despite reasonable accommodation efforts, the person is not qualified for the position described above due to his or her disability, the person must be employed in a position of equivalent seniority, status, and pay, so long as the employee is qualified to perform the duties of the position or could become qualified to perform them with reasonable efforts by the employer; or
- If the person does not become qualified for the position in either of the two above scenarios, the person must be employed in a position that, consistent with the circumstances of that person’s case, most nearly approximates the position in the second scenario in terms of seniority, status, and pay.

This provision covers all employers, regardless of size.
7. **Conflicting Reemployment Claims**

If two or more persons are entitled to reemployment in the same position, the following reemployment scheme applies:

- The person who first left the position has the superior right to it; or
- The person without the superior right is entitled to employment with full seniority in any other position that provides similar status and pay in the order of priority under the reemployment scheme otherwise applicable to such person.

8. **Changed Circumstances**

Reemployment of a person is excused if an employer’s circumstances have changed so much that reemployment of the person would be impossible or unreasonable. A reduction-in-force that would have included the person would be an example.

9. **Undue Hardship**

Employers are excused from making efforts to qualify returning service members or from accommodating individuals with service-connected disabilities when doing so would be of such difficulty or expense as to cause "undue hardship."

**E. RIGHTS OF REEMPLOYED PERSONS**

1. **Seniority Rights**

Reemployed service members are entitled to the seniority and all rights and benefits based on seniority that they would have attained with reasonable certainty had they remained continuously employed. A right or benefit is seniority-based if it is determined by or accrues with length of service. 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.

2. **Rights Not Based on Seniority**

Departing service members must be treated as if they are on a leave of absence. Consequently, while they are away they must be entitled to participate in any rights and benefits not based on seniority that are available to employees on nonmilitary leaves of absence, whether paid or unpaid. If there is a variation among different types of nonmilitary leaves of absence, the most favorable treatment must be accorded the service member.

The returning employees shall be entitled not only to nonseniority rights and benefits available at the time they left for military service, but also those that became effective during their service.
3. Forfeiture of Rights

If, prior to leaving for military service, an employee knowingly provides clear written notice of his or her intent not to return to work after military service, the employee waives entitlement to leave-of-absence rights and benefits not based on seniority.

At the time of providing the notice, the employee must be aware of the specific rights and benefits to be lost. If the employee lacks that awareness, or is otherwise coerced, the waiver will be ineffective.

Notices of intent not to return can waive only leave-of-absence rights and benefits. They cannot surrender other rights and benefits that a person would be entitled to under the law, particularly reemployment rights.

4. Funding of Benefits

Service members may be required to pay the employee cost, if any, of any funded benefit to the extent that other employees on leave of absence would be required to pay.

5. Pension/Retirement Plans

Pension plans, which are tied to seniority, are given separate, detailed treatment under the law. The law provides that:

- A reemployed person must be treated as not having incurred a break in service with the employer maintaining a pension plan;
- Military service must be considered service with an employer for vesting and benefit accrual purposes;
- The employer is liable for funding any resulting obligation; and
- The reemployed person is entitled to any accrued benefits from employee contributions only to the extent that the person repays the employee contributions.

a. Covered Plan

A "pension plan" that must comply with the requirements of the reemployment law would be any plan that provides retirement income to employees until the termination of employment or later. Defined benefit plans, defined contribution plans, and profit sharing plans that are retirement plans are covered.

b. Multi-Employer Plans

In a multi-employer defined contribution pension plan, the sponsor maintaining the plan may allocate among the participating employers the liability of the plan for pension benefits accrued by persons who are absent for military service. If no cost-sharing arrangement is provided, the full liability to make the retroactive contributions to the plan will be allocated to the last employer employing the person before the period of military service or, if that employer is no longer functional, to the overall plan.
Within 30 days after a person is reemployed, an employer who participates in a multi-employer plan must provide written notice to the plan administrator of the person’s reemployment.

c. Employee Contribution Repayment Period

Repayment of employee contributions can be made over three times the period of military service but no longer than five years.

d. Calculation of Contributions

For purposes of determining an employer’s liability or an employee’s contributions under a pension benefit plan, the employee’s compensation during the period of his or her military service will be based on the rate of pay the employee would have received from the employer except for the absence during the period of service.

If the employee’s compensation was not based on a fixed rate, the determination of such rate is not reasonably certain, on the basis of the employee’s average rate of compensation during the 12-month period immediately preceding such period (or, if shorter, the period of employment immediately preceding such period).

6. Vacation Pay

Service members must, at their request, be permitted to use any vacation that had accrued before the beginning of their military service instead of unpaid leave. However, it continues to be the law that service members cannot be forced to use vacation time for military service.

7. Health Benefits

The law provides for health benefit continuation for persons who are absent from work to serve in the military, even when their employers are not covered by the Consolidated Omnibus Budget Reconciliation Act (COBRA) of 1986. The law amends the Employee Retirement Income Security Act, the Internal Revenue Code and the Public Health Service Act to provide continuation of group health coverage that otherwise might be terminated. Employers with fewer than 20 employees are exempt for COBRA.

If a person’s health plan coverage would terminate because of an absence due to military service, the person may elect to continue the health plan coverage for up to 18 months after the absence begins or for the period of service (plus the time allowed to apply for reemployment), whichever period is shorter. The person cannot be required to pay more than 102 percent of the full premium for the coverage. If the military service was for 30 or fewer days, the person cannot be required to pay more than the normal employee share of any premium.
a. Exclusions/waiting periods

A waiting period or exclusion cannot be imposed upon reinstatement if health coverage would have been provided to a person had the person not been absent for military service. However, an exception applies to disabilities determined by the Secretary of Veterans’ Affairs (VA) to be service-connected.

b. Multi-employer

Liability for employer contributions and benefits under multi-employer plans is to be allocated by the plan sponsor in such manner as the plan sponsor provides. If the sponsor makes no provision for allocation, liability is to be allocated to the last employer employing the person before the person’s military service or, if that employer is no longer functional, to the plan.

F. PROTECTION FROM DISCHARGE

Under USERRA, a reemployed employee may not be discharged without cause as follows:

- For one year after the date of reemployment if the person’s period of military service was for more than six months (181 days or more).
- For six months after the date of reemployment if the person’s period of military service was for 31 to 180 days.

Persons who serve for 30 or fewer days are not protected from discharge without cause. However, they are protected from discrimination because of military service or obligation.

G. PROHIBITION AGAINST DISCRIMINATION OR RETALIATION

Employment discrimination because of past, current, or future military obligations is prohibited. The ban is broad, extending to most areas of employment, including:

- Hiring;
- Promotion;
- Reemployment;
- Termination; and
- Benefits.
1. **Persons Protected**

The law protects from discrimination past members, current members, and persons who apply to be a member of any of the branches of the uniformed services. Under prior law, only Reservists and National Guard members were protected from discrimination. Under USERRA, persons with past, current, or future obligations in all branches of the military are also protected.

2. **Standard / Burden of Proof**

If an individual’s past, present, or future connection with the service is a motivating factor in an employer’s adverse employment action against that individual, the employer has committed a violation, unless the employer can prove that it would have taken the same action regardless of the individual’s connection with the service. The burden of proof is on the employer once a *prima facie* case is established.

The enacted law clarifies that liability is possible when service connection is just one of an employer’s reasons for the action. To avoid liability, the employer must prove that a reason other than service connection would have been sufficient to justify its action.

Both the standard and burden of proof now set out in the law applies to all cases, regardless of the date of the cause of action, including discrimination cases arising under the predecessor (“VRR”) law.

3. **Reprisals**

Employers are prohibited from retaliating against anyone:

- Who files a complaint under the law;
- Who testifies, assists or otherwise participates in an investigation or proceeding under the law; or
- Who exercises any right provided under the law.

This protection applies whether or not the person has performed military service.

**H. HOW THE LAW IS ENFORCED**

1. **Department of Labor Regulations**

The Secretary of Labor is empowered to issue regulations implementing the statute. Previously, the Secretary lacked such authority. However, certain publications issued by the U.S. Department of Labor had been accorded "a measure of weight" by the courts.
2. Veterans’ Employment and Training Service

Reemployment assistance will continue to be provided by the Veterans’ Employment and Training Service (VETS) of the Department of Labor. VETS investigates complaints and attempts to resolve them. Filing of complaints with VETS is optional.

3. Access to Documents

The law gives VETS a right of access to examine and duplicate employer and employee documents that it considers relevant to an investigation. VETS also has the right of reasonable access to interview persons with information relevant to the investigation.

4. Subpoenas

The law authorizes VETS to subpoena the attendance and testimony of witnesses and the production of documents relating to any matter under investigation.

5. Government-Assisted Court Actions

Persons whose complaints are not successfully resolved by VETS may request that their complaints be submitted to the Attorney General for possible court action. If the Attorney General is satisfied that a complaint is meritorious, the Attorney General may file a court action on the complainant’s behalf.

6. Private Court Actions

Individuals continue to have the option to privately file court actions. They may do so if they have chosen not to file a complaint with VETS, have chosen not to request that VETS refer their complaint to the Attorney General, or have been refused representation by the Attorney General.

7. Double Damages

Award of back pay or lost benefits may be doubled in cases where violations of the law are found to be "willful." "Willful" is not defined in the law, but the law’s legislative history indicates the same definition that the U.S. Supreme Court has adopted for cases under the Age Discrimination in Employment Act should be used. Under that definition, a violation is willful if the employer’s conduct was knowingly or recklessly in disregard of the law.

8. Fees

The law, at the court’s discretion, allows for awards of attorney fees, expert witness fees, and other litigation expenses to successful plaintiffs who retain private counsel. Also, the law bans charging of court fees or costs against anyone who brings suit.
CHAPTER 11 – REVIEW QUESTIONS

The following questions are designed to ensure that you have a complete understanding of the information presented in the assignment. They do not need to be submitted in order to receive CPE credit. They are included as an additional tool to enhance your learning experience.

We recommend that you answer each review question and then compare your response to the suggested solution before answering the final exam questions related to this assignment.

1. The Uniformed Services Employment and Reemployment Rights Act applies to which of the following employers:
   a) the federal government
   b) state and local governments
   c) all private employers
   d) all of the above

2. Under most circumstances, persons who left a civilian job for military service are only eligible for re-employment if they return to their prior job within what period of time:
   a) one year
   b) three years
   c) five years
   d) seven years

3. To be protected by reemployment rights under USERRA, military service personnel must give their civilian employers advance notice of their leave of absence.
   a) true
   b) false

4. Employers have no right to demand documentation of eligibility from a military service person demanding reemployment.
   a) true
   b) false

5. Are civilian employers required to provide reemployment for service personnel who were disabled as a result of their military service:
   a) to the extent the individual cannot perform their prior job due to the military-related disability, they are not entitled to reemployment but will receive military benefits to supplement their income
   b) not unless the employer has at least 50 employees
   c) yes, but only to the extent the employee can perform their old job with or without reasonable accommodation
   d) yes, and the employer must provide reasonable accommodation to assist the individual in doing either their original job or an equivalent position, where possible
6. Can workers who served in the military for one year or more and who were re-employed under the provisions of USERRA be terminated:

   a) once reemployed, these workers are at-will to the same extent as any other employee and can therefore be discharged at any time
   b) they can only be discharged for cause during the first 90 days of their reemployment
   c) they can only be discharged for cause during the first year of their reemployment
   d) they can never be discharged, whether with or without cause

7. The USERRA prohibits discrimination in employment against persons based on their membership in the military.

   a) true
   b) false
CHAPTER 11 – SOLUTIONS AND SUGGESTED RESPONSES

1. A: Incorrect. While the Act governs the federal government in its capacity as an employer, this is not the best answer.

B: Incorrect. While state and local governments are covered by the Act, this is not the best answer.

C: Incorrect. All private sector employers are subject to the Act, but this is not the best answer.

D: Correct. This is a very broad law and applies to virtually every organization acting in the capacity as employer.

(See page 11-1 of the course material.)

2. A: Incorrect. Service personnel actually receive more time in which they are eligible for re-employment.

B: Incorrect. The time period is actually longer.

C: Correct. Assuming the other requirements of the statute are met (such as an honorable discharge), military personnel have five years within which to return to their prior civilian positions.

D: Incorrect. The actual period is only five years.

(See page 11-2 of the course material.)

3. A: True is correct. Unless an exception applies, USERRA requires military personnel to provide their civilian employers with advance notice of military service. Notice may be either written or oral. It may be provided by the employee or by an appropriate officer of the branch of the military in which the employee will be serving.

B: False is incorrect. Advanced notice is mandated unless an exception applies, i.e. military necessity or where the provision of notice is either impossible or unreasonable.

(See page 11-3 of the course material.)
4. A: True is incorrect. Employers have a right to certain documentation satisfying eligibility for reemployment under USERRA.

**B: False is correct.** An employer has the right to request that a person who is absent for a period of service of 31 days or more provide documentation showing that: (1) the person’s application for reemployment is timely, (2) the person has not exceeded the five-year service limitation; and (3) the person’s separation from service was other than disqualifying. If a person does not provide satisfactory documentation because it is not readily available or does not exist, the employer still must promptly reemploy the person. However, if, after reemploying the person, documentation becomes available that shows one or more of the reemployment requirements were not met, the employer may terminate the person. The termination would be effective as of that moment. It would not operate retroactively.

(See page 11-6 of the course material.)

5. A: Incorrect. Disabled veterans are entitled to re-employment and employers are obligated to provide reasonable accommodation to allow them to perform that or another job.

B: Incorrect. The re-employment provisions of federal law, including those provisions that mandate reasonable accommodation of disabled personnel, apply to all employers regardless of size.

C: Incorrect. If the employee cannot perform their old job with or without reasonable accommodation, they are entitled to a different position.

**D: Correct.** If the individual cannot perform their old or an equivalent position, they are entitled to be placed in a different position that they can perform.

(See page 11-8 of the course material.)

6. A: Incorrect. Depending on the length of their military service, re-employed veterans are protected for a period of time against discharge, except where it is for cause.

B: Incorrect. The period of time during which they are protected from being discharged is actually much longer.

**C: Correct.** There is a sliding scale of time during which re-employed veterans can be discharged without cause. For those that served at least one year, that period of time is one year.

D: Incorrect. They can be discharged so long as there is sufficient cause at any time during their re-employment. Federal law does not provide lifetime employment.

(See page 11-11 of the course material.)
7. **A: True is correct.** Employment discrimination because of past, current, or future military obligations is prohibited under the USERRA. The ban is broad, extending to most areas of employment, including hiring, promotion, reemployment, termination, and benefits.

   B: False is incorrect. The law provides protection from discrimination in all aspects of employment.

   (See page 11-12 of the course material.)
Chapter 12: Immigration Reform and Control Act

I. Introduction and Overview

The Immigration Reform and Control Act of 1986 (“IRCA”) makes it unlawful for an employer to hire any person who is not legally authorized to work in the United States, and requires employers to verify the employment eligibility of all new employees.

IRCA also prohibits discrimination in hiring and discharge based on national origin (as does Title VII) and on citizenship status. IRCA’s anti-discrimination provisions are intended to prevent employers from attempting to comply with the Act's work authorization requirements by discriminating against foreign-looking or foreign-sounding job applicants.

<table>
<thead>
<tr>
<th>IRCA Do’s and Don’ts</th>
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<tbody>
<tr>
<td>✔ Do verify eligibility of all new hires by completing a Form I-9;</td>
</tr>
<tr>
<td>✔ Don’t hire anyone not legally eligible to work in the United States; and</td>
</tr>
<tr>
<td>✔ Don’t discriminate in employment based on a person’s national origin or citizenship.</td>
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Under IRCA, employers may hire only persons who may legally work in the U.S., i.e., citizens and nationals of the U.S. and aliens authorized to work in the U.S. The employer must verify the identity and employment eligibility of anyone to be hired, which includes completing the Employment Eligibility Verification Form (I-9). Employers must keep each I-9 on file for at least three years, or one year after employment ends, whichever is longer.

Among its other significant provisions:

- IRCA's anti-discrimination provisions apply to smaller employers than those covered by EEOC-enforced laws, including Title VII of the Civil Rights Act of 1964;

- IRCA’s national origin discrimination provisions apply to employers with between 4 and 14 employees (who would not be covered by Title VII of the Civil Rights Act of 1964);

- IRCA's citizenship discrimination provisions apply to all employers with at least 4 employees; and

- IRCA is enforced by the U.S. Department of Justice.

IRCA was passed to control unauthorized immigration to the United States. Employer sanctions, increased appropriations for enforcement, and amnesty provisions of IRCA are the main ways of accomplishing its objective. The employer sanctions provision designates penalties for employers who hire aliens not authorized to work in the United States.
Under the amnesty provision, illegal aliens who lived continuously in the United States since before January 1, 1982, could have applied to the Immigration and Naturalization Service (INS) for legal resident status by May 4, 1988, the application cutoff date.

II. IRCA Anti-Discrimination Provisions

A. PURPOSE OF LAW

IRCA was enacted to control unauthorized immigration to the United States. Under IRCA, employers may be sanctioned by the Immigration and Naturalization Service (INS) for knowingly hiring non-U.S. citizens who are not authorized to work in the United States. To address the fear that employers would overreact to the threat of sanctions and discriminate against individuals who sounded or appeared "foreign," Congress also passed the Act's anti-discrimination provisions.

B. CITIZENSHIP STATUS DISCRIMINATION

Employers with four or more employees are prohibited from discriminating on the basis of citizenship status, which occurs when adverse employment decisions are made based upon an individual's real or perceived citizenship or immigration status. Examples of citizenship status discrimination include employers who hire only U.S. citizens or U.S. citizens and green card holders, employers who refuse to hire asylees or refugees because their employment authorization documents contain expiration dates, and employers who prefer to employ unauthorized workers or temporary visa holders rather than U.S. citizens and other workers with employment authorization.

C. DOCUMENT ABUSE

Employers with four or more employees are prohibited from committing document abuse. Document abuse occurs when an employer requests an employee or applicant to produce a specific document, or more or different documents than are required, to establish employment eligibility or rejects valid documents that reasonably appear genuine on their face.

Employers must accept any of the documents or combination of documents listed on the back of the INS Form I-9 to establish identity and employment eligibility. Examples of document abuse include requiring immigrants to present a specific document, such as a "green card" or any INS-ISSUED document, upon hire to establish employment eligibility, and refusing to accept tendered documents that appear reasonable on their face and that relate to the individual. U.S. citizens and all immigrants with employment authorization are protected from document abuse.

D. NATIONAL ORIGIN DISCRIMINATION

The anti-discrimination provisions also prohibit small employers (e.g., those with four to fourteen employees) from committing national origin discrimination against any U.S. citizen or individual with employment authorization. Larger employers are already covered by Title VII of the Civil Rights Act of 1964, which is enforced by the Equal Employment Opportunity Commission. In addition, employers may not retaliate against workers who file a complaint, cooperate in an investigation or testify at a hearing.
III. Employer Requirements

A. FORM I-9

Employers must verify the eligibility of each employee hired after November 1986 to work in the United States by completing INS Form 1-9. An employer must examine documents that establish the employee's identity and eligibility to work in the United States before completing this form. This examination should be made subsequent to the hiring decision to avoid violation of IRCA’s anti-discrimination provisions.

1. Acceptable Documents

IRCA and the INS regulations are clear about what documents are acceptable to fulfill these requirements. The documents that INS will accept to establish identity and employment eligibility are divided into three groups—those that establish both identity and eligibility, those that establish identity, and those that establish eligibility for employment. Documents acceptable for establishing both identity and employment eligibility were reduced in number in September 1997 and now include:

- U.S. passport (expired or unexpired);
- Alien Registration Receipt Card or Permanent Resident Card, Form I-551;
- An unexpired foreign passport that contains a temporary I-551 stamp; or
- An unexpired Employment Authorization Document that contains a photograph, Form I-766, Form I-688, Form I-688A, or Form I-688B.

In the case of a nonimmigrant alien authorized to work for a specific employer incident to status, an unexpired foreign passport with an Arrival-Departure Record, Form I-94, bearing the same name as the passport and containing an endorsement of the alien’s nonimmigrant status, so long as the period of endorsement has not yet expired and the proposed employment is not in conflict with any restrictions or limitations identified on the Form I-94.

2. Documents for Individuals 16 and Older

Documents acceptable for establishing identity for individuals 16 years of age or older are:

- A state-issued driver’s license or identification card containing a photograph, or identifying information shall be included such as name, date of birth, sex, height, color of eyes, and address;
- A school identification card with photograph;
- A voter registration card;
- A U.S. military card or draft record;
- An identification card issued by federal, state, or local government agencies or entities;
A military dependent identification;
Native American tribal documents,
A driver's license issued by a Canadian Government authority; or
United States Coast Guard Merchant Mariner Card.

3. Documents for Persons Under 16

Persons under age 16 who are unable to produce any of these documents for identification may present any of the following to establish their identity:

- A school record or report card;
- A clinic doctor or hospital record; or
- A day care or nursery school record.

Minors under the age of 18 who are unable to produce one of the identity documents listed above are exempt from producing one of the enumerated identity documents if:

- The minor's parent or legal guardian completes on the Form I-9 Section 1 “Employee Information and Verification” and in the space for the minor's signature, the parent or legal guardian writes the words, “minor under age 18”;
- The minor's parent or legal guardian completes on the Form I-9 the “Preparer/Translator certification”; or
- The employer or the recruiter writes in Section 2- “Employer Review and Verification” under List B in the space after the words “Document Identification #” the words, “minor under age 18.”

4. Disabled Persons

Individuals with disabilities, who are unable to produce one of the identity documents listed above who are being placed into employment by a nonprofit organization, association or as part of a rehabilitation program, may follow the procedures for establishing identity provided in this section for minors under the age of 18, substituting where appropriate, the term ”special placement” for “minor under age 18”, and permitting, in addition to a parent or legal guardian, a representative from the nonprofit organization, association or rehabilitation program placing the individual into a position of employment, to fill out and sign in the appropriate section, the Form I-9.

The term individual with a disability means any person who:

- Has a physical or mental impairment which substantially limits one or more of such person's major life activities;
- Has a record of such impairment; or
- Is regarded as having such impairment.
The following are acceptable documents to establish employment authorization only:

- A social security number card other than one which has printed on its face “not valid for employment purposes”;
- A Certification of Birth Abroad issued by the Department of State, Form FS-545;
- A Certification of Birth Abroad issued by the Department of State, Form DS-1350;
- An original or certified copy of a birth certificate issued by a State, county, municipal authority or outlying possession of the United States bearing an official seal;
- Native American tribal document;
- United States Citizen Identification Card, INS Form I-197;
- Identification card for use of resident citizen in the United States, INS Form I-179; or
- An unexpired employment authorization document issued by the Immigration and Naturalization Service.

