Employment and Labor Laws Index

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Overtime Compensation: Wage & Hour Laws

Payment of overtime compensation and minimum wages are required by the federal Fair Labor Standards Act (Wage-Hour Law) and the New Jersey Wage and Hour Law. In order to ensure compliance with both laws, employers will want to follow the guidelines of the more restrictive law.

General Requirements

Overtime

Federal

Basic requirements include: payment of a minimum rate per hour and payment of overtime compensation at one and one-half times the employee's "regular rate" for hours worked in excess of 40 in a given "workweek." Overtime compensation on a daily basis is not required by this or any other law. There are no restrictions under this