Employers are required to complete the second section of the I-9 form and must accept the proffered documents if they "reasonably appear to be genuine on their face" and relate to the individual. Remember, it is unlawful for an employer to practice "document abuse" by requiring prospective employees to present specific employment documents.

B. TAX DOCUMENTS

For purposes of completing tax documentation, employers may ask new employees for their social security cards. To avoid allegations of document abuse, the employer should do this separate and apart from the I-9 process.

Caution!

To avoid potential charges of discrimination, it is recommended that employers not initiate the I-9 process until after the decision to hire has been made and communicated to the employee. Applicants should not be asked where they were born or whether they are legally entitled to work in the United States.
C. INQUIRIES SUBSEQUENT TO EMPLOYMENT

Subsequent to employment, an employer who has reason to believe that a fraudulent document has been presented, perhaps as a result of an INS investigation, should not terminate the employee without first discussing the allegations with him or her. Depending upon the circumstances, the employee can be given an opportunity to provide other documents or additional information for employment verification purposes. If the I-9 form is a photocopy of an original, be sure to copy both sides of the form to provide to newly hired employees and the separate instruction page. It is good practice to retain copies of employees' eligibility documents. But if this is done, copies should be made of the documents of all employees in order to avoid charges of discrimination.

IV. Enforcement and Penalties

The Office of Special Counsel for Immigration Related Unfair Employment Practices enforces the statute prohibiting employment discrimination under IRCA, and has the responsibility for handling complaints against all employers alleging citizenship status discrimination, document abuse, retaliation and, if the employer has four to 14 employees, national origin discrimination. The Equal Employment Opportunity Commission handles national origin discrimination complaints against employers with fifteen or more employees.

Back pay (for lost wages), reinstatement or reinstatement, etc., may be awarded to victims of unlawful discrimination. Penalties for discrimination range between $275 and $2,200 for each victim for the first offense, $2,200 to $5,500 for the second offense, and $3,300 to $11,000 for the third offense. Fines for document abuse range from $110 to $1,100 for each victim.

U.S. citizens and work authorized immigrants who are victims of workplace discrimination based upon immigration status, national origin discrimination or document abuse may file complaints with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) at the U.S. Department of Justice.
CHAPTER 12 – REVIEW QUESTIONS

The following questions are designed to ensure that you have a complete understanding of the information presented in the assignment. They do not need to be submitted in order to receive CPE credit. They are included as an additional tool to enhance your learning experience.

We recommend that you answer each review question and then compare your response to the suggested solution before answering the final exam questions related to this assignment.

1. The Immigration Reform and Control Act does not contain any provisions prohibiting discrimination in employment on the basis of national origin.
   a) true
   b) false

2. What was Congress’s main goal in passing the Immigration Reform and Control Act:
   a) to keep foreign nationals from working in the United States
   b) to preserve jobs for American citizens
   c) to limit employment of illegal immigrants
   d) all of the above

3. Which of the following responsibilities is placed on employers by the Immigration Reform and Control Act:
   a) conducting background checks on all applicants prior to being hired
   b) examining certain documents prior to interviewing applicants
   c) completing a Form I-9 for all employees
   d) registering all employees with the Department of Homeland Security

4. Subsequent to employment, employers have no right to inquire into the legal status of a worker.
   a) true
   b) false
CHAPTER 12 – SOLUTIONS AND SUGGESTED RESPONSES

1. A: True is incorrect. The Act does contain non-discrimination provisions.

   B: False is correct. IRCA prohibits discrimination in hiring and discharge based on national origin (as does Title VII) and on citizenship status. IRCA's anti-discrimination provisions are intended to prevent employers from attempting to comply with the Act's work authorization requirements by discriminating against foreign-looking or foreign-sounding job applicants.

   (See page 12-1 of the course material.)

2. A: Incorrect. The Act was concerned only about undocumented workers. Indeed, it prohibits discrimination on the basis of national origin.

   B: Incorrect. The Act protects people from discrimination on the basis of national origin. It is aimed only at illegal aliens.

   C: Correct. The act is designed to limit employment of undocumented aliens by placing the burden on employers.

   D: Incorrect. Because neither A nor B are true, D cannot be correct.

   (See page 12-2 of the course material.)

3. A: Incorrect. The Act requires only verification of a person’s eligibility to work in the United States; it does not require any further investigation.

   B: Incorrect. The process of examining documents is not required until the individual has been offered employment.

   C: Correct. The hallmark of the Act is the requirement that employers verify an individual’s eligibility to work in the United States and document that eligibility on a Form I-9.

   D: Incorrect. There is no such registration requirement.

   (See page 12-3 of the course material.)
4. A: True is incorrect. Employers are entitled to make inquiries after employment, subject to limitations.

**B: False is correct.** Subsequent to employment, an employer who has reason to believe that a fraudulent document has been presented, perhaps as a result of an INS investigation, should not terminate the employee without first discussing the allegations with him or her. Depending upon the circumstances, the employee can be given an opportunity to provide other documents or additional information for employment verification purposes.

(See page 12-6 of the course material.)
Instructions

Read all instructions carefully before completing this form.

Anti-Discrimination Notice. It is illegal to discriminate against any individual (other than an alien not authorized to work in the United States) in hiring, discharging, or recruiting or referring for a fee because of that individual's national origin or citizenship status. It is illegal to discriminate against work-authorized individuals. Employers CANNOT specify which document(s) they will accept from an employee. The refusal to hire an individual because the documents presented have a future expiration date may also constitute illegal discrimination. For more information, call the Office of Special Counsel for Immigration Related Unfair Employment Practices at 1-800-255-8155.

What is the Purpose of This Form?
The purpose of this form is to document that each new employee (both citizen and noncitizen) hired after November 6, 1986, is authorized to work in the United States.

When Should Form I-9 Be Used?
All employees (citizens and noncitizens) hired after November 6, 1986, and working in the United States must complete Form I-9.

Filling Out Form I-9

Section 1, Employee
This part of the form must be completed no later than the time of hire, which is the actual beginning of employment. Providing the Social Security Number is voluntary, except for employees hired by employers participating in the USCIS Electronic Employment Eligibility Verification Program (E-Verify). The employer is responsible for ensuring that Section 1 is timely and properly completed.

Noncitizen nationals of the United States are persons born in American Samoa, certain former citizens of the former Trust Territory of the Pacific Islands, and certain children of noncitizen nationals born abroad.

Employers should note the work authorization expiration date (if any) shown in Section 1. For employees who indicate an employment authorization expiration date in Section 1, employers are required to reverify employment authorization for employment on or before the date shown. Note that some employees may leave the expiration date blank if they are aliens whose work authorization does not expire (e.g., asylees, refugees, certain citizens of the Federated States of Micronesia or the Republic of the Marshall Islands). For such employees, reverification does not apply unless they choose to present in Section 2 evidence of employment authorization that contains an expiration date (e.g., Employment Authorization Document (Form I-766)).

Preparer/Translator Certification
The Preparer/Translator Certification must be completed if Section 1 is prepared by a person other than the employee. A preparer/translator may be used only when the employee is unable to complete Section 1 on his or her own. However, the employee must still sign Section 1 personally.

Section 2, Employer
For the purpose of completing this form, the term "employer" means all employers including those recruiters and referrers for a fee who are agricultural associations, agricultural employers, or farm labor contractors. Employers must complete Section 2 by examining evidence of identity and employment authorization within three business days of the date employment begins. However, if an employer hires an individual for less than three business days, Section 2 must be completed at the time employment begins. Employers cannot specify which document(s) listed on the last page of Form I-9 employees present to establish identity and employment authorization. Employees may present any List A document OR a combination of a List B and a List C document.

If an employee is unable to present a required document (or documents), the employee must present an acceptable receipt in lieu of a document listed on the last page of this form. Receipts showing that a person has applied for an initial grant of employment authorization, or for renewal of employment authorization, are not acceptable. Employees must present receipts within three business days of the date employment begins and must present valid replacement documents within 90 days or other specified time.

Employers must record in Section 2:

1. Document title;
2. Issuing authority;
3. Document number;
4. Expiration date, if any; and
5. The date employment begins.

Employers must sign and date the certification in Section 2. Employees must present original documents. Employers may, but are not required to, photocopy the document(s) presented. If photocopies are made, they must be made for all new hires. Photocopies may only be used for the verification process and must be retained with Form I-9. Employers are still responsible for completing and retaining Form I-9.
For more detailed information, you may refer to the USCIS Handbook for Employers (Form M-274). You may obtain the handbook using the contact information found under the header “USCIS Forms and Information.”

Section 3, Updating and Reverification

Employers must complete Section 3 when updating and/or reverifying Form I-9. Employers must reverify employment authorization of their employees on or before the work authorization expiration date recorded in Section 1 (if any). Employers CANNOT specify which document(s) they will accept from an employee.

A. If an employee's name has changed at the time this form is being updated/reverified, complete Block A.

B. If an employee is rehired within three years of the date this form was originally completed and the employee is still authorized to be employed on the same basis as previously indicated on this form (updating), complete Block B and the signature block.

C. If an employee is rehired within three years of the date this form was originally completed and the employee’s work authorization has expired or if a current employee’s work authorization is about to expire (reverification), complete Block B; and:
   1. Examine any document that reflects the employee is authorized to work in the United States (see List A or C);
   2. Record the document title, document number, and expiration date (if any) in Block C; and
   3. Complete the signature block.

Note that for reverification purposes, employers have the option of completing a new Form I-9 instead of completing Section 3.

What Is the Filing Fee?

There is no associated filing fee for completing Form I-9. This form is not filed with USCIS or any government agency. Form I-9 must be retained by the employer and made available for inspection by U.S. Government officials as specified in the Privacy Act Notice below.

USCIS Forms and Information

To order USCIS forms, you can download them from our website at www.uscis.gov/forms or call our toll-free number at 1-800-870-3676. You can obtain information about Form I-9 from our website at www.uscis.gov or by calling 1-888-464-4218.

Information about E-Verify, a free and voluntary program that allows participating employers to electronically verify the employment eligibility of their newly hired employees, can be obtained from our website at www.uscis.gov/e-verify or by calling 1-888-464-4218.

General information on immigration laws, regulations, and procedures can be obtained by telephoning our National Customer Service Center at 1-800-375-5283 or visiting our Internet website at www.uscis.gov.

Photocopying and Retaining Form I-9

A blank Form I-9 may be reproduced, provided both sides are copied. The Instructions must be available to all employees completing this form. Employers must retain completed Form I-9s for three years after the date of hire or one year after the date employment ends, whichever is later.

Form I-9 may be signed and retained electronically, as authorized in Department of Homeland Security regulations at 8 CFR 274a.2.

Privacy Act Notice

The authority for collecting this information is the Immigration Reform and Control Act of 1986, Pub. L. 99-603 (8 USC 1324a).

This information is for employers to verify the eligibility of individuals for employment to preclude the unlawful hiring, or recruiting or referring for a fee, of aliens who are not authorized to work in the United States.

This information will be used by employers as a record of their basis for determining eligibility of an employee to work in the United States. The form will be kept by the employer and made available for inspection by authorized officials of the Department of Homeland Security, Department of Labor, and Office of Special Counsel for Immigration-Related Unfair Employment Practices.

Submission of the information required in this form is voluntary. However, an individual may not begin employment unless this form is completed, since employers are subject to civil or criminal penalties if they do not comply with the Immigration Reform and Control Act of 1986.
An agency may not conduct or sponsor an information collection and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The public reporting burden for this collection of information is estimated at 12 minutes per response, including the time for reviewing instructions and completing and submitting the form. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to: U.S. Citizenship and Immigration Services, Regulatory Management Division, 111 Massachusetts Avenue, N.W., 3rd Floor, Suite 3008, Washington, DC 20529-2210. OMB No. 1615-0047. Do not mail your completed Form I-9 to this address.
Read instructions carefully before completing this form. The instructions must be available during completion of this form.

ANTI-DISCRIMINATION NOTICE: It is illegal to discriminate against work-authorized individuals. Employers CANNOT specify which document(s) they will accept from an employee. The refusal to hire an individual because the documents have a future expiration date may also constitute illegal discrimination.

**Section 1. Employee Information and Verification (To be completed and signed by employee at the time employment begins.)**

<table>
<thead>
<tr>
<th>Print Name: Last</th>
<th>First</th>
<th>Middle Initial</th>
<th>Maiden Name</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Address (Street Name and Number)</th>
<th>Apt. #</th>
<th>Date of Birth (month/day/year)</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>City</th>
<th>State</th>
<th>Zip Code</th>
<th>Social Security #</th>
</tr>
</thead>
</table>

I am aware that federal law provides for imprisonment and/or fines for false statements or use of false documents in connection with the completion of this form.

I attest, under penalty of perjury, that I am (check one of the following):

- [ ] A citizen of the United States
- [ ] A noncitizen national of the United States (see instructions)
- [ ] A lawful permanent resident (Alien #)
- [ ] An alien authorized to work (Alien # or Admission #) until (expiration date, if applicable - month/day/year)

Employee's Signature

Date (month/day/year)

**Preparer and/or Translator Certification (To be completed and signed if Section 1 is prepared by a person other than the employee.) I attest, under penalty of perjury, that I have assisted in the completion of this form and that to the best of my knowledge the information is true and correct.**

Preparer/Translator's Signature

Print Name

Address (Street Name and Number, City, State, Zip Code)

Date (month/day/year)

**Section 2. Employer Review and Verification (To be completed and signed by employer. Examine one document from List A OR examine one document from List B and one from List C, as listed on the reverse of this form, and record the title, number, and expiration date, if any, of the document(s).)**

**List A**

<table>
<thead>
<tr>
<th>Document title:</th>
<th>Issuing authority:</th>
<th>Document #:</th>
<th>Expiration Date (if any):</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>List B</th>
<th>AND</th>
<th>List C</th>
</tr>
</thead>
</table>

**List C**

<table>
<thead>
<tr>
<th>Document title:</th>
<th>Issuing authority:</th>
<th>Document #:</th>
<th>Expiration Date (if any):</th>
</tr>
</thead>
</table>

CERTIFICATION: I attest, under penalty of perjury, that I have examined the document(s) presented by the above-named employee, that the above-listed document(s) appear to be genuine and to relate to the employee named, that the employee began employment on (month/day/year) and that to the best of my knowledge the employee is authorized to work in the United States. (State employment agencies may omit the date the employee began employment.)

Signature of Employer or Authorized Representative

Print Name

Title

Business or Organization Name and Address (Street Name and Number, City, State, Zip Code)

Date (month/day/year)

**Section 3. Updating and Reverification (To be completed and signed by employer.)**

A. New Name (if applicable)

B. Date of Rehire (month/day/year) (if applicable)

C. If employee's previous grant of work authorization has expired, provide the information below for the document that establishes current employment authorization.

<table>
<thead>
<tr>
<th>Document Title:</th>
<th>Document #:</th>
<th>Expiration Date (if any):</th>
</tr>
</thead>
</table>

I attest, under penalty of perjury, that to the best of my knowledge, this employee is authorized to work in the United States, and if the employee presented document(s), the document(s) I have examined appear to be genuine and to relate to the individual.

Signature of Employer or Authorized Representative

Date (month/day/year)
# Lists of Acceptable Documents

All documents must be unexpired

## List A
Documents that Establish Both Identity and Employment Authorization

<table>
<thead>
<tr>
<th>1. U.S. Passport or U.S. Passport Card</th>
</tr>
</thead>
<tbody>
<tr>
<td>2. Permanent Resident Card or Alien Registration Receipt Card (Form I-551)</td>
</tr>
<tr>
<td>3. Foreign passport that contains a temporary I-551 stamp or temporary I-551 printed notation on a machine-readable immigrant visa</td>
</tr>
<tr>
<td>4. Employment Authorization Document that contains a photograph (Form I-766)</td>
</tr>
<tr>
<td>5. In the case of a nonimmigrant alien authorized to work for a specific employer incident to status, a foreign passport with Form I-94 or Form I-94A bearing the same name as the passport and containing an endorsement of the alien's nonimmigrant status, as long as the period of endorsement has not yet expired and the proposed employment is not in conflict with any restrictions or limitations identified on the form</td>
</tr>
<tr>
<td>6. Passport from the Federated States of Micronesia (FSM) or the Republic of the Marshall Islands (RMI) with Form I-94 or Form I-94A indicating nonimmigrant admission under the Compact of Free Association Between the United States and the FSM or RMI</td>
</tr>
</tbody>
</table>

## List B
Documents that Establish Identity

| 1. Driver's license or ID card issued by a State or outlying possession of the United States provided it contains a photograph or information such as name, date of birth, gender, height, eye color, and address |
| 2. ID card issued by federal, state or local government agencies or entities, provided it contains a photograph or information such as name, date of birth, gender, height, eye color, and address |
| 3. School ID card with a photograph |
| 4. Voter's registration card |

## List C
Documents that Establish Employment Authorization

| 1. Social Security Account Number card other than one that specifies on the face that the issuance of the card does not authorize employment in the United States |
| 2. Certification of Birth Abroad issued by the Department of State (Form FS-545) |
| 3. Certification of Report of Birth issued by the Department of State (Form DS-1350) |
| 4. Original or certified copy of birth certificate issued by a State, county, municipal authority, or territory of the United States bearing an official seal |
| 5. Native American tribal document |
| 6. U.S. Citizen ID Card (Form I-197) |
| 7. Identification Card for Use of Resident Citizen in the United States (Form I-179) |
| 8. Employment authorization document issued by the Department of Homeland Security |

Illustrations of many of these documents appear in Part 8 of the Handbook for Employers (M-274)
Chapter 13: Miscellaneous Employment Laws

The following are just a few of the other federal employment laws that have yet to be discussed in this course. The discussion is intended to provide a brief overview of each statute so managers can be alert to potential issues involving these laws.

I. Worker Adjustment and Retraining Notification Act (WARN)

A. GENERAL PROVISIONS

The Worker Adjustment and Retraining Notification Act (WARN) was enacted on August 4, 1988 and became effective on February 4, 1989. WARN requires employers to provide notice 60 days in advance of covered plant closings and covered mass layoffs. This notice must be provided to either affected workers or their representatives (e.g., a labor union); to the State dislocated worker unit; and to the appropriate unit of local government.

1. Employer Coverage

In general, employers are covered by WARN if they have 100 or more employees, not counting employees who have worked less than 6 months in the last 12 months and not counting employees who work an average of less than 20 hours a week. Private, for-profit employers and private, nonprofit employers are covered, as are public and quasi-public entities which operate in a commercial context and are separately organized from the regular government. Regular Federal, State, and local government entities which provide public services are not covered.

2. Employee Coverage

Employees entitled to notice under WARN include hourly and salaried workers, as well as managerial and supervisory employees. Business partners are not entitled to notice.

3. What Triggers Notice

a. Plant Closing

A covered employer must give notice if an employment site (or one or more facilities or operating units within an employment site) will be shut down, and the shutdown will result in an employment loss for 50 or more employees during any 30-day period. This does not count employees who have worked less than 6 months in the last 12 months or employees who work an average of less than 20 hours a week for that employer. These latter groups, however, are entitled to notice.

b. Mass Layoff

A covered employer must give notice if there is to be a mass layoff which does not result from a plant closing, but which will result in an employment loss at the employment site during any 30-day period for 500 or more employees, or for 50-499 employees if they make up at least 33% of the employer’s active workforce. Again, this does not count employees who have worked less than 6 months in the last 12 months or employees...
who work an average of less than 20 hours a week for that employer. These latter groups, however, are entitled to notice.

An employer also must give notice if the number of employment losses which occur during a 30-day period fails to meet the threshold requirements of a plant closing or mass layoff, but the number of employment losses for 2 or more groups of workers, each of which is less than the minimum number needed to trigger notice, reaches the threshold level, during any 90-day period, of either a plant closing or mass layoff. Job losses within any 90-day period will count together toward WARN threshold levels, unless the employer demonstrates that the employment losses during the 90-day period are the result of separate and distinct actions and causes.

c. Sale of Businesses

In a situation involving the sale of part or all of a business, the following requirements apply. (1) In each situation, there is always an employer responsible for giving notice. (2) If the sale by a covered employer results in a covered plant closing or mass layoff, the required parties (discussed later) must receive at least 60 days notice. (3) The seller is responsible for providing notice of any covered plant closing or mass layoff which occurs up to and including the date/time of the sale. (4) The buyer is responsible for providing notice of any covered plant closing or mass layoff which occurs after the date/time of the sale. (5) No notice is required if the sale does not result in a covered plant closing or mass layoff. (6) Employees of the seller (other than employees who have worked less than 6 months in the last 12 months or employees who work an average of less than 20 hours a week) on the date/time of the sale become, for purposes of WARN, employees of the buyer immediately following the sale. This provision preserves the notice rights of the employees of a business that has been sold.

4. Employment Loss

The term "employment loss" means:

- An employment termination, other than a discharge for cause, voluntary departure, or retirement;
- A layoff exceeding 6 months; or
- A reduction in an employee's hours of work of more than 50% in each month of any 6-month period.

5. Exceptions

An employee who refuses a transfer to a different employment site within reasonable commuting distance does not experience an employment loss. An employee who accepts a transfer outside this distance within 30 days after it is offered or within 30 days after the plant closing or mass layoff, whichever is later, does not experience an employment loss. In both cases, the transfer offer must be made before the closing or layoff, there must be no more than a 6 month break in employment, and the new job must not be deemed a constructive discharge. These transfer exceptions from the "employment loss" definition apply only if the closing or layoff results from the relocation or consolidation of part or all of the employer's business.
B. EXEMPTIONS

An employer does not need to give notice if a plant closing is the closing of a temporary facility, or if the closing or mass layoff is the result of the completion of a particular project or undertaking. This exemption applies only if the workers were hired with the understanding that their employment was limited to the duration of the facility, project or undertaking. An employer cannot label an ongoing project "temporary" in order to evade its obligations under WARN.

An employer does not need to provide notice to strikers or to workers who are part of the bargaining unit(s) which are involved in the labor negotiations that led to a lockout when the strike or lockout is equivalent to a plant closing or mass layoff. Non-striking employees who experience an employment loss as a direct or indirect result of a strike and workers who are not part of the bargaining unit(s) which are involved in the labor negotiations that led to a lockout are still entitled to notice.

An employer does not need to give notice when permanently replacing a person who is an "economic striker" as defined under the National Labor Relations Act.

C. NOTICE

1. Who Must Receive Notice

The employer must give written notice to the chief elected officer of the exclusive representative(s) or bargaining agency(s) of affected employees and to unrepresented individual workers who may reasonably be expected to experience an employment loss. This includes employees who may lose their employment due to "bumping," or displacement by other workers, to the extent that the employer can identify those employees when notice is given. If an employer cannot identify employees who may lose their jobs through bumping procedures, the employer must provide notice to the incumbents in the jobs which are being eliminated. Employees who have worked less than 6 months in the last 12 months and employees who work an average of less than 20 hours a week are due notice, even though they are not counted when determining the trigger levels.

The employer must also provide notice to the State dislocated worker unit and to the chief elected official of the unit of local government in which the employment site is located.

2. Notification Period

With three exceptions, notice must be timed to reach the required parties at least 60 days before a closing or layoff. When the individual employment separations for a closing or layoff occur on more than one day, the notices are due to the representative(s), State dislocated worker unit and local government at least 60 days before each separation. If the workers are not represented, each worker's notice is due at least 60 days before that worker's separation.
The exceptions to 60-day notice are:

- Faltering company: This exception, to be narrowly construed, covers situations where a company has sought new capital or business in order to stay open and where giving notice would ruin the opportunity to get the new capital or business, and applies only to plant closings;

- Unforeseeable business circumstances: This exception applies to closings and layoffs that are caused by business circumstances that were not reasonably foreseeable at the time notice would otherwise have been required; and

- Natural disaster: This applies where a closing or layoff is the direct result of a natural disaster, such as a flood, earthquake, drought or storm.

If an employer provides less than 60 days advance notice of a closing or layoff and relies on one of these three exceptions, the employer bears the burden of proof that the conditions for the exception have been met. The employer also must give as much notice as is practicable. When the notices are given, they must include a brief statement of the reason for reducing the notice period in addition to the items required in notices.

3. **Form and Content of Notice**

No particular form of notice is required. However, all notices must be in writing. Any reasonable method of delivery designed to ensure receipt 60 days before a closing or layoff is acceptable.

Notice must be specific. Notice may be given conditionally upon the occurrence or non-occurrence of an event only when the event is definite and its occurrence or nonoccurrence will result in a covered employment action less than 60 days after the event.

**D. PENALTIES**

An employer who violates the WARN provisions by ordering a plant closing or mass layoff without providing appropriate notice is liable to each aggrieved employee for an amount including back pay and benefits for the period of violation, up to 60 days. The employer’s liability may be reduced by such items as wages paid by the employer to the employee during the period of the violation and voluntary and unconditional payments made by the employer to the employee.

An employer who fails to provide notice as required to a unit of local government is subject to a civil penalty not to exceed $500 for each day of violation. This penalty may be avoided if the employer satisfies the liability to each aggrieved employee within 3 weeks after the closing or layoff is ordered by the employer.

Enforcement of WARN requirements is through the United States district courts. Workers, representatives of employees and units of local government may bring individual or class action suits. In any suit, the court, in its discretion, may allow the prevailing party a reasonable attorney’s fee as part of the costs.
II. Occupational Safety and Health Act

A. WHO IS COVERED

In general, the Act covers all employers and their employees in the 50 states, the District of Columbia, Puerto Rico, and other U.S. territories. Coverage is provided either directly by the federal Occupational Safety and Health Administration (OSHA) or by an OSHA-approved state job safety and health plan. Employees of the U.S. Postal Service also are covered.

The Act defines an employer as any "person engaged in a business affecting commerce who has employees, but does not include the United States or any state or political subdivision of a State." Therefore, the Act applies to employers and employees in such varied fields as manufacturing, construction, long-shoring, agriculture, law and medicine, charity and disaster relief, organized labor and private education. The Act does not cover:

- Self-employed persons;
- Farms which employ only immediate members of the farmer’s family;
- Industries in which other federal agencies, operating under the authority of other federal laws, regulate working conditions. This category includes most working conditions in mining, nuclear energy and nuclear weapons manufacture, and many aspects of the transportation industries; and
- Employees of state and local governments, unless they are in one of the states with OSHA-approved safety and health plans.

B. BASIC PROVISIONS

The Act assigns OSHA two regulatory functions: setting standards and conducting inspections to ensure that employers are providing safe and healthful workplaces. OSHA standards may require that employers adopt certain practices, means, methods or processes reasonably necessary and appropriate to protect workers on the job. Employers must become familiar with the standards applicable to their establishments and eliminate hazards.

Compliance with standards may include ensuring that employees have and use personal protective equipment when required for safety or health. Employees must comply with all rules and regulations that apply to their own actions and conduct.

Even in areas where OSHA has not set forth a standard addressing a specific hazard, employers are responsible for complying with the OSH Act's "general duty" clause. The general duty clause [Section 5(a)(1)] states that each employer "shall furnish . . . a place of employment which is free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."

States with OSHA-approved job safety and health plans must set standards that are at least as effective as the equivalent federal standard. Most of the state-plan states adopt
standards identical to the federal ones (three states, New Jersey, New York and Connecticut, have plans which cover only public sector employees).

1. Federal OSHA Standards

Standards are grouped into four major categories: general industry (29 CFR 1910); construction (29 CFR 1926); maritime (shipyards, marine terminals, longshoring--29 CFR 1915-19); and agriculture (29 CFR 1928). While some standards are specific to just one category, others apply across industries. Among the standards with similar requirements for all sectors of industry are those that address access to medical and exposure records, personal protective equipment, and hazard communication.

a. Access to Medical and Exposure Records

This regulation requires the employer to grant the employee access to any medical records the employer maintains with respect to that employee, including any records about the employee's exposure to toxic substances.

b. Personal Protective Equipment

This standard, which is defined separately for each segment of industry except agriculture, requires employers to provide employees with personal equipment designed to protect them against certain hazards. This equipment can range from protective helmets to prevent head injuries in construction and cargo handling work, to eye protection, hearing protection, hard-toed shoes, special goggles for welders, and gauntlets for iron workers.

c. Hazard Communication

This standard requires manufacturers and importers of hazardous materials to conduct hazard evaluations of the products they manufacture or import. If a product is found to be hazardous under the terms of the standard, the manufacturer or importer must so indicate on containers of the material, and the first shipment of the material to a new customer must include a material safety data sheet (MSDS). Employers must use these MSDSs to train their employees to recognize and avoid the hazards presented by the materials. OSHA regulations cover such items as recordkeeping, reporting and posting.

d. Recordkeeping

Every employer covered by OSHA who has more than 10 employees, except for employers in certain low-hazard industries in the retail, finance, insurance, real estate, and service sectors, must maintain three types of OSHA-specified records of job-related injuries and illnesses.

The OSHA Form 300 is an injury/illness log, with a separate line entry for each recordable injury or illness. Such events include work-related deaths, injuries and illnesses other than minor injuries that require only first aid treatment and that do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job. Each year, the employer must post a summary of the OSHA Form 300 on a Form 300A, which includes the previous year's injuries and illnesses, in the workplace from February through April.
OSHA Form 301 is an individual incident report that provides added detail about each specific recordable injury or illness. A suitable insurance or workers’ compensation form that provides the same details may be substituted for OSHA Form 301.

Employers with 10 or fewer employees and employers in statistically low-hazard industries are exempt from maintaining these records. Industries currently designated as low-hazard include: automobile dealers; apparel and accessory stores; eating and drinking places; most finance, insurance, and real estate industries; and certain service industries, such as personal and business services, medical and dental offices, and legal, educational, and membership organizations.

However, in one situation such employers must still keep these records. Each year, the Department of Labor’s Bureau of Labor Statistics (BLS) conducts a national survey of workplace injuries and illnesses. Participants are selected by the individual states, and all employers selected for the survey, even those usually exempt from the record-keeping requirements, must maintain these records. Before the end of the year, OSHA notifies all selected employers to begin keeping records during the coming year. The state offices that selected the employers are available to help employers complete the forms.

e. Reporting

Each employer, regardless of industry category or the number of its employees, must advise the nearest OSHA office of any accident that results in one or more fatalities or the hospitalization of three or more employees. The employer must so notify OSHA within eight hours of the occurrence of the accident. OSHA often investigates such accidents to determine whether violations of standards contributed to the event.

2. Types of Violations

a. Other-Than-Serious Violation

A violation that has a direct relationship to job safety and health, but probably would not cause death or serious physical harm. A proposed penalty of up to $7,000 for each violation is discretionary. A penalty for an other-than-serious violation may be adjusted downward by as much as 95 percent, depending on the employer’s good faith (demonstrated efforts to comply with the Act), history of previous violations, and size of business. When the adjusted penalty amounts to less than $50, no penalty is proposed.

b. Serious Violation

A violation where a substantial probability that death or serious physical harm could result and where the employer knew, or should have known, of the hazard. A mandatory penalty of up to $7,000 for each violation is proposed. A penalty for a serious violation may be adjusted downward, based on the employer’s good faith, history of previous violations, the gravity of the alleged violation, and size of business.
c. Willful Violation

A violation that the employer intentionally and knowingly commits. The employer either knows that what he or she is doing constitutes a violation, or is aware that a hazardous condition existed and has made no reasonable effort to eliminate it.

The Act provides that an employer who willfully violates the Act may be assessed a civil penalty of not more than $70,000 but not less than $5,000 for each violation. A proposed penalty for a willful violation may be adjusted downward, depending on the size of the business and its history of previous violations. Usually no credit is given for good faith.

If an employer is convicted of a willful violation of a standard that has resulted in the death of an employee, the offense is punishable by a court-imposed fine or by imprisonment for up to six months, or both. A fine of up to $250,000 for an individual, or $500,000 for a corporation [authorized under the Omnibus Crime Control Act of 1984 (1984 OCCA), not the OSH Act], may be imposed for a criminal conviction.

d. Repeated Violation

A repeated violation is a violation of any standard, regulation, rule or order where, upon reinspection, a substantially similar violation is found. Repeated violations can bring fines of up to $70,000 for each such violation. To serve as the basis for a repeat citation, the original citation must be final; a citation under contest may not serve as the basis for a subsequent repeat citation.

e. Failure to Correct Prior Violation

Failure to correct a prior violation may bring a civil penalty of up to $7,000 for each day the violation continues beyond the prescribed abatement date.

Additional violations for which citations and proposed penalties may be issued:

- **Falsifying Records, Reports or Applications:** Upon conviction, can bring a fine of $10,000 or up to six months in jail, or both.

- **Assaulting a CSHO:** This act, or otherwise resisting, opposing, intimidating, or interfering with a CSHO in the performance of his or her duties, is a criminal offense, subject to a fine of not more than $250,000 for an individual and $500,000 for a corporation (1984 OCCA) and imprisonment.

Citation and penalty procedures may differ somewhat in states with their own OSH programs.

III. Employee Polygraph Protection Act of 1988 (EPPA)

A. WHO IS COVERED

The Employee Polygraph Protection Act (EPPA) applies to most private employers. The law does not cover federal, state and local governments.
B. BASIC PROVISIONS

The EPPA prohibits most private employers from using lie detector tests, either for pre-employment screening or during the course of employment. Employers generally may not require or request any employee or job applicant to take a lie detector test, or discharge, discipline, or discriminate against an employee or job applicant for refusing to take a test or for exercising other rights under the Act.

Employers may not use or inquire about the results of a lie detector test or discharge or discriminate against an employee or job applicant on the basis of the results of a test, or for filing a complaint, or for participating in a proceeding under the Act.

Subject to restrictions, the Act permits polygraph (a type of lie detector) tests to be administered to certain job applicants of security service firms (armored car, alarm, and guard) and of pharmaceutical manufacturers, distributors and dispensers.

Subject to restrictions, the Act also permits polygraph testing of certain employees of private firms who are reasonably suspected of involvement in a workplace incident (theft, embezzlement, etc.) that resulted in specific economic loss or injury to the employer.

Where polygraph examinations are allowed, they are subject to strict standards for the conduct of the test, including the pretest, testing and post-testing phases. An examiner must be licensed and bonded or have professional liability coverage. The Act strictly limits the disclosure of information obtained during a polygraph test.

C. EMPLOYEE RIGHTS

The EPPA provides that employees have a right to employment opportunities without being subjected to lie detector tests, unless a specific exemption applies. The Act also provides employees the right to file a lawsuit for violations of the Act. In addition, the Wage and Hour Division accepts complaints of alleged EPPA violations.

D. PENALTIES

The Secretary of Labor can bring court action to restrain violators and assess civil money penalties up to $10,000 per violation. An employer who violates the law may be liable to the employee or prospective employee for legal and equitable relief, including employment, reinstatement, promotion and payment of lost wages and benefits.

Any person against whom a civil money penalty is assessed may, within 30 days of the notice of assessment, request a hearing before an administrative law judge. If dissatisfied with the administrative law judge's decision, such person may request a review of the decision by the Secretary of Labor. Final determinations on violations are enforceable through the courts.

E. RELATION TO STATE, LOCAL AND OTHER FEDERAL LAWS

The law does not preempt any provision of any state or local law or any collective bargaining agreement that is more restrictive with respect to lie detector tests.
The Department of Labor administers and enforces the Employee Polygraph Protection Act of 1988 (the Act) through the Wage and Hour Division of the Employment Standards Administration. The Act generally prevents employers engaged in interstate commerce from using lie detector tests either for pre-employment screening or during the course of employment, with certain exemptions.

Under the Act, the Secretary of Labor is directed to distribute a notice of the Act's protections, to issue rules and regulations, and to enforce the provisions of the Act. The Act empowers the Secretary of Labor to bring injunctive actions in U.S. district courts to restrain violations, and to assess civil money penalties up to $10,000 against employers who violate any provision of the Act. Employers are required to post notices summarizing the protections of the Act in their places of work.

F. DEFINITIONS

1. Lie Detector

A lie detector includes a polygraph, deceptograph, voice stress analyzer, psychological stress evaluator or similar device (whether mechanical or electrical) used to render a diagnostic opinion as to the honesty or dishonesty of an individual.

2. Polygraph

A polygraph means an instrument that records continuously, visually, permanently, and simultaneously changes in cardiovascular, respiratory and electodermal patterns as minimum instrumentation standards and is used to render a diagnostic opinion as to the honesty or dishonesty of an individual.

G. EXEMPTIONS

Federal, state and local governments are excluded. In addition, lie detector tests administered by the Federal Government to employees of Federal contractors engaged in national security intelligence or counterintelligence functions are exempt. The Act also includes limited exemptions where polygraph tests (but no other lie detector tests) may be administered in the private sector, subject to certain restrictions:

- To employees who are reasonably suspected of involvement in a workplace incident that results in economic loss to the employer and who had access to the property that is the subject of an investigation; and

- To prospective employees of armored car, security alarm, and security guard firms who protect facilities, materials or operations affecting health or safety, national security, or currency and other like instruments; and

- To prospective employees of pharmaceutical and other firms authorized to manufacture, distribute, or dispense controlled substances who will have direct access to such controlled substances, as well as current employee who had access to persons or property that are the subject of an ongoing investigation.
IV. Employee Retirement Income Security Act (ERISA)

A. WHO IS COVERED

The provisions of Title I of ERISA cover most private sector employee benefit plans. Such plans are voluntarily established and maintained by an employer, an employee organization, or jointly by one or more such employers and an employee organization.

Pension plans – a type of employee benefit plan – are established and maintained to provide retirement income or to defer income until termination of covered employment or beyond. Other employee benefit plans, called welfare plans, are established and maintained to provide health benefits, disability benefits, death benefits, prepaid legal services, vacation benefits, day care centers, scholarship funds, apprenticeship and training benefits, or other similar benefits.

In general, ERISA does not cover plans established or maintained by government entities or churches for their employees, or plans which are maintained solely to comply with workers’ compensation, unemployment or disability laws. ERISA also does not cover plans maintained outside the U.S. primarily for the benefit of nonresident aliens or unfunded excess benefit plans.

B. BASIC PROVISIONS

ERISA sets uniform minimum standards to ensure that employee benefit plans are established and maintained in a fair and financially sound manner. In addition, employers have an obligation to provide promised benefits and satisfy ERISA’s requirements for managing and administering private pension and welfare plans.

The Department of Labor’s Employee Benefits Security Administration (EBSA), together with the Internal Revenue Service (IRS), has the statutory and regulatory authority to ensure that workers receive the promised benefits. The Department has principal jurisdiction over Title I of ERISA, which requires persons and entities that manage and control plan funds to:

- Manage plans for the exclusive benefit of participants and beneficiaries;
- Carry out their duties in a prudent manner and refrain from conflict-of-interest transactions expressly prohibited by law;
- Comply with limitations on certain plans’ investments in employer securities and properties;
- Fund benefits in accordance with the law and plan rules;
- Report and disclose information on the operations and financial condition of plans to the government and participants; and
- Provide documents required in the conduct of investigations to ensure compliance with the law.
The Department also has jurisdiction over the prohibited transaction provisions of Title II of ERISA. However, the IRS generally administers the rest of Title II of ERISA, as well as the standards of Title I of ERISA that address vesting, participation, nondiscrimination and funding.

C. REPORTING AND DISCLOSURE

Part 1 of Title I requires the administrator of an employee benefit plan to furnish participants and beneficiaries with a summary plan description (SPD), clearly describing their rights, benefits and responsibilities under the plan. Plan administrators must also furnish participants with a summary of any material changes to the plan or changes to the information contained in the SPD. Copies of these documents need not be automatically filed with the Department, but they must be furnished to the Department on request.

In addition, the administrator generally must file an annual report (Form 5500 Series) each year containing financial and other information about the operation of the plan. Plan administrators filing annual reports must furnish participants and beneficiaries with a summary of the information in the annual report (the Summary Annual Report).

Certain pension and welfare benefit plans may be exempt from the requirement to file an annual report. For example, welfare benefit plans with fewer than 100 participants that are fully insured or unfunded within the meaning of the Department's regulation at 29 CFR 2520.104-20 are not required to file an annual report.

D. FIDUCIARY STANDARDS

Part 4 of Title I sets forth standards and rules for the conduct of plan fiduciaries. In general, persons who exercise discretionary authority or control over management of a plan or disposition of its assets are "fiduciaries" for purposes of Title I of ERISA. Fiduciaries are required, among other things, to discharge their duties solely in the interest of plan participants and beneficiaries and for the exclusive purpose of providing benefits and defraying reasonable expenses of administering the plan. In discharging their duties, fiduciaries must act prudently and in accordance with documents governing the plan, to the extent such documents are consistent with ERISA.

ERISA prohibits certain transactions between an employee benefit plan and "parties in interest," which include the employer and others who may be in a position to exercise improper influence over the plan, and such transactions may trigger civil monetary penalties under Title I of ERISA. The Internal Revenue Code also prohibits most of these transactions, and it imposes an excise tax on "disqualified persons" (whose definition generally parallels that of parties in interest) who participate in such transactions.

E. EXEMPTIONS

ERISA and the Internal Revenue Code contain various statutory exemptions from the prohibited transaction rules and give the Departments of Labor and Treasury, respectively, authority to grant administrative exemptions and establish exemption procedures.
The statutory exemptions generally include loans to participants, the provision of services needed to operate a plan for reasonable compensation, loans to employee stock ownership plans, and investment with certain financial institutions regulated by other state or federal agencies. The Department of Labor may grant administrative exemptions on a class or individual basis for a wide variety of proposed transactions with a plan. Applications for individual exemptions must include, among other information:

- A detailed description of the exemption transaction and the parties for whom an exemption is requested;
- The reasons a plan would have for entering into the transaction;
- The percentage of assets involved in the exemption transaction;
- The names of persons with investment discretion;
- The extent of plan assets already invested in loans to, property leased by, and securities issued by parties in interest involved in the transaction;
- Copies of all contracts, agreements, instruments and relevant portions of plan documents and trust agreements bearing on the exemption transaction;
- Information about plan participation in pooled funds when the exemption transaction involves such funds;
- A declaration by the applicant, under penalty of perjury, attesting to the truth of representations made in such exemption submissions; and
- Statement of consent by third-party experts acknowledging that their statement is being submitted to the Department as part of an exemption application.

F. EMPLOYEE RIGHTS

The Act grants employees several important rights. Among them are the right to receive important information about their pension or health benefit plans, to participate in timely and fair processes for benefit claims, to elect to temporarily continue group health coverage after losing coverage, to receive certificates verifying health coverage under a plan, and to recover benefits due under the plan.

G. PENALTIES / SANCTIONS

ERISA confers substantial law enforcement responsibilities on the Department of Labor. Section 5 of Title I of ERISA gives the Department authority to bring a civil action to correct violations of the law, provides investigative authority to determine whether any person has violated Title I, and imposes criminal penalties on any person who willfully violates any provision of Part 1 of Title I.

EBSA has authority under ERISA Section 502(c)(2) to assess civil penalties for reporting violations. A penalty of up to $1,000 per day may be assessed against plan administrators who fail or refuse to comply with annual reporting requirements. Section 502(i) gives the agency authority to assess civil penalties against parties in interest who
engage in prohibited transactions with welfare and nonqualified pension plans. The penalty can range from five percent to 100 percent of the amount involved in a transaction.

A parallel provision of the Code directly imposes an excise tax against disqualified persons, including employee benefit plan sponsors and service providers, who engage in prohibited transactions with tax-qualified pension and profit sharing plans.

Finally, Section 502(l) requires the Department to assess mandatory civil penalties equal to 20 percent of any amount recovered with respect to fiduciary breaches resulting from either a settlement agreement with the Department or a court order as the result of a lawsuit by the Department.

**H. RELATION TO STATE, LOCAL AND OTHER FEDERAL LAWS**

Part 5 of Title I states that the provisions of ERISA Titles I and IV supersede state and local laws which "relate to" an employee benefit plan. ERISA, however, does not preempt certain state and local laws, including state insurance regulation of multiple employer welfare arrangements (MEWAs). MEWAs generally constitute employee welfare benefit plans or other arrangements providing welfare benefits to employees of more than one employer, not pursuant to a collective bargaining agreement.

In addition, ERISA’s general prohibitions against assignment or alienation of pension benefits do not apply to qualified domestic relations orders. Plan administrators must comply with the terms of qualifying orders made pursuant to state domestic relations law that award all or part of a participant’s benefit in the form of child support, alimony, or marital property rights to an alternative payee (spouse, former spouse, child or other dependent). Finally, group health plans covered by ERISA must provide benefits in accordance with the requirements of qualified medical child support orders issued under state domestic relations laws.

**V. Consolidated Omnibus Budget Reconciliation Act (COBRA)**

Congress passed the landmark Consolidated Omnibus Budget Reconciliation Act (COBRA) health benefit provisions in 1986. The law amends the Employee Retirement Income Security Act, the Internal Revenue Code and the Public Health Service Act to provide continuation of group health coverage that otherwise might be terminated.

**A. WHAT COBRA DOES**

COBRA provides certain former employees, retirees, spouses, former spouses, and dependent children the right to temporary continuation of health coverage at group rates. This coverage, however, is only available when coverage is lost due to certain specific events. Group health coverage for COBRA participants is usually more expensive than health coverage for active employees, since usually the employer pays a part of the premium for active employees while COBRA participants generally pay the entire premium themselves. It is ordinarily less expensive, though, than individual health coverage.
B. PERSONS ENTITLED TO BENEFITS UNDER COBRA

There are three elements to qualifying for COBRA benefits. COBRA establishes specific criteria for plans, qualified beneficiaries, and qualifying events:

1. Plan Coverage

Group health plans for employers with 20 or more employees on more than 50 percent of its typical business days in the previous calendar year are subject to COBRA. Both full and part-time employees are counted to determine whether a plan is subject to COBRA. Each part-time employee counts as a fraction of an employee, with the fraction equal to the number of hours that the part-time employee worked divided by the hours an employee must work to be considered full time.

2. Qualified Beneficiaries

A qualified beneficiary generally is an individual covered by a group health plan on the day before a qualifying event who is either an employee, the employee's spouse, or an employee's dependent child. In certain cases, a retired employee, the retired employee's spouse, and the retired employee's dependent children may be qualified beneficiaries. In addition, any child born to or placed for adoption with a covered employee during the period of COBRA coverage is considered a qualified beneficiary. Agents, independent contractors, and directors who participate in the group health plan may also be qualified beneficiaries.

3. Qualified Events

Qualifying events are certain events that would cause an individual to lose health coverage. The type of qualifying event will determine who the qualified beneficiaries are and the amount of time that a plan must offer the health coverage to them under COBRA. A plan, at its discretion, may provide longer periods of continuation coverage.

a. Qualifying Events for Employees

Qualifying events for employees are either (1) voluntary or involuntary termination of employment for reasons other than gross misconduct; or (2) reduction in the number of hours of employment.

b. Qualifying Events for Spouses

Qualifying events for spouses are:

- Voluntary or involuntary termination of the covered employee's employment for any reason other than gross misconduct;
- Reduction in the hours worked by the covered employee;
- Covered employee's becoming entitled to Medicare;
- Divorce or legal separation of the covered employee; and
- Death of the covered employee.

c. Qualifying Events for Dependent Children

Qualifying events for dependent children are:

- Loss of dependent child status under the plan rules;
- Voluntary or involuntary termination of the covered employee's employment for any reason other than gross misconduct;
- Reduction in the hours worked by the covered employee;
- Covered employee's becoming entitled to Medicare;
- Divorce or legal separation of the covered employee; and
- Death of the covered employee.

C. HOW A PERSON BECOMES ELIGIBLE FOR COVERAGE

To be eligible for COBRA coverage, you must have been enrolled in your employer's health plan when you worked and the health plan must continue to be in effect for active employees. COBRA continuation coverage is available upon the occurrence of a qualifying event that would, except for the COBRA continuation coverage, cause an individual to lose his or her health care coverage.

D. GROUP PLANS SUBJECT TO COBRA

The law generally covers health plans maintained by private-sector employers with 20 or more employees, employee organizations, or state or local governments.

E. PROCESS TO ELECT COBRA CONTINUATION COVERAGE

Employers must notify plan administrators of a qualifying event within 30 days after an employee's death, termination, reduced hours of employment or entitlement to Medicare. A qualified beneficiary must notify the plan administrator of a qualifying event within 60 days after divorce or legal separation or a child's ceasing to be covered as a dependent under plan rules.

Plan participants and beneficiaries generally must be sent an election notice not later than 14 days after the plan administrator receives notice that a qualifying event has occurred. The individual then has 60 days to decide whether to elect COBRA continuation coverage. The person has 45 days after electing coverage to pay the initial premium.
1. Time Limits

Qualified beneficiaries must be given an election period during which each qualified beneficiary may choose whether to elect COBRA coverage. Each qualified beneficiary may independently elect COBRA coverage. A covered employee or the covered employee’s spouse may elect COBRA coverage on behalf of all other qualified beneficiaries. A parent or legal guardian may elect COBRA on behalf of a minor child.

Qualified beneficiaries must be given at least 60 days for the election. This period is measured from the later of the coverage loss date or the date the COBRA election notice is provided by the employer or plan administrator. The election notice must be provided in person or by first class mail within 14 days after the plan administrator receives notice that a qualifying event has occurred.

2. Filing a Claim

Health plan rules must explain how to obtain benefits and must include written procedures for processing claims. Claims procedures must be described in the Summary Plan Description.

Individuals should submit a claim for benefits in accordance with the plan's rules for filing claims. If the claim is denied, the applicant must be given notice of the denial in writing generally within 90 days after the claim is filed. The notice should state the reasons for the denial, any additional information needed to support the claim, and procedures for appealing the denial. The individual will have at least 60 days to appeal a denial and he or she must receive a decision on the appeal generally within 60 days after that.

F. QUALIFYING FOR LONGER PERIODS OF COVERAGE

Individuals can qualify for longer periods of COBRA continuation coverage. Disability can extend the 18 month period of continuation coverage for a qualifying event that is a termination of employment or reduction of hours. To qualify for additional months of COBRA continuation coverage, the qualified beneficiary must:

- Have a ruling from the Social Security Administration that he or she became disabled within the first 60 days of COBRA continuation coverage; and
- Send the plan a copy of the Social Security ruling letter within 60 days of receipt, but prior to expiration of the 18-month period of coverage.

If these requirements are met, the entire family qualifies for an additional 11 months of COBRA continuation coverage. Plans can charge 150% of the premium cost for the extended period of coverage.
G. MISCELLANEOUS OTHER ISSUES

1. Coverage of Divorced Spouses

Under COBRA, participants, covered spouses and dependent children may continue their plan coverage for a limited time when they would otherwise lose coverage due to a particular event, such as divorce (or legal separation). A covered employee’s spouse who would lose coverage due to a divorce may elect continuation coverage under the plan for a maximum of 36 months. A qualified beneficiary must notify the plan administrator of a qualifying event within 60 days after divorce or legal separation. After being notified of a divorce, the plan administrator must give notice, generally within 14 days, to the qualified beneficiary of the right to elect COBRA continuation coverage.

2. Effect of Waiver

If a qualified beneficiary waives COBRA coverage during the election period, he or she may revoke the waiver of coverage before the end of the election period. A beneficiary may then elect COBRA coverage. Then, the plan need only provide continuation coverage beginning on the date the waiver is revoked.

3. Mandatory Benefits

If a qualified beneficiary waives COBRA coverage during the election period, he or she may revoke the waiver of coverage before the end of the election period. A beneficiary may then elect COBRA coverage. Then, the plan need only provide continuation coverage beginning on the date the waiver is revoked.

4. Period of Coverage

COBRA coverage begins on the date that health care coverage would otherwise have been lost by reason of a qualifying event.

H. LENGTH OF COVERAGE

COBRA establishes required periods of coverage for continuation health benefits. A plan, however, may provide longer periods of coverage beyond those required by COBRA. COBRA beneficiaries generally are eligible for group coverage during a maximum of 18 months for qualifying events due to employment termination or reduction of hours of work. Certain qualifying events, or a second qualifying event during the initial period of coverage, may permit a beneficiary to receive a maximum of 36 months of coverage.

Coverage begins on the date that coverage would otherwise have been lost by reason of a qualifying event and will end at the end of the maximum period. It may end earlier if:

- Premiums are not paid on a timely basis;
- The employer ceases to maintain any group health plan;
After the COBRA election, coverage is obtained with another employer group health plan that does not contain any exclusion or limitation with respect to any pre-existing condition of such beneficiary. However, if other group health coverage is obtained prior to the COBRA election, COBRA coverage may not be discontinued, even if the other coverage continues after the COBRA election;

After the COBRA election, a beneficiary becomes entitled to Medicare benefits. However, if Medicare is obtained prior to COBRA election, COBRA coverage may not be discontinued, even if the other coverage continues after the COBRA election.

Although COBRA specifies certain periods of time that continued health coverage must be offered to qualified beneficiaries, COBRA does not prohibit plans from offering continuation health coverage that goes beyond the COBRA periods.

Some plans allow participants and beneficiaries to convert group health coverage to an individual policy. If this option is generally available from the plan, a qualified beneficiary who pays for COBRA coverage must be given the option of converting to an individual policy at the end of the COBRA continuation coverage period. The option must be given to enroll in a conversion health plan within 180 days before COBRA coverage ends. The premium for a conversion policy may be more expensive than the premium of a group plan, and the conversion policy may provide a lower level of coverage. The conversion option, however, is not available if the beneficiary ends COBRA coverage before reaching the end of the maximum period of COBRA coverage.

I. LIABILITY FOR PAYMENT FOR COVERAGE

Beneficiaries may be required to pay for COBRA coverage. The premium cannot exceed 102 percent of the cost to the plan for similarly situated individuals who have not incurred a qualifying event, including both the portion paid by employees and any portion paid by the employer before the qualifying event, plus 2 percent for administrative costs.

For qualified beneficiaries receiving the 11-month disability extension of coverage, the premium for those additional months may be increased to 150 percent of the plan's total cost of coverage.

COBRA premiums may be increased if the costs to the plan increase but generally must be fixed in advance of each 12-month premium cycle. The plan must allow you to pay premiums on a monthly basis if you ask to do so, and the plan may allow you to make payments at other intervals (weekly or quarterly).

The initial premium payment must be made within 45 days after the date of the COBRA election by the qualified beneficiary. Payment generally must cover the period of coverage from the date of COBRA election retroactive to the date of the loss of coverage due to the qualifying event. Premiums for successive periods of coverage are due on the date stated in the plan with a minimum 30-day grace period for payments. Payment is considered to be made on the date it is sent to the plan.

If premiums are not paid by the first day of the period of coverage, the plan has the option to cancel coverage until payment is received and then reinstate coverage retroactively to the beginning of the period of coverage.
If the amount of the payment made to the plan is made in error but is not significantly less than the amount due, the plan is required to notify you of the deficiency and grant a reasonable period (for this purpose, 30 days is considered reasonable) to pay the difference. The plan is not obligated to send monthly premium notices.

COBRA beneficiaries remain subject to the rules of the plan and therefore must satisfy all costs related to co-payments and deductibles, and are subject to catastrophic and other benefit limits.

J. RELATION TO FMLA

The Family and Medical Leave Act, effective August 5, 1993, requires an employer to maintain coverage under any group health plan for an employee on FMLA leave under the same conditions coverage would have been provided if the employee had continued working. Coverage provided under the FMLA is not COBRA coverage, and FMLA leave is not a qualifying event under COBRA. A COBRA qualifying event may occur, however, when an employer's obligation to maintain health benefits under FMLA ceases, such as when an employee notifies an employer of his or her intent not to return to work.

Further information on FMLA is available from the nearest office of the Wage and Hour Division, listed in most telephone directories under U.S. Government, U.S. Department of Labor, Employment Standards Administration.
CHAPTER 13 – REVIEW QUESTIONS

The following questions are designed to ensure that you have a complete understanding of the information presented in the assignment. They do not need to be submitted in order to receive CPE credit. They are included as an additional tool to enhance your learning experience.

We recommend that you answer each review question and then compare your response to the suggested solution before answering the final exam questions related to this assignment.

1. Which of the following employers are subject to the provisions of the Worker Adjustment and Retraining Notification Act:
   a) all government employers
   b) private employers with at least 100 employees
   c) all private employers, regardless of size
   d) only private employers directly engaged in manufacturing

2. Under the Worker Adjustment and Retraining Notification Act, the mandated notice must generally be provided at least 60 days in advance of a closing or mass layoff.
   a) true
   b) false

3. Accounting firms are generally exempt from coverage of the Occupational Safety and Health Act.
   a) true
   b) false

4. Which of the following is not a function of the Occupational Safety and Health Administration:
   a) to proscribe wage and hour rules for private employers
   b) to set standards governing working conditions
   c) to inspect workplaces
   d) both a and b above

5. Financial services firms are typically exempt from OSHA’s recordkeeping requirements.
   a) true
   b) false

6. A willful violation of OSHA can result in a penalty of up to $70,000.
   a) true
   b) false
7. The Employee Polygraph Protection Act:

   a) prohibits most private sector employers from using lie detector tests on employees
   b) requires all applicants for employment to take a lie detector test before being hired
   c) prohibits lie detector tests unless the employee has been given the right to consult an attorney first
   d) governs only government employers

8. What is the primary purpose of the Employee Retirement Income and Security Act:

   a) to govern social security benefits
   b) to mandate that all private employers provide retirement benefits to qualified employees
   c) to ensure that employee benefits plans are fair
   d) to ensure that corporate executives are not over-compensated

9. ERISA limits the rights of employees to access information about their pension and other benefit plans.

   a) true
   b) false

10. Which of the following people would be eligible for continuation of health care benefits under the Consolidated Omnibus Budget Reconciliation Act:

    a) an employee of a large manufacturing company who was laid off due to lack of work
    b) a newspaper executive who resigned to stay home with her children
    c) a department store manager who was fired because he did not get along with his boss
    d) all of the above
CHAPTER 13 – SOLUTIONS AND SUGGESTED RESPONSES


    B: Correct. The Act covers only those larger employers who potentially may have large layoffs or other work force reductions.

    C: Incorrect. Only private employers with at least 100 employers are covered.

    D: Incorrect. The Act covers all private employers of the requisite size regardless of the nature of their business.

(See page 13-1 of the course material.)

2. A: True is correct. The only exceptions are when the company is attempting to secure new financing, where there have been unforeseeable business circumstances, or where the closing or layoff is the direct result of a natural disaster.

    B: False is incorrect. Other than with three exceptions, notice must be timed to reach the required parties at least 60 days before a closing or layoff.

(See pages 13-3 to 13-4 of the course material.)

3. A: True is incorrect. There is no exemption for accounting firms.

    B: False is correct. In general, the Act covers all employers and their employees in the 50 states, the District of Columbia, Puerto Rico, and other U.S. territories.

(See page 13-5 of the course material.)

4. A: Correct. OSHA is involved solely with workplace safety and health and has no regulation of wage and hour standards, which are governed by the Fair Labor Standards Act.

    B: Incorrect. Establishing standards in the workplace to safeguard worker safety and health is one of the twin purposes of OSHA.

    C: Incorrect. Inspecting workplaces to ensure safety and health of workers is one of the twin purposes of OSHA.

    D: Incorrect. Since A is not one of the purposes of the Act, D cannot be correct.

(See page 13-5 of the course material.)
5. **A: True is correct.** Every employer covered by OSHA who has more than 10 employees, except for employers in certain low-hazard industries in the retail, finance, insurance, real estate, and service sectors, must maintain three types of OSHA-specified records of job-related injuries and illnesses.

   B: False is incorrect. Employers in certain low-hazard industries are not required to maintain three types of OSHA-specified records of job-related injuries and illnesses, including finance employers.

   (See page 13-6 of the course material.)

6. **A: True is correct.** The Act provides that an employer who willfully violates the Act may be assessed a civil penalty of not more than $70,000 but not less than $5,000 for each violation. A proposed penalty for a willful violation may be adjusted downward, depending on the size of the business and its history of previous violations. Usually no credit is given for good faith.

   B: False is incorrect. Penalties can reach up to $70,000 where they are willful.

   (See page 13-8 of the course material.)

7. **A: Correct.** The Employee Polygraph Protection Act (EPPA) applies to most private employers and generally prohibits the use of lie detectors.

   B: Incorrect. There is no such requirement. To the contrary, the Act prohibits such testing.

   C: Incorrect. Lie detector tests are generally prohibited regardless of whether legal counsel has been provided.

   D: Incorrect. To the contrary, the Act governs private sector employees only.

   (See pages 13-8 to 13-9 of the course material.)

8. A: Incorrect. ERISA governs private companies, and social security is a federal benefit plan.

   B: Incorrect. ERISA governs the establishment and administration of employee benefit plans, including retirement, but it does not mandate their establishment.

   **C: Correct.** ERISA is intended to ensure that when a private employer voluntarily elects to establish and administer an employee benefits plan, that it is done in a fair manner.

   D: Incorrect. While certain aspects of ERISA ensure that benefits are distributed fairly, this is not the specific primary purpose of the law.

   (See page 13-11 of the course material.)
9. A: True is incorrect. ERISA grants the employee several rights regarding their pension and health coverage.

**B: False is correct.** Under ERISA, employees have the right to receive important information about their pension or health benefit plans, to participate in timely and fair processes for benefit claims, to elect to temporarily continue group health coverage after losing coverage, to receive certificates verifying health coverage under a plan, and to recover benefits due under the plan.

(See page 13-13 of the course material.)

10. A: Incorrect. Assuming all of the other requirements of the employer are met, this employee is eligible for COBRA benefits. However, this is not the best answer.

B: Incorrect. Assuming all of the other requirements of the employer are met, this employee is eligible for COBRA benefits. A person who leaves voluntarily or involuntarily, with the exception of those fired in extreme cases, are eligible under COBRA. However, this is not the best answer.

C: Incorrect. A person is still eligible if they are fired so long as their conduct was not extreme. However, this is not the best answer.

**D: Correct.** Assuming all of the other requirements are met, all of the above people are eligible for continuation of benefits under COBRA.

(See page 13-14 of the course material.)
I. Overview

Let’s begin this discussion by being honest: Businesses often choose to “hire” independent contractors instead of employees as a way of saving money. That is because both state and federal laws impose significant legal and financial obligations on employers. The following list is just a sample:

- Employees are eligible for employer-provided fringe benefits, including health insurance, on a non-discriminatory basis;
- Employers are vicariously liable for the acts of their employees;
- Employees are covered by state and federal labor standards, including minimum wage and overtime rules;
- Employees are entitled to protection from discrimination under state and federal anti-discrimination laws, including prohibitions against sexual harassment and racial discrimination;
- Employees are entitled to take time off to care for a sick relative (if the employer is covered by the applicable law);
- Employees have the right to organize themselves under the provisions of the National Labor Relations Act;
- Employees are eligible for unemployment insurance benefits; and
- Employees are covered by their employer’s workers’ compensation insurance policy for on the job injuries and illnesses.

As a result of these and many other obligations faced by employers that have been outlined in this course, incorrectly classifying an employee as an independent contractor can have huge financial ramifications to the owner of the business. For example, penalties associated with misclassifying an employee as an independent contractor for federal tax purposes include:

- Past social security and unemployment insurance contributions;
- Federal, state, and local taxes not withheld;
- Unpaid overtime;
- Fines and penalties on any amounts not properly withheld.

Does this all mean that businesses should simply forget about utilizing independent contractors and put all workers on the company payroll? No. Independent contractors have their place in American business, even in light of the potential risks and costs of
making a classification error. Many workers are in fact independent contractors. The key to safely using independent contractors is to make a thorough and honest examination of the facts to see if independent contractor status is feasible and, if so, to design and implement a written agreement that adequately protects the business.

Perhaps the most frustrating aspect of this area of the law is its gross inconsistency. The U.S. Tax Court might rule that a worker is an independent contractor for purposes of income tax withholding while a state court in Minnesota may find the very same person to be an employee for purposes of his or her eligibility for state-mandated workers’ compensation benefits. Such a result would by no means be unusual. Each court is applying its own rule.

Table 14-1. Risks and Benefits to Business in Hiring Independent Contractors

<table>
<thead>
<tr>
<th>RISKS OF INDEPENDENT CONTRACTOR CLASSIFICATION</th>
<th>BENEFITS OF INDEPENDENT CONTRACTOR CLASSIFICATION</th>
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<tbody>
<tr>
<td>Liability for unpaid state and federal employment taxes</td>
<td>Avoid federal and state employment taxes</td>
</tr>
<tr>
<td>Liability for workplace injuries sustained by “employees”</td>
<td>Not required to provide workers’ compensation insurance coverage</td>
</tr>
<tr>
<td>Liability for unpaid overtime</td>
<td>Not covered by state and federal “employment” laws, including wage and hour laws and anti-discrimination provisions</td>
</tr>
<tr>
<td>Liability for failure to provide benefits under ERISA</td>
<td>Not required to provide “employee” benefits</td>
</tr>
<tr>
<td>Liability for back unemployment insurance contributions</td>
<td>Not required to grant mandatory “family leaves” or accommodate certain disabilities under state and federal law</td>
</tr>
</tbody>
</table>

The following are examples of problems associated with misclassification of employees as independent contractors.

**Example 1.**

*ABC Corp. hires John to deliver its products to customers.* John signs a contract indicating he is an independent contractor. When ABC decides to terminate his contract, John files for unpaid overtime with the state labor commissioner. ABC Corp. had been paying John by the job rather than by the hour. If the labor commission determines that John should have been classified as an employee, *ABC Corp. will be liable for the difference between what John was paid and what John should have been paid if the employer were complying with minimum wage and overtime laws.* Depending on the circumstances, the difference could be considerable.
Example 2.

*Bullet Department Store “hires” Jack as an independent contractor salesperson. Under the terms of the written agreement, Bullet is allowed to decide the days Jack works. They assign Jack to work on Sundays despite his request that he not work that day because it is prohibited by the tenets of his church. Bullet terminates Jack’s contract when he refuses to work on Sundays. Jack brings a suit under Title VII alleging that Bullet failed to reasonably accommodate his religious practices. If the court finds that Jack was in fact an employee and not an independent contractor, Bullet will be ordered to pay Jack damages for violating his rights under Title VII.*

Example 3.

*The Boomtown Gazette uses independent contractors to deliver its daily newspaper. Sally signs a contract to deliver the newspaper in her neighborhood. One morning on her way from the newspaper plant to her route, Sally is involved in an automobile accident. She is severely injured and unable to work for a long period of time. Sally files for workers’ compensation benefits. The newspaper says she is not eligible because she is an independent contractor. If the appropriate state regulatory body determines that Sally should have been classified as an employee, the newspaper will be liable for her workers’ compensation insurance benefits.*

Example 4.

*The accounting firm of J, K & L places an advertisement in the local newspaper looking for an accountant who will work as an independent contractor for a 3-month period during the firm’s busy season. Barbara, who is wheelchair bound, is called in for an interview. When Barbara learns that the firm is located on the second-floor of an old building that is not equipped with an elevator, they tell her she will not be able to do the job. If a court finds Barbara was applying for an employment position, the firm could be liable for not finding a way to reasonably accommodate her disability.*

Example 5.

*The law firm of Apple, Apple, and Sauce, enters into a contract with Spencer, a licensed attorney, to provide help in a large suit the firm is prosecuting. The contract calls for Spencer to be classified as an independent contractor. A year after entering into the agreement, Spencer learns that his mother is seriously ill and has only a few months to live. He asks the firm for a 2-week leave to spend time with her. The firm refuses. If Spencer can show that he should have been classified as an employee, he has the right to seek damages against the firm if an employee in his same circumstances would have been entitled to a leave of absence.*
Table 14-2. Comparison of Legal Obligations of Businesses for Employees and Independent Contractors

<table>
<thead>
<tr>
<th>Issue</th>
<th>Employees</th>
<th>Independent Contractors</th>
</tr>
</thead>
<tbody>
<tr>
<td>Workers Compensation coverage</td>
<td>Required</td>
<td>Not required</td>
</tr>
<tr>
<td>Unemployment Insurance coverage</td>
<td>Required</td>
<td>Not required</td>
</tr>
<tr>
<td>Income tax withholding</td>
<td>Required</td>
<td>Not required</td>
</tr>
<tr>
<td>Liability of company for worker’s actions</td>
<td>Employer vicariously liable</td>
<td>Company may be liable in some circumstances</td>
</tr>
<tr>
<td>Wage and Hour laws, including minimum wage</td>
<td>Covered</td>
<td>Not covered</td>
</tr>
<tr>
<td>Employment discrimination laws</td>
<td>Applicable</td>
<td>Not applicable, but other general business laws may provide some protection</td>
</tr>
<tr>
<td>Family and Medical Leave laws (state and federal)</td>
<td>Applicable</td>
<td>Not applicable</td>
</tr>
<tr>
<td>Federal laws protecting collective bargaining and other labor organizing activities</td>
<td>Applicable</td>
<td>Not applicable</td>
</tr>
</tbody>
</table>

II. **IRS 20-Factor Test**

The Internal Revenue Service is the branch of the federal government charged with collecting employment taxes, including federal income and unemployment insurance. Given the amount of money involved in misclassification, part of the charge of the IRS is to “audit” businesses to ensure that workers are properly classified as either independent contractors or employees.

Keep in mind that the government has a vested interest in determining that a worker is an employee rather than an independent contractor – the collection of taxes. It is more efficient for the government to have employers act as tax collectors for income tax purposes than to hope “independent contractors” will file timely and accurate personal tax returns. Many commentators have also suggested that public policy favors the finding of employment status and all of the legal protections and rights that attach to that status – including eligibility for unemployment insurance. We will see in Part III that state law often expressly favors finding workers to be employees rather than independent contractors. It is important to keep this in mind because the burden will always be on the business, or alleged “employer” to prove that the worker is an independent contractor rather than an employee. Careful attention to every aspect of the relationship with a purported independent contractor is therefore essential, as the following discussion will illustrate.

A. **COMMON LAW EMPLOYEES / THE IRS 20-FACTOR TEST**

The first thing the IRS will do in conducting an employment tax audit is to see if any purported “independent contractors” fall into the categories of statutory employees.
These categories provide that, as a matter of law, certain workers are employees for purposes of some or all employment taxes. When no clear statutory provision exists, the IRS will look to the common law classification of the workers in question. The IRS uses its own test to determine the status of a worker as either that of employee or independent contractor. The IRS test is based on common law rather than statute, meaning it is derived from the manner in which the courts have classified workers rather than a legislative enactment. The well-known IRS 20-factor test, below, was promulgated in the form of Revenue Ruling 1987-1 C.B. 296, issued in 1987.

Revenue Ruling

EMPLOYMENT STATUS UNDER SECTION 530(D) OF THE REVENUE ACT OF 1978

Employment status under section 530(d) of the Revenue Act of 1978. Guidelines are set forth for determining the employment status of a taxpayer (technical service specialist) affected by section 530(d) of the Revenue Act of 1978, as added by section 1706 of the Tax Reform Act of 1986. The specialists are to be classified as employees under generally applicable common law standards.

ISSUE

In the situations described below, are the individuals employees under the common law rules for purposes of the Federal Insurance Contributions Act (FICA), the Federal Unemployment Tax Act (FUTA), and the Collection of Income Tax at Source on Wages (chapters 21, 23, and 24 respectively, subtitle C, Internal Revenue Code)? These situations illustrate the application of section 530(d) of the Revenue Act of 1978, 1978-3 (Vol. 1) C.B. xi, 119 (the 1978 Act), which was added by section 1706(a) of the Tax Reform Act of 1986, 1986-3 (Vol. 1) C.B. ___ (the 1986 Act) (generally effective for services performed and remuneration paid after December 31, 1986).

FACTS

In each factual situation, an individual worker (Individual), pursuant to an arrangement between one person (Firm) and another person (Client), provides services for the Client as an engineer, designer, drafter, computer programmer, systems analyst, or other similarly skilled worker engaged in a similar line of work.

SITUATION 1

The Firm is engaged in the business of providing temporary technical services to its clients. The Firm maintains a roster of workers who are available to provide technical services to prospective clients. The Firm does not train the workers but determines the services that the workers are qualified to perform based on information submitted by the workers.

The Firm has entered into a contract with the Client. The contract states that the Firm is to provide the Client with workers to perform computer programming services meeting specified qualifications for a particular project. The Individual, a computer programmer, enters into a contract with the Firm to perform services as a computer programmer for the Client's project, which is expected to last less than one year. The Individual is one of several programmers provided by the Firm to the Client. The Individual has not been an
employee of or performed services for the Client (or any predecessor or affiliated corporation of the Client) at any time preceding the time at which the Individual begins performing services for the Client. Also, the Individual has not been an employee of or performed services for or on behalf of the Firm at any time preceding the time at which the Individual begins performing services for the Client. The Individual's contract with the Firm states that the Individual is an independent contractor with respect to services performed on behalf of the Firm for the Client.

The Individual and the other programmers perform the services under the Firm's contract with the Client. During the time the Individual is performing services for the Client, even though the Individual retains the right to perform services for other persons, substantially all of the Individual's working time is devoted to performing services for the Client. A significant portion of the services are performed on the Client's premises. The Individual reports to the Firm by accounting for time worked and describing the progress of the work. The Firm pays the Individual and regularly charges the Client for the services performed by the Individual. The Firm generally does not pay individuals who perform services for the Client unless the Firm provided such individuals to the Client.

The work of the Individual and other programmers is regularly reviewed by the Firm. The review is based primarily on reports by the Client about the performance of these workers. Under the contract between the Individual and the Firm, the Firm may terminate its relationship with the Individual if the review shows that he or she is failing to perform the services contracted for by the Client. Also, the Firm will replace the Individual with another worker if the Individual's services are unacceptable to the Client. In such a case, however, the Individual will nevertheless receive his or her hourly pay for the work completed.

Finally, under the contract between the Individual and the Firm, the Individual is prohibited from performing services directly for the Client and, under the contract between the Firm and the Client, the Client is prohibited from receiving services from the Individual for a period of three months following the termination of services by the Individual for the Client on behalf of the Firm.

**SITUATION 2**

The Firm is a technical services firm that supplies clients with technical personnel. The Client requires the services of a systems analyst to complete a project and contacts the Firm to obtain such an analyst. The Firm maintains a roster of analysts and refers such an analyst, the Individual, to the Client. The Individual is not restricted by the Client or the Firm from providing services to the general public while performing services for the Client and in fact does perform substantial services for other persons during the period the Individual is working for the Client. Neither the Firm nor the Client has priority on the services of the Individual. The Individual does not report, directly or indirectly, to the Firm after the beginning of the assignment to the Client concerning (1) hours worked by the Individual, (2) progress on the job, or (3) expenses incurred by the Individual in performing services for the Client. No reports (including reports of time worked or progress on the job) made by the Individual to the Client are provided by the Client to the Firm.

If the Individual ceases providing services for the Client prior to completion of the project or if the Individual's work product is otherwise unsatisfactory, the Client may seek
damages from the Individual. However, in such circumstances, the Client may not seek damages from the Firm, and the Firm is not required to replace the Individual. The Firm may not terminate the services of the Individual while he or she is performing services for the Client and may not otherwise affect the relationship between the Client and the Individual. Neither the Individual nor the Client is prohibited for any period after termination of the Individual’s services on this job from contracting directly with the other. For referring the Individual to the Client, the Firm receives a flat fee that is fixed prior to the Individual’s commencement of services for the Client and is unrelated to the number of hours and quality of work performed by the Individual. The Individual is not paid by the Firm either directly or indirectly. No payment made by the Client to the Individual reduces the amount of the fee that the Client is otherwise required to pay the Firm. The Individual is performing services that can be accomplished without the Individual’s receiving direction or control as to hours, place of work, sequence, or details of work.

SITUATION 3

The Firm, a company engaged in furnishing client firms with technical personnel, is contacted by the Client, who is in need of the services of a drafter for a particular project, which is expected to last less than one year. The Firm recruits the Individual to perform the drafting services for the Client. The Individual performs substantially all of the services for the Client at the office of the Client, using materials and equipment of the Client. The services are performed under the supervision of employees of the Client. The Individual reports to the Client on a regular basis. The Individual is paid by the Firm based on the number of hours the Individual has worked for the Client, as reported to the Firm by the Client or as reported by the Individual and confirmed by the Client. The Firm has no obligation to pay the Individual if the Firm does not receive payment for the Individual’s services from the Client. For recruiting the Individual for the Client, the Firm receives a flat fee that is fixed prior to the Individual’s commencement of services for the Client and is unrelated to the number of hours and quality of work performed by the Individual. However, the Firm does receive a reasonable fee for performing the payroll function. The Firm may not direct the work of the Individual and has no responsibility for the work performed by the Individual. The Firm may not terminate the services of the Individual. The Client may terminate the services of the Individual without liability to either the Individual or the Firm. The Individual is permitted to work for another firm while performing services for the Client, but does in fact work for the Client on a substantially full-time basis.

LAW AND ANALYSIS

This ruling provides guidance concerning the factors that are used to determine whether an employment relationship exists between the Individual and the Firm for federal employment tax purposes and applies those factors to the given factual situations to determine whether the Individual is an employee of the Firm for such purposes. The ruling does not reach any conclusions concerning whether an employment relationship for federal employment tax purposes exists between the Individual and the Client in any of the factual situations.
Analysis of the preceding three fact situations requires an examination of the common law rules for determining whether the Individual is an employee with respect to either the Firm or the Client, a determination of whether the Firm or the Client qualifies for employment tax relief under section 530(a) of the 1978 Act, and a determination of whether any such relief is denied the Firm under section 530(d) of the 1978 Act (added by Section 1706 of the 1986 Act).

An individual is an employee for federal employment tax purposes if the individual has the status of an employee under the usual common law rules applicable in determining the employer-employee relationship. Guides for determining that status are found in the following three substantially similar sections of the Employment Tax Regulations: sections 31.3121(d)-1(c); 31.3306(i)-1; and 31.3401(c)-1.

These sections provide that generally the relationship of employer and employee exists when the person or persons for whom the services are performed have the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but as to how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if the employer has the right to do so.

Conversely, these sections provide, in part, that individuals (such as physicians, lawyers, dentists, contractors, and subcontractors) who follow an independent trade, business, or profession, in which they offer their services to the public, generally are not employees.

Finally, if the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such a relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, independent contractor, or the like.

As an aid to determining whether an individual is an employee under the common law rules, twenty factors or elements have been identified as indicating whether sufficient control is present to establish an employer-employee relationship. The twenty factors have been developed based on an examination of cases and rulings considering whether an individual is an employee. The degree of importance of each factor varies depending on the occupation and the factual context in which the services are performed. The twenty factors are designed only as guides for determining whether an individual is an employee; special scrutiny is required in applying the twenty factors to assure that formalistic aspects of an arrangement designed to achieve a particular status do not obscure the substance of the arrangement (that is, whether the person or persons for whom the services are performed exercise sufficient control over the individual for the individual to be classified as an employee). The twenty factors are described below:

1. **INSTRUCTIONS.** A worker who is required to comply with other persons' instructions about when, where, and how he or she is to work is ordinarily an employee. This control factor is present if the person or persons for whom the services are performed have the RIGHT to require compliance with instructions. See, for example, Rev. Rul. 68-598, 1968-2 C.B. 464, and Rev. Rul. 66-381, 1966-2 C.B. 449.
2. **TRAINING.** Training a worker by requiring an experienced employee to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the person or persons for whom the services are performed want the services performed in a particular method or manner. See Rev. Rul. 70-630, 1970-2 C.B. 229.

3. **INTEGRATION.** Integration of the worker's services into the business operations generally shows that the worker is subject to direction and control. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, the workers who perform those services must necessarily be subject to a certain amount of control by the owner of the business. See United States v. Silk, 331 U.S. 704 (1947), 1947-2 C.B. 167.

4. **SERVICES RENDERED PERSONALLY.** If the Services must be rendered personally, presumably the person or persons for whom the services are performed are interested in the methods used to accomplish the work as well as in the results. See Rev. Rul. 55-695, 1955-2 C.B. 410.

5. **HIRING, SUPERVISING, AND PAYING ASSISTANTS.** If the person or persons for whom the services are performed hire, supervise, and pay assistants, that factor generally shows control over the workers on the job. However, if one worker hires, supervises, and pays the other assistants pursuant to a contract under which the worker agrees to provide materials and labor and under which the worker is responsible only for the attainment of a result, this factor indicates an independent contractor status. Compare Rev. Rul. 63-115, 1963-1 C.B. 178, with Rev. Rul. 55-593 1955-2 C.B. 610.

6. **CONTINUING RELATIONSHIP.** A continuing relationship between the worker and the person or persons for whom the services are performed indicates that an employer-employee relationship exists. A continuing relationship may exist where work is performed at frequently recurring although irregular intervals. See United States v. Silk.

7. **SET HOURS OF WORK.** The establishment of set hours of work by the person or persons for whom the services are performed is a factor indicating control. See Rev. Rul. 73-591, 1973-2 C.B. 337.

8. **FULL TIME REQUIRED.** If the worker must devote substantially full time to the business of the person or persons for whom the services are performed, such person or persons have control over the amount of time the worker spends working and impliedly restrict the worker from doing other gainful work. An independent contractor on the other hand, is free to work when and for whom he or she chooses. See Rev. Rul. 56-694, 1956-2 C.B. 694.

9. **DOING WORK ON EMPLOYER'S PREMISES.** If the work is performed on the premises of the person or persons for whom the services are performed, that factor suggests control over the worker, especially if the work could be done elsewhere. Rev. Rul. 56-660, 1956-2 C.B. 693. Work done off the premises of the person or persons receiving the services, such as at the office of the worker, indicates some freedom from control. However, this fact by itself does not mean that the worker is not an employee. The importance of this factor depends on the nature of the service involved and the extent to which an employer generally would require that employees perform such services on the employer's premises. Control over the place of work is indicated when
Independent Contractors

the person or persons for whom the services are performed have the right to compel the worker to travel a designated route, to canvass a territory within a certain time, or to work at specific places as required. See Rev. Rul. 56-694.

10. ORDER OR SEQUENCE SET. If a worker must perform services in the order or sequence set by the person or persons for whom the services are performed, that factor shows that the worker is not free to follow the worker's own pattern of work but must follow the established routines and schedules of the person or persons for whom the services are performed. Often, because of the nature of an occupation, the person or persons for whom the services are performed do not set the order of the services or set the order infrequently. It is sufficient to show control, however, if such person or persons retain the right to do so. See Rev. Rul. 56-694.

11. ORAL OR WRITTEN REPORTS. A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control. See Rev. Rul. 70-309, 1970-1 C.B. 199, and Rev. Rul. 68-248, 1968-1 C.B. 431.

12. PAYMENT BY HOUR, WEEK, MONTH. Payment by the hour, week, or month generally points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying a lump sum agreed upon as the cost of a job. Payment made by the job or on a straight commission generally indicates that the worker is an independent contractor. See Rev. Rul. 74-389, 1974-2 C.B. 330.

13. PAYMENT OF BUSINESS AND/OR TRAVELING EXPENSES. If the person or persons for whom the services are performed ordinarily pay the worker's business and/or traveling expenses, the worker is ordinarily an employee. An employer, to be able to control expenses, generally retains the right to regulate and direct the worker's business activities. See Rev. Rul. 55-144, 1955-1 C.B. 483.

14. FURNISHING OF TOOLS AND MATERIALS. The fact that the person or persons for whom the services are performed furnish significant tools, materials, and other equipment tends to show the existence of an employer-employee relationship. See Rev. Rul. 71-524, 1971-2 C.B. 346.

15. SIGNIFICANT INVESTMENT. If the worker invests in facilities that are used by the worker in performing services and are not typically maintained by employees (such as the maintenance of an office rented at fair value from an unrelated party), that factor tends to indicate that the worker is an independent contractor. On the other hand, lack of investment in facilities indicates dependence on the person or persons for whom the services are performed for such facilities and, accordingly, the existence of an employer-employee relationship. See Rev. Rul. 71-524. Special scrutiny is required with respect to certain types of facilities, such as home offices.

16. REALIZATION OF PROFIT OR LOSS. A worker who can realize a profit or suffer a loss as a result of the worker's services (in addition to the profit or loss ordinarily realized by employees) is generally an independent contractor, but the worker who cannot is an employee. See Rev. Rul. 70-309. For example, if the worker is subject to a real risk of economic loss due to significant investments or a bona fide liability for expenses, such as salary payments to unrelated employees, that factor indicates that the worker is an independent contractor. The risk that a worker will not receive payment for his or her
services, however, is common to both independent contractors and employees and thus does not constitute a sufficient economic risk to support treatment as an independent contractor.

17. WORKING FOR MORE THAN ONE FIRM AT A TIME. If a worker performs more than de minimis services for a multiple of unrelated persons or firms at the same time, that factor generally indicates that the worker is an independent contractor. See Rev. Rul. 70-572, 1970-2 C.B. 221. However, a worker who performs services for more than one person may be an employee of each of the persons, especially where such persons are part of the same service arrangement.

18. MAKING SERVICE AVAILABLE TO GENERAL PUBLIC. The fact that a worker makes his or her services available to the general public on a regular and consistent basis indicates an independent contractor relationship. See Rev. Rul. 56-660.

19. RIGHT TO DISCHARGE. The right to discharge a worker is a factor indicating that the worker is an employee and the person possessing the right is an employer. An employer exercises control through the threat of dismissal, which causes the worker to obey the employer's instructions. An independent contractor, on the other hand, cannot be fired so long as the independent contractor produces a result that meets the contract specifications. Rev. Rul. 75-41, 1975-1 C.B. 323.

20. RIGHT TO TERMINATE. If the worker has the right to end his or her relationship with the person for whom the services are performed at any time he or she wishes without incurring liability, that factor indicates an employer-employee relationship. See Rev. Rul. 70-309.

Rev. Rul. 75-41 considers the employment tax status of individuals performing services for a physician's professional service corporation. The corporation is in the business of providing a variety of services to professional people and firms (subscribers), including the services of secretaries, nurses, dental hygienists, and other similarly trained personnel. The individuals who are to perform the services are recruited by the corporation, paid by the corporation, assigned to jobs, and provided with employee benefits by the corporation. Individuals who enter into contracts with the corporation agree they will not contract directly with any subscriber to which they are assigned for at least three months after cessation of their contracts with the corporation. The corporation assigns the individual to the subscriber to work on the subscriber's premises with the subscriber's equipment.

Subscribers have the right to require that an individual furnished by the corporation cease providing services to them, and they have the further right to have such individual replaced by the corporation within a reasonable period of time, but the subscribers have no right to affect the contract between the individual and the corporation. The corporation retains the right to discharge the individuals at any time. Rev. Rul. 75-41 concludes that the individuals are employees of the corporation for federal employment tax purposes.

Rev. Rul. 70-309 considers the employment tax status of certain individuals who perform services as oil well pumpers for a corporation under contracts that characterize such individuals as independent contractors. Even though the pumpers perform their services away from the headquarters of the corporation and are not given day-to-day directions
and instructions, the ruling concludes that the pumpers are employees of the corporation because the pumpers perform their services pursuant to an arrangement that gives the corporation the right to exercise whatever control is necessary to assure proper performance of the services; the pumpers' services are both necessary and incident to the business conducted by the corporation; and the pumpers are not engaged in an independent enterprise in which they assume the usual business risks, but rather work in the course of the corporation's trade or business. See also Rev. Rul. 70-630, 1970-2 C.B. 229, which considers the employment tax status of sales clerks furnished by an employee service company to a retail store to perform temporary services for the store.

Section 530(a) of the 1978 Act, as amended by section 269(c) of the Tax Equity and Fiscal Responsibility Act of 1982, 1982-2 C.B. 462, 536, provides, for purposes of the employment taxes under subtitle C of the Code, that if a taxpayer did not treat an individual as an employee for any period, then the individual shall be deemed not to be an employee, unless the taxpayer had no reasonable basis for not treating the individual as an employee. For any period after December 31, 1978, this relief applies only if both of the following consistency rules are satisfied: (1) all federal tax returns (including information returns) required to be filed by the taxpayer with respect to the individual for the period are filed on a basis consistent with the taxpayer's treatment of the individual as not being an employee ('reporting consistency rule'), and (2) the taxpayer (and any predecessor) has not treated any individual holding a substantially similar position as an employee for purposes of the employment taxes for periods beginning after December 31, 1977 ('substantive consistency rule').

The determination of whether any individual who is treated as an employee holds a position substantially similar to the position held by an individual whom the taxpayer would otherwise be permitted to treat as other than an employee for employment tax purposes under section 530(a) of the 1978 Act requires an examination of all the facts and circumstances, including particularly the activities and functions performed by the individuals. Differences in the positions held by the respective individuals that result from the taxpayer's treatment of one individual as an employee and the other individual as other than an employee (for example, that the former individual is a participant in the taxpayer's qualified pension plan or health plan and the latter individual is not a participant in either) are to be disregarded in determining whether the individuals hold substantially similar positions.

Section 1706(a) of the 1986 Act added to section 530 of the 1978 Act a new subsection (d), which provides an exception with respect to the treatment of certain workers. Section 530(d) provides that section 530 shall not apply in the case of an individual who, pursuant to an arrangement between the taxpayer and another person, provides services for such other person as an engineer, designer, drafter, computer programmer, systems analyst, or other similarly skilled worker engaged in a similar line of work. Section 530(d) of the 1978 Act does not affect the determination of whether such workers are employees under the common law rules. Rather, it merely eliminates the employment tax relief under section 530(a) of the 1978 Act that would otherwise be available to a taxpayer with respect to those workers who are determined to be employees of the taxpayer under the usual common law rules. Section 530(d) applies to remuneration paid and services rendered after December 31, 1986.
The Conference Report on the 1986 Act discusses the effect of section 530(d) as follows:

The Senate amendment applies whether the services of [technical service workers] are provided by the firm to only one client during the year or to more than one client, and whether or not such individuals have been designated or treated by the technical services firm as independent contractors, sole proprietors, partners, or employees of a personal service corporation controlled by such individual. The effect of the provision cannot be avoided by claims that such technical service personnel are employees of personal service corporations controlled by such personnel. For example, an engineer retained by a technical services firm to provide services to a manufacturer cannot avoid the effect of this provision by organizing a corporation that he or she controls and then claiming to provide services as an employee of that corporation.

* * * [T]he provision does not apply with respect to individuals who are classified, under the generally applicable common law standards, as employees of a business that is a client of the technical services firm.

2 H. R. Rep. No. 99-841 (Conf. Rep.), 99th Cong., 2d Sess. II-834 to 835 (1986). Under the facts of Situation 1 the legal relationship is between the Firm and the Individual, and the Firm retains the right of control to insure that the services are performed in a satisfactory fashion. The fact that the Client may also exercise some degree of control over the Individual does not indicate that the Individual is not an employee. Therefore, in Situation 1, the Individual is an employee of the Firm under the common law rules. The facts in Situation 1 involve an arrangement among the Individual, Firm, and Client, and the services provided by the Individual are technical services. Accordingly, the Firm is denied section 530 relief under section 530(d) of the 1978 Act (as added by section 1706 of the 1986 Act), and no relief is available with respect to any employment tax liability incurred in Situation 1. The analysis would not differ if the acts of Situation 1 were changed to state that the Individual provided the technical services through a personal service corporation owned by the Individual.

In Situation 2, the Firm does not retain any right to control the performance of the services by the Individual and, thus, no employment relationship exists between the Individual and the Firm.

In Situation 3, the Firm does not control the performance of the services of the Individual, and the Firm has no right to affect the relationship between the Client and the Individual. Consequently, no employment relationship exists between the Firm and the Individual.

**HOLDINGS**

**SITUATION 1.** The Individual is an employee of the Firm under the common law rules. Relief under section 530 of the 1978 Act is not available to the Firm because of the provisions of section 530(d).
SITUATION 2. The Individual is not an employee of the Firm under the common law rules.

SITUATION 3. The Individual is not an employee of the Firm under the common law rules.

Because of the application of section 530(b) of the 1978 Act, no inference should be drawn with respect to whether the Individual in Situations 2 and 3 is an employee of the Client for federal employment tax purposes.

III. Application of the 20-Factor Test

A. NO GUARANTEES

The 20-factor test is helpful in determining worker status, but it certainly does not give businesses any type of guarantee that they have correctly classified their workers. This ambiguity is the result of several factors:

- The IRS does not give specific weight to any of the 20 factors discussed above; its determinations are made based on the totality of the circumstances. That means that a business could theoretically be okay on 15 of the 20 factors and will still be faced with being told its worker is an employee;

- The precise nature of the relationship between a business and its worker(s) is very individualized; it is almost impossible to promulgate a rule that will provide guidance to businesses in every situation; even within the same industry practices can vary greatly.

A business that wants to utilize an independent contractor in lieu of an employee should attempt to have as many aspects of its relationship comport with the IRS test. The following table summarizes those factors.
Table 14-3. The IRS 20-Factor Test

<table>
<thead>
<tr>
<th>FACTOR</th>
<th>EMPLOYEE STATUS</th>
<th>INDEPENDENT CONTRACTOR STATUS</th>
</tr>
</thead>
<tbody>
<tr>
<td>INSTRUCTIONS</td>
<td>Employer has right to direct specific actions of employee, including when and where to work</td>
<td>Independent contractor not required to comply with specific instructions of principal as to when, where, or how to complete the task</td>
</tr>
<tr>
<td>TRAINING</td>
<td>An employee can be required to undergo training mandated by the employer</td>
<td>An independent contractor does not receive and is not required to undergo training by the principal or his agents</td>
</tr>
<tr>
<td>INTEGRATION</td>
<td>An employee performs his job in conjunction with other employees</td>
<td>An independent contractor performs his duties without significant involvement of the principal’s employees</td>
</tr>
<tr>
<td>SERVICES RENDERED PERSONALLY</td>
<td>An employee personally renders the services for which he is employed</td>
<td>An independent contractor is not required to personally render the services contracted for; he may utilize his own employees or other independent contractors; he does not need permission to utilize agents in the performance of the contract</td>
</tr>
<tr>
<td>HIRING, SUPERVISING, AND PAYING ASSISTANTS</td>
<td>An employee is not responsible for hiring and paying his own assistants -- that is done by the employer</td>
<td>An independent contractor is responsible for hiring, supervising and paying his own assistants, if necessary to the performance of the contract</td>
</tr>
<tr>
<td>CONTINUING RELATIONSHIP</td>
<td>An employee has a continuing relationship with his employer</td>
<td>An independent contractor does not necessarily have a continuing relationship with any particular principal</td>
</tr>
<tr>
<td>SET HOURS OF WORK</td>
<td>An employee has his hours of work established by his employer</td>
<td>An independent contractor is able to control the hours he works</td>
</tr>
<tr>
<td><strong>FULL-TIME REQUIRED</strong></td>
<td>An employee is subject to the control of his employer in terms of when he works and can be limited in accepting outside employment</td>
<td>An independent contractor is not required to spend all of his work time performing services for the principal; he is free to work for whom and when he chooses</td>
</tr>
<tr>
<td>------------------------</td>
<td>------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td>------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td><strong>DOING WORK ON EMPLOYER’S PREMISES</strong></td>
<td>An employee is required to perform his duties on the employer’s premises; this is particularly true when work could be performed elsewhere</td>
<td>An independent contractor is not required to perform work at any particular location, including the principal’s premises; the nature of the work may limit the choice available to an independent contractor</td>
</tr>
<tr>
<td><strong>ORDER TO SEQUENCE SET</strong></td>
<td>An employee is given a set order or sequence in which to perform certain work by his employer and is normally not allowed to select his own pattern or schedule</td>
<td>An independent contractor is not required to perform his services in any particular sequence; rather, he establishes his own routing and patterns for performing his services</td>
</tr>
<tr>
<td><strong>ORAL OR WRITTEN REPORTS</strong></td>
<td>An employee is required to submit regular reports, either oral or written, to his employer</td>
<td>An independent contractor is not required to report to his principal on a regular basis, although the provisions of his contract may mandate specific progress reports</td>
</tr>
<tr>
<td><strong>PAYMENT BY HOUR, WEEK, MONTH</strong></td>
<td>An employee is paid by the hour, week or month</td>
<td>An independent contractor is paid by the job or receives a straight commission</td>
</tr>
<tr>
<td><strong>PAYMENT OF BUSINESS AND/OR TRAVELING EXPENSES</strong></td>
<td>An employee is reimbursed for expenses, including travel, incurred in the performance of his employment duties</td>
<td>An independent contractor is responsible for paying all of his own expenses, including travel</td>
</tr>
<tr>
<td><strong>FURNISHING OF TOOLS AND MATERIALS</strong></td>
<td>An employee receives his tools or other materials required for work from his employer</td>
<td>An independent contractor furnishes his own tools or other materials</td>
</tr>
</tbody>
</table>

Independent Contractors 14-16
<table>
<thead>
<tr>
<th>SIGNIFICANT INVESTMENT</th>
<th>An employee is not required to make a significant investment in order to perform his job; the place of work and necessary equipment are provided by the employer</th>
<th>An independent contractor makes a personal investment in his business or trade, such as the renting of an office or the purchase of equipment</th>
</tr>
</thead>
<tbody>
<tr>
<td>REALIZATION OF PROFIT OR LOSS</td>
<td>An employee is paid the same amount regardless of the outcome of his work, and therefore is unable to either suffer a loss or realize a profit</td>
<td>An independent contractor is a business person able to realize a profit or suffer a loss as a result of performing his services for the principal(s)</td>
</tr>
<tr>
<td>WORKING FOR MORE THAN ONE FIRM AT A TIME</td>
<td>An employee normally works for only one firm or employer at a time</td>
<td>An independent contractor often works for more than one principal at a time</td>
</tr>
<tr>
<td>MAKING SERVICE AVAILABLE TO GENERAL PUBLIC</td>
<td>An employee generally does not provide services or do work for other people or firms</td>
<td>An independent contractor offers his services to other people or business</td>
</tr>
<tr>
<td>RIGHT TO DISCHARGE</td>
<td>An employee is subject to dismissal by an employer regardless at any time (in the absence of an employment contract limiting the right of an employer to discharge, in which case discharge is governed by terms of the agreement)</td>
<td>An independent contractor cannot be “fired” so long as the independent contractor produces a result that meets the contract specifications</td>
</tr>
<tr>
<td>RIGHT TO TERMINATE</td>
<td>An employee is free to quit at any time without incurring liability (in the absence of a written employment contract providing otherwise)</td>
<td>An independent contractor may only terminate his relationship with the principal according to the terms of their contract</td>
</tr>
</tbody>
</table>
Under the common law, a worker is an employee when the person for whom the services are performed has the right to control and direct the individual who performs the services. The "right of control" is determined by applying the above 20-factors. This control reaches not only the result to be accomplished, but also the details and means by which that result is to be accomplished. Note that control must be present, but need not actually be exercised. Also, note that courts have held that the degree of supervision necessary to demonstrate control is only "such supervision as the nature of the work requires."

To determine whether the control test is satisfied in a particular case, the facts and circumstances must be examined. Questions about the relationship between the worker and the prospective employer are asked to ascertain control.

Also remember that the IRS will consider factors beyond the 20 specified above. The following points are also helpful when considering the use of independent contractors:

- There is no "magic number" of relevant evidentiary factors;
- Whatever the number of factors used, the factors merely point to facts to be used in evaluating the extent of the right to direct and control;
- As in any examination, the IRS will explore all relevant information before answering the legal question of whether the right to direct and control associated with an employment relationship exists.
- The IRS will expect a business to have strong and well-documented evidence to support its position that a worker or workers are independent contractors. This includes written contracts, company protocols, records of payments made to workers, etc.

The pieces of information that are important to help determine employee status change over time because business relationships change over time. What might have been a crucial piece of evidence in 1985 on which to base a decision about whether a business retained the right to control a worker may not carry the same weight for making an employee status determination currently.

For example, the fact that a delivery driver was required to wear a uniform bearing the name of the retail business demonstrated control indicative of an employee relationship. Today, these requirements may be established to provide customers with some assurance that the worker can be safely allowed entry to the home or business. In other words, the wearing of the uniform today may have less to do with the degree of control exercised by the business over the worker than it had in the past.

**B. CATEGORIES**

Attorneys often divide the 20-factors into three broad categories: (1) behavioral control; (2) financial control; and (3) the type of relationship between the company and the worker, i.e. the understanding of the parties themselves.
1. **Behavioral Control**

The common law “right of control” test that was discussed in the Introduction deals specifically with the level of control the business has over the manner in which the work is performed. Behavioral Control covers facts that show whether the business has a right to direct and control how the work is done, through instructions, training, or other means.

The following factors within the IRS test are illustrative of the type of behavioral control that results in the finding of employment status:

- Instructions;
- Training;
- Set hours of work;
- Integration;
- Services personally rendered;
- Oral or written reports;
- Set sequence of work; and
- Doing work on employer’s premises.

2. **Financial Control**

Financial Control covers facts that show whether the employer or business has a right to control the business aspects of the worker’s job. This includes:

- The extent to which the worker has unreimbursed business expenses;
- The extent of the worker’s investment in the business;
- The extent to which the worker makes services available to the relevant market;
- How the business pays the worker; and
- The extent to which the worker can realize a profit or incur a loss.

3. **Relationship of the Parties**

We said in Part I that the parties own classification is not legally conclusive. That means that the fact that a worker signs a contract in which agrees that he is an independent contractor does not make him in independent contractor. It is, however, certainly relevant to the analysis. Also relevant are other aspects of the relationship, including whether the worker receives or is entitled to the benefits offered to employees. Facts covered by Type of Relationship include:
Independent Contractors 14-20

- Written contracts describing the relationship the parties intended to create;
- The extent to which the worker is available to perform services for other, similar businesses;
- Whether the business provides the worker with employee–type benefits, such as insurance, a pension plan, vacation pay, or sick pay; and
- The permenancy of the relationship.

Caution!

Always remember, however, that no one factor is determinative. The best rule of thumb is that the more a business directs and controls the manner in which the work is performed, the more likely it is that the worker is an employee and not an independent contractor.

Table 14-4. Determining the Right to Direct or Control

<table>
<thead>
<tr>
<th>Behavioral Control</th>
<th>Facts that illustrate whether there is a right to direct or control how the worker performs the specific task for which he or she is hired:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>• Instructions</td>
</tr>
<tr>
<td></td>
<td>• Training</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Financial Control</th>
<th>Facts that illustrate whether there is a right to direct or control how the business aspects of the worker’s activities are conducted:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>• Significant investment</td>
</tr>
<tr>
<td></td>
<td>• Unreimbursed expenses</td>
</tr>
<tr>
<td></td>
<td>• Services available to the public</td>
</tr>
<tr>
<td></td>
<td>• Method of payment</td>
</tr>
<tr>
<td></td>
<td>• Opportunity for profit or loss</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Relationship of the Parties</th>
<th>Facts that illustrate how the parties perceive their relationship:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>• Employee benefits</td>
</tr>
<tr>
<td></td>
<td>• Intent of parties/written contracts</td>
</tr>
<tr>
<td></td>
<td>• Permenancy</td>
</tr>
<tr>
<td></td>
<td>• Discharge/Termination</td>
</tr>
<tr>
<td></td>
<td>• Regular business activity</td>
</tr>
</tbody>
</table>

Let’s use the following examples to illustrate these factors:

Example 1.

Steve Smith, a computer programmer, is laid off when Megabyte Inc. downsizes. Megabyte agrees to pay Steve a flat amount to complete a one-time project to create a certain product. It is not clear how long it will take to complete the project, and Steve is not guaranteed any minimum
payment for the hours spent on the program. Megabyte provides Steve with no instructions beyond the specification for the product itself. Steve and Megabyte have a written contract, which provides that Steve is considered to be an independent contractor, is required to pay Federal and state taxes, and receives no benefits from Megabyte. Megabyte will file a Form 1099-MISC. Steve does the work on a new high-end computer which cost him $7000. Steve works at home and is not expected or allowed to attend meetings of the software development group.

**LIKELY CLASSIFICATION: INDEPENDENT CONTRACTOR**

**Example 2.**

Donna Lee is a salesperson employed on a full-time basis by Bob Blue, an auto dealer. She works 6 days a week and is on duty in Bob’s showroom on certain assigned days and times. She appraises trade-ins, but her appraisals are subject to the sales manager's approval. Lists of prospective customers belong to the dealer. She has to develop leads and report results to the sales manager. Because of her experience, she requires only minimal assistance in closing and financing sales and in other phases of her work. She is paid a commission and is eligible for prizes and bonuses offered by Bob. Bob also pays the cost of health insurance and group-term life insurance for Donna.

**LIKELY CLASSIFICATION: EMPLOYEE**

**IV. IRS Revenue Rulings**

The following significant IRS Revenue Rulings are all cited in the famous 20-factor test.

1. **Instructions**

   **Rev. Rul. 68-598**

   Internal Revenue Service (I.R.S.)
   Revenue Ruling
   Published: 1968

   26 CFR 31.3121(d)-1: Who are employees.

   (Also Sections 3306, 3401; 31.3306(i)-1, 31.3401(c)-1.)

   Driving instructors performing services on a commission basis for a school that furnishes the training automobile, trains them to employ its driving methods, and requires them to give lessons under its name and conform to its standards are employees of the school.

   Advice has been requested whether certain individuals who perform services for a company under the circumstances described below are employees of the company for purposes of the Federal Insurance Contributions Act, the Federal Unemployment Tax
The company operates a driving school that offers automobile driver training to the general public. It engages the individuals, under written agreements, to give driver training lessons in specified areas and pays them specified commissions for the services performed. Each driver instructor is trained by the company and, when giving driving lessons, is required to conform to basic standards established by it from time to time. The instructor agrees to give driving lessons only under the school's name, to charge a student no less than the minimum rate established by the company, and to turn over to the company a fixed percentage of fees collected by him.

The company furnishes the automobiles used for training students. The driver instructor pays the expenses of cleaning the vehicle used by him and for gasoline and oil. At the end of each day the instructor furnishes the company a record showing all the driver training given by him, the names of the students and the rates charged, and any amounts that are owed for lessons. The company may terminate an instructor's services if he fails to follow the standards established for training students, or for other reasons specified in the agreement. An instructor may terminate his services at any time, by giving appropriate notice to the company.

The driver instructors are employees for Federal employment tax purposes if they have the status of employees under the usual common law rules applicable in determining the employer-employee relationship. Guides for determining that status are found in three substantially similar sections of the Employment Tax Regulations, namely sections 31.3121(d)-1(c), 31.3306(i)-1, and 31.3401(c)-1.

These sections provide, in part, that generally the relationship of employer and employee exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer.

The facts in this case show that the driver instructors perform personal services that are an integral part of the business conducted by the company. They are trained by the company and are required to conform to its training standards and use its name and equipment. They may be discharged by the company. They are not engaged in independent business enterprises that require the outlay of capital or the assumption of business risks.

Accordingly, since the company exercises, or has the right to exercise, over the driver instructors in the performance of their services the degree of direction and control necessary to establish the relationship of employer and employee, they are employees of the company for purposes of the Federal Insurance Contributions Act, the Federal Unemployment Tax Act, and the Collection of Income Tax at Source on Wages.

2. Instructions

Rev. Rul. 66-381

Internal Revenue Service (I.R.S.)
Revenue Ruling
Published: 1966

(Also Sections 3306, 3401; 31.3306(i)-1, 31.3401(c)-1.)

‘Car shuttlers’ are engaged by a car rental agency to shuttle cars from one location to another. They are required to deliver the car personally at the time and place specified, and for a designated fee, in the same condition as received. They may not use the car other than for the delivery to the location specified nor transport any person or property therein. They are paid on a job basis. Held, the shuttlers are employees of the agency for federal employment tax purposes.

The Internal Revenue Service has been asked to determine whether individuals employed by a car rental agency to shuttle cars from one location to another under the circumstances described below are employees of the agency for purposes of the Federal Insurance Contributions Act, the Federal Unemployment Tax Act, and the Collection of Income Tax at Source on Wages (chs. 21, 23, and 24, respectively, subtitle C, Internal Revenue Code of 1954).

The agency is in the business of renting cars without drivers. The availability of cars at locations where needed is a prime factor in developing and keeping customers. This requires a constant re-distribution of cars to meet reservations and maintain a ready reserve. Normally this is accomplished by regular full-time employees of the agency who also perform other duties, such as washing cars, changing tires, and making minor repairs.

In certain metropolitan areas where during peak rental periods the movement of cars cannot be handled exclusively by the agency's regular employees, the agency engages individuals, who are known in the industry as ‘car shuttlers,’ to meet this emergency re-distribution problem.

A separate contract is negotiated for delivery of each car. The contract requires that the shuttler deliver the car personally at the time and place specified, and for a designated fee, in the same condition as received, ordinary wear and tear excepted. The agency pays all expenses incurred in connection with the delivery of the car. The shuttler agrees to use the car only for delivery to the location specified and not to transport any person or property therein. The contract designates the shuttler as an independent contractor.

The shuttler is paid on a job basis. A photocopy of the shuttler's driver's license is made and retained by the agency for the purpose of having evidence he is a licensed driver and for identification purposes in case of an accident. The agency is interested in the safe delivery of the car and if the shuttler has an accident due to negligence or is stopped by the police for drinking or speeding, the agency will not enter into another contract with that shuttler. Most of the shuttlers have regular employment elsewhere and only perform shuttling services in their spare time for short periods of time.
The shuttlers are employees for federal employment tax purposes if they have the status of employees under the usual common law rules applicable in determining the employer-employee relationship. Guides for determining that status are found in three substantially similar sections of the Employment Tax Regulations, namely, sections 31.3121(d)-1(c), 31.3306(i)-1, and 31.3401(c)-1.

Section 31.3121(d)-1(c) of the regulations provides, in part, that generally the relationship of employer and employee exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished, that is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer.

The test of control must be viewed in the context of the particular job to be done. In the instant case the agency maintains a degree of control over the shuttlers which is parallel to that maintained over its regular employees who perform the same task. Both the nature and economy of transporting a single car to a specific location preclude the placing of another employee of the agency in the automobile to maintain direct control over the driver. Under the terms of the contract the agency retains the right of control over when the car leaves and arrives and control over what is done with the car en route. The requirement that the shutter personally perform the service indicates that the agency is concerned with the method of performance, which it can control through its power of selection, as well as the result of that performance. Related to this is the agency's right to discharge the shutter by simply not giving him any future contracts. See Ringling Bros.-Barnum & Bailey Com. Shows v. Higgins, 189 F.2d 865 (1951).

Payment by an employer of a worker's business expenses is a factor indicating control over the worker. Conversely, a lack of control is indicated by the worker having to take care of incidental expenses. The 'car shutter' incurs no expenses in the delivery of the car; the agency pays all expenses, such as insurance, gas, and oil.

A significant investment in facilities tends to show an independent status. In the case of the 'car shutter' no investment is made. Similarly, a person who is in a position to realize a profit or suffer a loss is generally an independent contractor while an individual who is an employee is not in such a position. The 'car shutter' is paid a flat fee and is not engaged in an independent enterprise requiring the outlay of capital or the assumption of business risks.

The degree of skill required by an individual is a factor to be considered in determining whether the individual is an employee or an independent contractor. See United States v. Albert Silk, et al., 331 U.S. 704 (1947), Ct. D. 1688, C.B. 1947-2, 167, holding unloaders to be employees.

Upon the basis of the stated facts, the agency exercises, or has the right to exercise, such direction and control over the 'car shuttlers' in the performance of their services as is necessary to establish the relationship of employer an employee under the usual common law rules. If the relationship of employer and employee exists, the designation
or description of the relationship by the parties as anything other than that of employer and employee is immaterial. See section 31.3121(d)-1(a)(3) of the regulations. Accordingly, the shuttlers performing services for the agency under the circumstances described above are employees of the agency for Federal employment tax purposes.


3. Training

Rev. Rul. 70-630

Internal Revenue Service (I.R.S.)
Revenue Ruling
Published: 1970

26 CFR 31.3121(d)-1: Who are employees.

(Also Sections 3306, 3401; 31.3306(i)-1, 31.3401(c)-1.)

Salesclerks trained by an employee service company that assigns them to retail stores to perform temporary sales services and has the right to direct and control the clerks in the performance of such services are employees of the company; S.S.T. 377 superseded.

The purpose of this ruling is to update and restate, under the current statute and regulations, the position set forth in S.S.T. 377, C.B. 1939-2, 288.

The question presented is whether salesclerks trained by an employee service company and furnished to a retail store to perform temporary services for the store are employees of the service company or of the retail store for purposes of the Federal Insurance Contributions Act, the Federal Unemployment Tax Act, and the Collection of Income Tax at Source on Wages (chapters 21, 23, and 24, respectively, subtitle C, Internal Revenue Code of 1954).

The service company was formed for the purpose of training salesclerks and other temporary personnel and furnishing them to retail establishments that may require the services of additional salesclerks during special sales and other periods of demand. Upon request of a store for a certain number of salesclerks, the company trains individuals to perform sales services in conformity with the established procedure of the store. The company places a supervisor in each store to which salesclerks are furnished. It is the duty of the supervisor to determine whether the clerks have been properly assigned to the respective departments in the store for which they were requested, and to see that they are neat in appearance and dressed in accordance with the store's regulations. The supervisor makes periodic reports to the company showing the number of hours each clerk works and the number of sales made. Each salesclerk is required to forward to the company a weekly time card for payroll purposes after it has been approved by the store. The salesclerks are subject to the instructions and control of the supervisor and are not under the supervision of the store while performing their services. The store does not have the right to demand any particular salesclerk, but is required to accept the clerks assigned to it. However, it is the policy of the company to furnish the best clerks available, and if the services of any clerks prove to be
unsatisfactory, the store may request the company to remove those particular clerks. The clerks are not subject to discharge by the store but the company may discontinue their services at any time. The working hours established by the company conform to those of the store and are maintained in accordance with the company's instructions.

The company carries public liability, workmen's compensation, and employers' liability insurance on the salesclerks. The store pays the company a stipulated amount for the services furnished and the clerks receive a standard wage directly from the company.

An individual is an employee for Federal employment tax purposes if he has the status of employee under the usual common law rules applicable in determining the employer-employee relationship. Guides for determining that status are found in three substantially similar sections of the Employment Tax Regulations: namely, sections 31.3121(d)-1, 31.3306(i)-1, and 31.3401(c)-1. As stated in the regulations, generally the relationship of employer and employee exists when the person for whom the services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is the employer.

The facts in the instant case show that the employee service company has the right to direct and control the salesclerks to the extent necessary to establish the relationship of employer and employee under the usual common law rules. Accordingly, it is held that the salesclerks are employees of the employee service company for purposes of the Federal Insurance Contributions Act, the Federal Unemployment Tax Act, and the Collection of Income Tax at Source on Wages.

S.S.T. 377 is superseded, since the position set forth therein is restated under current law in this Revenue Ruling.


4. Services Personally Rendered

Rev. Rul. 55-695

Internal Revenue Service (I.R.S.)
Revenue Ruling
Published: 1955

An employee, upon reaching retirement age, was retained by her employer to train a replacement for her job. She was required, under an agreement, to devote all of her knowledge, skill and working time to the company. She worked exclusively for the company on its premises under the direction of a company manager; was furnished office space, equipment, telephone, stationery, etc., without charge; was reimbursed for all expenses incurred on the company's behalf; and received a retainer fee for her services. The agreement was terminable by the company at any time upon proper
notice. Held, the individual was an employee of the company for Federal employment tax purposes with respect to services performed during the term of the agreement.

The Internal Revenue Service has been requested to determine the status, for purposes of the Federal Insurance Contributions Act (chapter 21, subtitle C, Internal Revenue Code of 1954), of an individual who, upon reaching retirement age, was retained by her 'former' employer as a consultant on a retainer fee basis for the purpose of training a replacement for her job.

The individual had worked as an employee of the company for many years and was thoroughly familiar with all the details of her work. When she attained retirement age, the company desired, because of her knowledge of the work, to retain her services for an extended period of time for the purpose of training a replacement. An agreement entered into between the individual and the company provided that she was to be engaged as an independent contractor to serve in the capacity of a consultant; that she would devote all of her knowledge, skill and working time solely to the business and other interests of the company; and that she would be paid a retainer fee payable in equal monthly installments.

The company agreed to reimburse her for amounts paid out for expenses incurred in its behalf. She agreed not to incur any extraordinary expenses without company approval. Deductions from her fee would be made for periods of absence on account of illness or other causes. The contract was terminable by the company upon 30 days written notice for performance not in keeping with the terms of the contract. The individual worked exclusively for the company on its premises and was furnished office space, office equipment, telephone, stationery, etc., without charge. She worked under the general direction of the company's office manager but did not require supervision in the details of her work in view of her past experience on the job. The services performed were the same as those performed by her prior to her attainment of retirement age, except that at the same time she was occupied in training a replacement for her job.

Section 3121(d) of the Act provides, among other things, that the term 'employee' means any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee. Whether a person is an independent contractor or an employee is largely a question to be determined under the particular facts in each case. The guides for determining, under the usual common law rules, whether an employer-employee relationship exists are found in section 408.204(c) of Regulations 128, applicable to the provisions of the Internal Revenue Code of 1954 by virtue of Treasury Decision 6091, C.B. 1954-2, 47.

Section 408.204(a) of Regulations 128, supra, provides that if the relationship of employer and employee exists, the designation or description of the relationship of the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, independent contractor, or the like. Hence, although the contract stipulated that the relationship of the parties would be that of principal and contractor, such designation of the parties in interest as to their relationship may be accepted only if warranted by the facts in the case.
Under the circumstances states, it is apparent that the individual performed, on a continuing basis, personal services of the type normally performed by an employee for a business firm, and that the company either exercised, or retained the right to exercise, over her the direction and control necessary to establish the relationship of employer and employee. Accordingly, it is held that the individual was an employee of the company for Federal employment tax purposes for the period during which she served the company as a consultant subsequent to her attainment of retirement age.


5. Hiring, Supervising and Paying Assistants

Rev. Rul. 63-115

Internal Revenue Service (I.R.S.)
Revenue Ruling
Published: 1963

26 CFR 31.3121(d)-1: Who are employees.

Individuals engaged by truck driver-employees, with the express consent of their employer trucking company, to unload the company's trucks, and who were paid out of funds provided by the company, are also employees of that company for Federal employment tax purposes, even though not regularly employed. The Internal Revenue Service will not follow the decision of the United States District Court for the Eastern District of Virginia in Bonney Motor Express, Inc., 206 Fed.Supp. 22 (1962).

The Internal Revenue Service will not follow the decision of the United States District Court for the Eastern District of Virginia in the case of Bonney Motor Express, Inc. v. United States, 206 Fed.Supp. 22, entered June 22, 1962.

The principal question in that case concerned the Federal employment tax status of individuals who were engaged by the taxpayer's truck driver-employees, with the express consent of their employer, to unload the taxpayer's trucks and who were paid by the taxpayer's employees out of funds provided by the taxpayer.

The court, relying heavily on the fact that the unloaders were not regularly employed by the taxpayer, held that the unloaders were independent contractors rather than employees. The Internal Revenue Service is of the opinion that this holding is in conflict with the decision of the Supreme Court of the United States in United States v. Albert Silk, et al., 331 U.S. 704 (1947), Ct. D. 1688, C.B. 1947-2, 167, wherein it is stated, at page 173, as follows:

* * * we cannot agree that the unloaders in the Silk case were independent contractors. They provided only picks and shovels. They had no opportunity to gain or lose except from the work of their hands and these simple tools. That the unloaders did not work regularly is not significant. They did work in the course of the employer's trade or business. This brings them under the coverage of the Act. * * *' (Emphasis supplied.)
While regularity with which services were performed was significant in determining employment for social security tax purposes prior to 1955 with respect to services which were not in the course of the employer's trade or business, regularity of employment has never been significant with respect to services which are in the course of the employer's trade or business. The District Court, in deciding Bonney Motor Express, Inc., stated, at page 29, as follows:

We are in accord with the Government's contention that the work of unloading was a part of plaintiff's business. The trucking company was contractually obligated to deliver the cargo on the consignee's dock. This test is not, however, conclusive.

It is the position of the Internal Revenue Service that unloaders of trucks are the employees of the trucking companies that engage them and pay for their services. The trucking company in such cases unquestionably has the right to control the manner in which its cargo is unloaded, and whether it exercises that right continuously, or only sporadically, is not material. Under a realistic application of the common law rules, the unloaders in such cases are employees. The position of the service regarding truck unloaders is set forth in Revenue Ruling 55-543, C.B. 1955-2, 400, Revenue Ruling 57-12, C.B. 1957-1, 353, and Announcement 59-38, I.R.B. 1959-14, 37. See also S.S.T. 45, C.B. XV-2, 408 (1936), which held that men hired to unload steamers were employees despite the fact that they were paid and discharged as soon as the steamer was unloaded.

The position of the Service regarding individuals who are hired by employees to help them in the normal course of their employment is set forth in S.S.T. 336, C.B. 1938-2, 295, as follows:

The Bureau has consistently held in cases where an employee, with either the express or implied consent of his employer, engages other individuals to perform services in connection with his employment by such employer, that such other individuals are also employees of his employer within the meaning of the taxing provisions of the Social Security Act. (See generally S.S.T. 295, C.B. 1938-1, 390, and rulings cited therein.) * * * (Emphasis supplied.)

In the Bonney Motor Express, Inc., case, the unloaders were hired by the driver-employees and were paid out of company funds which the company designated 'casual labor.' Thus, there is no doubt that the unloaders were hired with the express consent of the employer, so that an employer-employee relationship actually existed between the unloaders and the trucking company.

For the foregoing reasons, the Internal Revenue Service will not follow the Bonney Motor Express, Inc., case.

6. Set Hours of Work

Rev. Rul. 73-591

Internal Revenue Service (I.R.S.)
Revenue Ruling
BEAUTICIAN IN BEAUTY SHOP; EMPLOYEE
Published: 1973

26 CFR 31.3121(d)-1: Who are employees

(Also Sections 3306, 3401; 31.3306(i)-1, 31.3401(c)-1.)

Beautician in beauty shop; employee. A beautician is an employee for Federal employment tax purposes when, under an agreement with a beauty salon, she 'leases' a space in the salon, is required to work specified hours, furnishes daily reports to the owner of the salon reflecting the day's receipts on which the amount due her is computed, and obtains the necessary state cosmetology licenses for which she pays the necessary fees.

Advice has been requested as to the employment status of a beautician performing services in a beauty salon, under the circumstances described below, for purposes of the Federal Insurance Contributions Act, the Federal Unemployment Tax Act, and the Collection of Income Tax at Source on Wages (chapters 21, 23, and 24, respectively, Subtitle C, Internal Revenue Code of 1954).

Under an agreement with the beauty salon the beautician agrees to 'lease' a space in the salon to be used for the sole purpose of performing services as a beautician and hairdresser. The salon agrees to furnish, repair, and maintain all of the equipment, materials, supplies, accessories, and personal tools usually used in the operation of a beauty salon. For her services the beautician receives a specified percentage of all money taken in by her. No credit or free work may be done by the beautician without the prior express approval of the salon. The agreement may be terminated by either party upon one week's notice.

The salon rules require the beautician to be at her chair at 8 a.m. on those days that she is scheduled to work, to furnish her own uniforms, to charge fees as determined by the salon, and to perform services as requested by the customers. The beautician furnishes a report each day to the owner reflecting the day's receipts. The salon uses these records as the basis for computing the amount due to her. The beautician is required to work until 6 p.m. on weekdays and until noon on Saturday. The beautician obtains the necessary licenses for cosmetology from the state and pays the appropriate fees.

Individuals are employees for Federal employment tax purposes if they have the status of employees under the usual common law rules applicable in determining the employer-employee relationship. Guides for determining whether that relationship exists are found in three substantially similar sections of the Employment Tax Regulations, namely, sections 31.3121(d)-1, 31.3306(i)-1, and 31.3401(c)-1. Generally, the relationship of employer and employee exists when the person for whom the services are performed has the right to control and direct the individual who performs the services not only as to the result to be accomplished by the work but also as to the details and means by which
that result is accomplished. Thus, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is the employer.

The facts in the instant case show that the beauty salon has the right to direct and control the beautician in the performance of her services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished.

Accordingly, it is held that the beautician is an employee of the beauty salon for purposes of the Federal Insurance Contributions Act, the Federal Unemployment Tax Act, and the Collection of Income Tax at Source on Wages.

Compare Rev. Rul. 73-592, concerning the status of a beautician performing services for a beauty salon under a fixed fee lease agreement.


7. Full-Time Required / Order of Sequence Set

Rev. Rul. 56-694

Internal Revenue Service (I.R.S.)
Revenue Ruling
Published: 1956

A corporation operating a portrait studio engages photographers to take photographs in the homes of customers who purchase coupons from its canvassers. The corporation usually sets the time for appointments, instructs the photographers as to operation methods, requires them to follow a set pattern of poses for each age group, and furnishes the necessary film. The photographers perform the services personally; are remunerated on a piece-work basis; furnish equipment, such as cameras and lights; operate under the corporation's name, and perform services for the corporation on a full-time basis. They maintain no studios of their own and the services may be terminated by either party at any time. Held, the photographers are employees of the corporation for Federal employment tax purposes.

The Internal Revenue Service has been requested to determine the status, for Federal employment tax purposes, of photographers engaged by a corporation operating a portrait studio.

The corporation is engaged in the home portraiture business. The photographers in question were engaged as the result of a newspaper advertisement placed by the corporation for experienced home photographers. The corporation's canvassers go from house to house selling coupons for photographs, principally of children, to be taken in the homes. The canvassers mail copies of the coupons to the studio office and lists of the purchasers are given to the various photographers to whom the appointments are assigned. Usually, the time of the appointments for taking photographs is specified on
each list the corporation furnishes the photographers; however, appointments may also
be made by either the canvassers or the studio office. The photographers, when first
engaged, are given instructions by the corporation as to its methods of operation and are
required to follow a set pattern of poses for each age group. From time to time, a
representative of the corporation accompanies the photographers on their appointments
and checks their operating methods for the purpose of improvement as to the handling
of children and actual photographing. The photographers report in person to the studio
office once a week to turn in the exposed film and to receive their pay. The photographs
taken must meet the standards of a professional photographer. If they do not meet such
standards, they are retaken by the photographers without additional remuneration. All
complaints and adjustments are handled by the corporation.

The corporation furnishes the necessary film and envelopes for exposed film and the
photographers furnish their own transportation facilities and photographic equipment,
such as cameras and lights. The photographers personally perform the services in
question and operate under the corporation's name; are engaged on a full-time basis by
the corporation; are required to fulfill all appointments given to them; are covered by
workmen's compensation carried by the corporation; and are paid on a piece-work basis
for each picture taken. They do not maintain studios of their own and do not perform
photographic services for any other persons. Their services may be terminated by either
party at any time upon proper notice.

Under section 3121(d)(2) of the Federal Insurance Contributions Act (chapter 21, subtitle
C, Internal Revenue Code of 1954), the term 'employee' means any individual who,
der under the usual common law rules applicable in determining the employer-employee
relationship, has the status of an employee. The guides for determining, under such
rules, whether an employer-employee relationship exists are found in section
31.3121(d)-1(c) of the Employment Tax Regulations.

Whether an employer-employee relationship exists depends upon the particular facts in
each case. It appears from the facts present in the instant case that the photographers
perform personal services on a continuing basis in the ordinary course of and as an
integral and principal part of the corporation's business activities; that their personal
services were contracted for; and that, while detailed direction and supervision over
them in the performance of their services is neither necessary nor warranted, the
corporation is vested with the ultimate right to direct and control them to the extent
necessary under the usual common law rules to establish an employer-employee
relationship. Accordingly, it is held that the photographers are employees of the
corporation for purposes of the Federal Insurance Contributions Act.

This conclusion is also applicable for purposes of the Federal Unemployment Tax Act
and the Collection of Income Tax at Source on Wages (chapters 23 and 24, respectively,

A writer was engaged by an organization to write a book portraying the organization's history. The engagement is for an indefinite period, depending upon the time required to complete the work. His services are performed on the organization's premises during regular working hours, on a full-time basis. He is furnished an office and all the necessary equipment and facilities, receives a stated amount each month, and is required to perform the services personally. He does not follow a specified routine, but his writings are subject to revision or rejection by the organization. He does not hold himself out to the public as being available to do work of a similar nature for others; nor does he maintain an office or shop, or advertise in the newspaper. His services may be terminated by either party at any time upon proper notice. Held, the writer is an employee of the organization for Federal employment tax purposes with respect to the service performed for it.

Advice has been requested relative to the status, for federal employment tax purposes, of a writer engaged by an organization to write a book portraying its history.

The writer was engaged on a full-time basis to write a book on the history of the organization. The engagement is for an indefinite period, that is, until the history is completed. The writer’s work consists of research into the history of the organization and the writing thereof in the form of a book. He performs the services on the organization's premises during regular working hours and is provided with an office and all the necessary equipment and facilities. He is given considerable latitude in his work, is not given instructions or training with respect thereto, and is not required to meet a minimum quota of work or to follow a routine established by the organization. He is, however, required to submit his writings for review and approval by the organization's staff members and history committee and may be required to rewrite unsatisfactory material. He is paid a stated amount each month whether or not all of his material is acceptable. He is granted sick leave with pay, but he is not eligible for bonuses or a pension. He is required to perform the services personally and devotes his full time to services for the organization, although on one occasion he was granted leave without pay to perform a writing job for another firm. The writer does not hold himself out to the public as being available to do work of a similar or related nature, advertise in newspapers, etc., or maintain an office or shop. His services may be terminated by either party at any time upon proper notice to the other party.

Section 3121(d) of the Federal Insurance Contributions Act (chapter 21, subtitle C, Internal Revenue Code of 1954) provides, among other things, that the term 'employee' means any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee. The guides for determining whether, under such rules, an employer-employee relationship exists are found in section 31.3121(d)-1(c) of the Employment Tax Regulations.
It is concluded, upon the basis of the above facts, that the organization has the right to exercise such control and direction over the writer as is necessary to establish the relationship of employer and employee under the usual common law rules. Accordingly, it is held that the writer is an employee of the organization for purposes of the Federal Insurance Contributions Act, with respect to the services performed for it.

This conclusion is also applicable with respect to the tax imposed by the Federal Unemployment Tax Act and for purposes of the Collection of Income Tax at Source on Wages (chapters 23 and 24, respectively, subtitle C, Internal Revenue Code of 1954).


9. Right to Terminate / Oral or Written Reports / Realization of Profit or Loss

Rev. Rul. 70-309

Internal Revenue Service (I.R.S.)
Revenue Ruling
Published: 1970

26 CFR 31.3121(d)-1: Who are employees.

(Also Sections 3306, 3401; 31.3306(i)-1, 31.3401(c)-1.)

Oil well pumpers performing services for a corporation having the right to exercise whatever control is necessary to assure proper performance of their services are employees of the corporation for FICA, FUTA and income tax withholding.

Advice has been requested whether, under the circumstances described below, individuals who perform services as oil well pumpers for a corporation are its employees for purposes of the Federal Insurance Contributions Act, the Federal Unemployment Tax Act, and the Collection of Income Tax at Source on Wages (chapters 21, 23, and 24, respectively, subtitle C, Internal Revenue Code of 1954).

The corporation operates oil wells in areas located a considerable distance from its headquarters. It engages the oil well pumpers under written contracts. Each contract provides that the pumper will perform certain services for a fixed amount of remuneration per month based upon the number of oil wells serviced by him. The services performed consist of watching over the wells, turning on tanks, gauging tanks, and submitting periodic reports to the corporation. The contracts state that the pumpers are independent contractors. The pumpers provide their own transportation and small hand tools of minimal value.

The pumpers are not required to follow a fixed routine or to work prescribed hours; however, they are required to verify the status of production by submitting written reports to the corporation on a regular basis. Due to the distance between the oil wells and the corporation's headquarters, the pumpers seldom see its agents or other representatives. Major tools and similar items are furnished to the pumpers by the corporation. The corporation retains the right to discharge the pumpers at any time upon proper written notice.
The oil well pumpers are employees for Federal employment tax purposes if they have the status of employees under the usual common law rules applicable in determining the employer-employee relationship. Guides for determining that status are found in three substantially similar sections of the Employment Tax Regulations, namely, sections 31.3121(d)-1(c), 31.3306(i)-1, and 31.3401(c)-1.

These sections provide, in part, that generally, the relationship of employer and employee exists when the person for whom the services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as an independent contractor.

The oil well pumpers in this case perform personal services pursuant to a continuing relationship created under a written agreement that is terminable at any time; their services are both necessary and incident to the business conducted by the corporation; and they are not engaged in an independent enterprise in which they assume the usual business risks. Although the pumpers perform the services away from the headquarters of the corporation and are not given day-to-day directions and instructions, the corporation has the right to exercise whatever control is necessary to assure proper performance of the services by them.

In United States v. Silk, 331 U.S. 704 (1947), Ct.D. 1688, C.B. 1947-2, 167, it was held that certain coal unloaders were employees, even though they provided their own picks and shovels and did not work regularly. They had no opportunity to gain or lose except from the work of their hands and simple tools, they worked in the course of the company's trade or business, and the company had the right to exercise all necessary supervision over their tasks.

The facts in the instant case show that the corporation exercises or has the right to exercise over the oil well pumpers in the performance of their services the degree of direction and control necessary to establish the relationship of employer-employee under the usual common law rules. Accordingly, the oil well pumpers performing services for the corporation under the circumstances described above are employees of the corporation for purposes of the Federal Insurance Contributions Act, the Federal Unemployment Tax Act, and the Collection of Income Tax at Source on Wages.

10. Oral or Written Reports

Rev. Rul. 68-248

Internal Revenue Service (I.R.S.)
Revenue Ruling
Published: 1968

(Also Sections 3306, 3401; 26 CFR 31.3306(i)-1, 31.3401(c)-1.)

Under an oral agreement, X engages repairmen on a part-time basis to tune and repair pianos and organs. They perform their services at frequent intervals, and on a continuing basis. They are not required to follow a fixed working schedule or routine, but they are required to complete service invoices that are equivalent to a report on each job. Held, the repairmen are employees of X for Federal employment tax purposes.

Advice has been requested whether individuals employed to tune and repair pianos and organs under the circumstances described below are employees for purposes of the Federal Insurance Contributions Act, the Federal Unemployment Tax Act, and the Collection of Income Tax at Source on Wages (chapters 21, 23, and 24, respectively, subtitle C, Internal Revenue Code of 1954).

The X Company, which is in the business of repairing and tuning pianos and organs, engages the individuals under an oral agreement to tune and repair pianos and organs on a part-time basis. They perform their services in the homes of customers at the mutual convenience of the customers and themselves. They require no supervision insofar as workmanship is concerned, because training and experience is a prerequisite for employment. However, X is responsible for the quality of the work done.

The repairmen are not required to adhere to a fixed working schedule or routine. They furnish their own hand tools and X supplies each with a parts kit and repair manuals, as well as special equipment when it is needed. The repairmen furnish their own transportation to make service calls, but X suggests the mileage rates to be billed to the customer. X requires the repairmen to complete service invoice forms that are equivalent to a report on each job. X sets the prices to be charged for service and repair parts. All billing is on X's invoices and all collections made by the repairmen are turned in to it. The repairmen's compensation is based on a percentage of the service charge and parts sold. X retains the right to discharge them at any time.

The repairmen are employees for Federal employment tax purposes if they have the status of employees under the usual common law rules applicable in determining the employer-employee relationship. Guides for determining that status are found in three substantially similar sections of the Employment Tax Regulations, namely, sections 31.3121(d)-1(c), 31.3306(i)-1, and 31.3401(c)-1.

For example, it is pointed out in paragraph (2) of section 31.3121(d)-1(c) of the regulations that an employer-employee relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as the result to be accomplished by the work but also as to the details and means by which that result is accomplished, that is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be
done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so.

Whether an employer-employee relationship exists depends upon the particular facts in each case. The repairmen in this case perform personal services at frequent intervals pursuant to a continuing relationship created under an oral agreement terminable at any time; their services are both necessary and incident to the business conducted by X; and they are not engaged in an independent enterprise in which they assume the usual business risks. Since they are skilled workmen, they do not require constant supervision.

Although the repairmen may be extremely well qualified to perform work without detailed supervision and do perform services with considerable freedom of action, these facts are not controlling in reaching a decision as to their employment status since the ultimate test for determining whether there is an employment relationship is whether the person for whom the services are performed retains the right to exercise direction and control over them in the performance of their services.

Upon the basis of the facts stated, X exercises or has the right to exercise over the repairmen in the performance of their services the degree of direction and control necessary to establish the relationship of employer-employee under the usual common law rules. Accordingly, the repairmen performing services for X under the circumstances described above are employees of X for purposes of the Federal Insurance Contributions Act, the Federal Unemployment Tax Act, and the withholding of income Tax at source on wages.


11. Payment by Hour, Week or Month

Rev. Rul. 74-389

Internal Revenue Service (I.R.S.)
Revenue Ruling
SALESemen; YACHTS AND SHIPS
Published: 1974

26 CFR 31.3121(d)-1: Who are employees.

(Also Sections 1402, 3306, 3401, 6015, 6017; 1.402(c)-1, 31.3306(i)-1, 31.3401(c)-1.)

Salesmen; yachts and ships. Salesmen engaged by a company to sell yachts and ships listed with it, who agree to perform their services personally, are free to solicit prospective buyers and listings at their own discretion, are not restricted to a specific territory, are not required to work any regular hours or at any specified time, are not required to attend scheduled sales meetings, are paid on a commission basis and who pay all of their own expenses are not employees of the company but are engaged in a trade or business.
Advice has been requested whether salesman performing services, under the circumstances described below, are employees for purposes of the Federal Insurance Contributions Act, the Federal Unemployment Tax Act, and the Collection of Income Tax at Source on Wages (chapters 21, 23 and 24, subtitle C, Internal Revenue Code of 1954.)

The salesmen are engaged by a company to sell yachts and ships listed with it. Their agreements with the company contemplate that all of the salesmen’s services will be performed by them personally and provide that the company will make available to them all of its current yacht and ship listings. The salesmen are free to solicit prospective buyers and listings at their own discretion. The agreements may be terminated at any time by either party, upon written notice.

The salesmen perform their services both on the company’s premises and at home, and are not required to follow a daily or weekly routine or to work any regular hours or at any specified time. Except for reporting to the company about yachts and ships they are trying to sell, they are not required to report in person, by telephone, in writing, or otherwise. However, in order to equitably allocate inquiries addressed to the company to all of the salesman, they are encouraged to schedule their work at the office part of the time. Periodic meetings of the salesmen are scheduled for the purposes of interchanging information and reviewing new listings, but attendance at such meetings is not mandatory.

The salesmen are not restricted to a specific territory and have the right to obtain listings or sell yachts and ships listed with the company wherever the customer, owner, or ship may be located. They are not given instructions or training and are not required to meet a minimum sales quota.

The salesmen are compensated on a commission basis and are not entitled to any advance or draw against commissions or eligible for any bonuses, pensions, or sick pay. The company does not establish the price, terms, or conditions of a sale and the salesmen have full authority to participate in the negotiations of selling prices and terms acceptable to the listing owners and prospective buyers. However, the salesmen do not have the authority to reduce the normal commission basis without the company’s consent and if they should do so the reductions are deducted entirely from their portion of the commission.

The salesmen operate under the company's name, are not available to others to do work of a similar or related nature, do not ordinarily advertise, and do not maintain offices in their own homes. They are required to be licensed by the State in which they transact business and, unless otherwise agreed upon, they pay for their own licenses, renewal fees, travel and entertainment expenses, business cards, and other work related expenses.

An individual is an employee for Federal employment tax purposes if he has the status of employee under the usual common law rules applicable in determining the employer-employee relationship. Guides for determining that status are found in three substantially similar sections of the employment tax regulations, namely sections 31.3121(d)-1, 31.3306(i)-1, and 31.3401(c)-1. As stated in the regulations, generally, the relationship of employer and employee exists when the person for whom the services are performed has the right to control and direct the individual who performs the services, not only as to
the result to be accomplished by the work, but also as to the details and means by which that work is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also a factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work to the individual who performs the services. In general, if an individual is subject to the control of direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is not an employee.

Under the facts in this case, the company does not exercise or have the right to exercise over the salesmen in the performance of their services such control as is necessary under the common law rules to establish the relationship of employer and employee. Accordingly, the salesmen are not employees of the company for purposes of the Federal Insurance Contributions Act, the Federal Unemployment Tax Act, and the Collection of Income Tax at Source on Wages.

Furthermore, the salesmen are engaged in a 'trade or business' for purposes of the Self-Employment Contributions Act of 1954 (chapter 2, subtitle A of the Code), the income from which should be considered in computing net earnings from self-employment as contemplated by that Act and in determining whether they are required to file declaration of estimated income and self-employment tax returns under sections 6015 and 6017, respectively, of the Code.


12. Payment of Business and/or Traveling Expenses

Rev. Rul. 55-144

Internal Revenue Service (I.R.S.)
Revenue Ruling
Published: 1955

An individual is employed by a dealer in used automobiles to drive automobiles to an auction company located in a city distant from the dealer's place of business. The dealer instructs the individual with respect to the price at which the cars are to be sold at auction, requires the individual to 'protect that price,' pays all expenses of the trip, and remunerates the individual on the basis of a stated amount for each car sold. Held, the individual is an employee of the dealer for Federal employment tax purposes.

An opinion has been requested whether an individual employed by a used car dealer to drive automobiles to an auction company located in a city distant from the dealer's place of business and to 'protect the price' at which the car is to be sold is an employee of the dealer for purposes of the Federal Insurance Contributions Act (subchapter A, chapter 9, Internal Revenue Code of 1939).
In the instant case, a dealer in used automobiles employed an individual under the terms of an oral agreement to drive automobiles to an auction company located in a city distant from the dealer's place of business. The dealer places a price on the car to be sold at auction and requires the individual to 'protect the price.' The auction company generally mails the check in payment for the car direct to the dealer. The dealer pays all expenses incurred by the individual in connection with the trip and remunerates him on the basis of a stated amount for each car sold. The individual also drives automobiles to the dealer's place of business from locations out of the City, for which he receives a stated sum. All services are performed in the name of the dealer. The individual's services may be terminated by the dealer for any or no reason. The individual also performs similar services for another used car dealer.

Section 1426(d) of the Act provides, in part, that the term 'employee' means any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee. The guides to be used in determining the employer-employee relationship under the usual common law rules are found in section 408.204(c) of Regulations 128.

Whether a person is an independent contractor or an employee is largely a question of fact to be determined upon the particular facts of each case. In the instant case the individual performs personal services for the dealer and the dealer exercise, or has the right to exercise, such control over the individual in the performance of his services as is necessary to establish an employer-employee relationship. The fact that the individual performs services for another principal does not negate the existence of an employer-employee relationship. See S.S.T. 24, C.B. XV-2, 406 (1936). Accordingly, it is held that the individual is an employee of the dealer for Federal employment tax purposes.


13. Furnishing of Tools and Materials / Significant Investment

Rev. Rul. 71-524

Internal Revenue Service (I.R.S.)
Revenue Ruling
Published: 1971

26 CFR 31.3121(d)-1: Who are employees.

(Also Sections 3306, 3401; 31.3306(i)-1, 31.3401(c)-1.)

A truck driver is an employee of a truck company leasing tractor-trailer rigs with a driver to a contract carrier and retaining the right to direct and control the driver to the extent necessary to protect its investment.

Advice has been requested whether a truck driver who performs services under the circumstances described below is an employee of the leasing company for which he performs the services for purposes of the Federal Insurance Contributions Act, the Federal Unemployment Tax Act, and the Collection of Income Tax at Source on Wages (chapters 21, 23, and 24 respectively, subtitle C, Internal Revenue Code of 1954).
The leasing company is in the business of furnishing one or more of its tractor-trailer rigs and a driver to another corporation qualified as a contract carrier. The carrier makes payment for this service on a weight-mileage basis. The carrier gives the driver daily instructions as to where and when to pick up and deliver merchandise.

The leasing company enters into an agreement with the driver providing that he will perform substantially all of the services personally, and that the gross payment from the carrier will be divided on a percentage basis. The driver is in control of and responsible for the vehicle at all times and is not subject to supervision or review. He pays the everyday driving and operational expenses of the vehicle, and the leasing company pays for all major repairs, tires, and license plates. The driver can refuse to accept a load if the circumstances appear to be unreasonable, and he can quit at any time. The leasing company can terminate the driver's services if his conduct jeopardizes its contract with the carrier.

Individuals are employees for Federal employment tax purposes if they have the status of employees under the usual common law rules applicable in determining the employer-employee relationship. Guides for determining that status are found in three substantially similar sections of the Employment Tax Regulations, namely, sections 31.3121(d)-1, 31.3306(i)-1, and 31.3401(c)-1.

Generally, the relationship of employer and employee exists when the person for whom the services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which the result is accomplished. That is, the employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct and control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing the right is an employer.

In the instant case the leasing company owns the tractor-trailer rigs and leases them with driver; it furnishes major repairs, tires, and license plates for the rigs; it generates all the work or jobs; it bears the major expenses and financial risks of the business; and it hires the driver to perform personal services on a continuing basis. The driver is not engaged in an independent enterprise requiring capital outlays or the assumption of business risks, but rather his services are a necessary and integral part of the leasing company's business. The leasing company has the right to direct and control the driver to the extent necessary to protect its investment, and to discharge him if his conduct jeopardizes its contract with the carrier.

Accordingly, it is held that the driver engaged in performing services under the circumstances described above is an employee of the leasing company for purposes of the Federal Insurance Contributions Act, the Federal Unemployment Tax Act, and the Collection of Income Tax at Source on Wages.

14. Working for More Than One Firm at a Time

Rev. Rul. 70-572

Internal Revenue Service (I.R.S.)
Revenue Ruling
Published: 1970

26 CFR 31.3121(d)-1: Who are employees.

(Also Sections 3306, 3401; 31.3306(i)-1, 31.3401(c)-1.)

A 'free-lance' jockey engaged for one race by a race horse owner who has no control over his services except to require that he obey the rules of the Racing Commission is not an employee of the owner; Em. T. 446 superseded.

The purpose of this Revenue Ruling is to update and restate, under the current statute and regulations, the position set forth in Em. T. 446, C.B. 1943, 1072.

In the case of Whalen v. Harrison, 51 F.Supp. 515 (1943), the U.S. District Court held that a 'free-lance' jockey was an independent contractor for employment tax purposes under the facts of that case. The court found that the owner or trainer could not intervene to control the details and means by which the jockey performed his services, except to require him to obey the rules of the Racing Commission, and had no right to discharge the jockey after he was up on the horse. The court concluded that the 'free-lance' jockey was an independent contractor engaged in a trade or profession in which he offered his services to all of the horse racing public.

Held, a 'free-lance' jockey engaged by a race horse owner for one race under circumstances similar to the Whalen case is not an employee of the owner for purposes of the Federal Insurance Contributions Act, the Federal Unemployment Tax Act, and the Collection of Income Tax at Source on Wages (chapters 21, 23, and 24, respectively, subtitle C, Internal Revenue Code of 1954).

See Revenue Ruling 70-573, which holds under the facts set forth therein that jockey engaged under contract with a race horse owner is an employee of the owner, for Federal employment tax purposes.

Em. T. 446 is superseded, since the position set forth therein is restated under current statute and regulations in this Revenue Ruling.

15. Right to Discharge

Rev. Rul. 75-41

Internal Revenue Service (I.R.S.)
Revenue Ruling
PHYSICIAN'S PROFESSIONAL SERVICE CORPORATION
Published: 1975

Physician's professional service corporation. Individuals who are recruited, paid, assigned to jobs, provided with employee benefits, and can be discharged by a physician's professional service corporation, that enters into employment contracts with them and furnishes their services to various professional people and firms, are the employees of the corporation for purposes of the FICA, FUTA, and income tax withholding.

Advice has been requested whether a corporation furnishing individuals to various professional people and firms, under the circumstances described below, is the employer of the individuals for purposes of the Federal Insurance Contributions Act, the Federal Unemployment Tax Act, and the Collection of Income Tax at Source on Wages (chapters 21, 23, and 24, respectively, subtitle C, Internal Revenue Code of 1954).

A physician's professional service corporation is in the business of providing a variety of services to professional people and firms (subscribers), including the services of secretaries, nurses, dental hygienists, and other similarly trained personnel. It enters into contracts with the subscribers under which the subscribers specify the services to be provided and the fee to be paid to the corporation for each individual furnished. Subscribers have the right to require that an individual furnished by the corporation cease providing services to them, and they have the further right to have such individual replaced by the corporation within a reasonable period of time, but the subscribers have no right to affect the contract between the individual and the corporation. The contracts also provide that the corporation has the right to remove or reassign any personnel furnished to subscribers but that it will, in such cases, either furnish a replacement promptly or adjust the fee to compensate for the vacancy created.

The individuals who are to perform the services are recruited by the corporation and given various tests to determine their qualifications and degrees of skill. The corporation hires the personnel, pays their wages, and provides them with liability and unemployment insurance, workmen's compensation, and other benefits. Under the contract with the corporation, the individuals agree to be available to perform services for any subscribers to which they are assigned. The contract sets forth the amounts to be paid to the individuals. The fee that the corporation charges to the subscribers is based on a predetermined mark up formula. The corporation has the right, under the contract, to evaluate the performance of the individuals and to discharge them if the evaluation shows that they are failing to satisfactorily perform the services contracted for by the subscribers. Individuals who enter into contracts with the corporation agree that they will not contract directly with any subscriber to which they are assigned for at least three months after cessation of their contracts with the corporation.
When the corporation considers an individual qualified to meet a subscriber's request, the corporation assigns the individual to the subscriber to work on the subscriber's premises with the subscriber's equipment. The corporation instructs the individual as to his work hours and the nature of his duties, based on the subscriber's request for that particular type of individual and the hours he is to work. Subscribers rely on the corporation to see that the individual meets the qualifications they require and give the individual no further tests.

For purposes of federal employment taxes the usual common law rules ordinarily apply in determining whether the employer-employee relationship exists and, if so, who is the employer. The regulations generally identifying who are employers speak of them as persons who employ employees (section 31.3121(d)-2 and 31.3306(a)-1 of the Employment Tax Regulations) and as any person for whom services are performed as an employee (section 31.3401(d)-1 of the regulations). The regulations require the finding of a legal relationship of a contractual nature that may be examined to determine whether it comprises a common law employer-employee relationship.

Guides for determining whether the legal relationship between the parties involved is an employer-employee relationship are found in sections 31.3121(d)-1, 31.3306(i)-1, and 31.3401(c)-1 of the regulations. These sections provide that, generally, the relationship exists when the person for whom the services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which the result is to be accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer.

In the instant case, the individuals have entered into contracts with the corporation under which the latter has the right to control and direct the performance of their services for the corporation's subscribers and the right to discharge them should they not satisfactorily perform those services. Accordingly, it is held that the corporation is the employer of the individuals for purposes of the Federal Insurance Contributions Act, the Federal Unemployment Tax Act, and the Collection of Income Tax at Source on Wages.

Rev. Rul. 75-41, 1975-1 C.B. 323, 1975
CHAPTER 14 – REVIEW QUESTIONS

The following questions are designed to ensure that you have a complete understanding of the information presented in the assignment. They do not need to be submitted in order to receive CPE credit. They are included as an additional tool to enhance your learning experience.

We recommend that you answer each review question and then compare your response to the suggested solution before answering the final exam questions related to this assignment.

1. Which of the following statements about the misclassification of employees as independent contractors is most correct:
   a) because there is little difference between how the two are treated under the law, there is little downside to a misclassification
   b) the government tends to look the other way on misclassification of workers, so the cost is usually low
   c) the cost can be extensive, including penalties and back taxes
   d) smaller employers are generally able to get away with misclassification to a greater extent than larger employers

2. Which of the following is a benefit of classifying a worker as an independent contractor rather than an employee:
   a) independent contractors are not subject to overtime rules
   b) independent contractors are not entitled to leave under the Family and Medical Leave Act
   c) independent contractors do not need to be covered by a business's workers' compensation insurance
   d) all of the above

3. Employment discrimination laws apply to independent contractors.

   a) true
   b) false

4. The Internal Revenue Service has authority to determine the status of workers as either independent contractors or employees.

   a) true
   b) false
5. Applying the IRS 20-factor test to a business will:

   a) give the employer a guarantee of the workers’ status
   b) ensure that the workers are employees or independent contractors for income tax purposes but not for state law purposes
   c) give employers an idea of the likely correct classification of the workers but no guarantee
   d) prove to the IRS that the employer was acting in good faith and constitute an affirmative defense to any proposed penalties

6. An independent contractor is not typically required to personally render the services contracted for and may utilize his own employees or other independent contractors.

   a) true
   b) false

7. Having set hours of work is evidence of being an independent contractor rather than an employee.

   a) true
   b) false

8. Which of the following is an example of “behavioral control” by a business over a worker, thus making it more likely that the worker is an employee rather than an independent contractor:

   a) providing the worker with training
   b) asking the worker to provide updates to a manager on their work
   c) paying the worker an hourly rate
   d) both a and b above
CHAPTER 14 – SOLUTIONS AND SUGGESTED RESPONSES

1. A: Incorrect. Significantly greater legal and financial obligations, including taxes, withholding, and wage and hours laws apply to employees. This makes hiring independent contractors much less expensive and more desirable than hiring employees. The cost of misclassification is therefore quite expensive.

B: Incorrect. To the contrary, the government gets more money from employees than independent contractors and is usually the driving force in reclassification of workers.

C: Correct. The employment laws and tax obligation of employees make them significantly more expensive than independent contractors. The price of misclassification is therefore high, including significant government penalties.

D: Incorrect. There is no such difference.

(See page 14-1 of the course material.)

2. A: Incorrect. Independent contractors are not covered by state and federal employment laws, including overtime rules. However, this is not the best answer.

B: Incorrect. Independent contractors are not eligible for FMLA or other leaves allowed under state or federal law. However, this is not the best answer.

C: Incorrect. One of the costs businesses avoid by classifying workers as independent contractors instead of employees is workers’ compensation insurance. However, this is not the best answer.

D: Correct. All of the above are among the many benefits and cost savings associated with classifying a worker as an independent contractor rather than an employee. Independent contractors also do not receive employee benefits and are not subject to tax withholdings and payments by employers, including unemployment insurance and income tax.

(See page 14-2 of the course material.)

3. A: True is incorrect. Such statutes provide protection for employees only.

B: False is correct. Anti-discrimination laws are just some of the federal standards that apply to employees but not independent contractors.

(See page 14-4 of the course material.)
4. **A: True is correct.** The Internal Revenue Service is the branch of the federal government charged with collecting employment taxes, including federal income and unemployment insurance. Part of the charge of the IRS is to “audit” businesses to ensure that workers are properly classified as either independent contractors or employees.

   B: False is incorrect. The IRS is charged with determining worker status for purposes of employment taxes.

   (See page 14-4 of the course material.)

5. A: Incorrect. There is no guarantee of worker status through application of this test for state or federal law purposes.

   B: Incorrect. There are no assurances for tax or other purposes through application of this test.

   **C: Correct.** This test is a guideline only based on the most important factors that the IRS uses in determining worker status.

   D: Incorrect. There are defenses based on good faith, but simply applying the 20-factor test is not one of them.

   (See page 14-14 of the course material.)

6. **A: True is correct.** This is a classic indicator of independent contractor status as set forth in the IRS 20-factor test.

   B: False is incorrect. When an individual is expected to personally render services, that is indicative of employment status.

   (See page 14-15 of the course material.)

7. A: True is incorrect. Having set hours of work is indicative of an employee, not an independent contractor.

   **B: False is correct.** An employee has his hours of work established by his employer whereas an independent contractor is able to control the hours he or she works.

   (See page 14-15 of the course material.)
8. A: Incorrect. Providing a worker with training, in essence showing them how to do their job, is a form of behavioral control. However, this is not the best answer.

B: Incorrect. Requiring reports of any kind is definitely a form of behavioral control. However, this is not the best answer.

C: Incorrect. This is a form of control, but it is financial rather than behavioral control.

D: Correct. Both A and B are examples of behavioral control.

(See page 14-19 of the course material.)
Age Discrimination in Employment Act (ADEA) – A federal law that protects older employees from employment discrimination on the basis of age. Does not provide protection for independent contractors.

Americans with Disabilities Act (ADA) – A federal law that protects employees from discrimination on the basis of disability and imposes upon employers the requirement that they make “reasonable accommodations” for their employees’ disabilities. Does not provide protection for independent contractors.

Alter ego – Under this legal doctrine, the law will disregard the personal liability an individual has as a result of the existence a corporate entity and will regard an act as the act of the individual rather than solely the act of the corporation.

Compensatory damages – Damages recoverable or awarded for injury or loss sustained. In addition to actual loss or injury, this term may include amounts for expenses, loss of time, bodily suffering and mental suffering, but does not include punitive damages.

Constructive discharge – A termination of employment brought about by making the employee’s working conditions so intolerable that the employee feels compelled to leave.

Equal Pay Act (EPA) – A federal law that prohibits sex-based differentials in compensation for substantially equal jobs in the same establishment.

Escalator principle – Requires that each returning service member actually step back onto the seniority escalator at the point the person would have occupied if the person had remained continuously employed.

Fair Labor Standards Act (FLSA) – The federal law that governs hours and wages of employees, including requirements for minimum wage and overtime. Is not applicable to independent contractors.

Family and Medical Leave Act (FMLA) – The federal law that requires certain employers to give time off to employees to take care of their own or a family member’s illness.

Harassment – A feeling of intense annoyance caused by being tormented.

Respondeat Superior – Under certain circumstances, a principal is responsible for the wrongful acts of its agents or an employer for those of its employees. Under this doctrine, if an employee negligently injures a customer while in the course of his employment, the employer could be held liable.

Tangible employment action – Any significant change in an individual’s employment status.
**Title VII** – Part of the federal Civil Rights Act of 1964 that prohibits discrimination in employment on the basis of age, color, national origin, race, religion, or sex. Does not provide protection to independent contractors.

**Wage rate** – The measure by which an employee’s compensation is determined. It encompasses rates of pay based on a time, commission, piece, job incentive, profit sharing, bonus, or other basis.

**Wages** – All payments made to (or on behalf of) an employee as remuneration for employment.
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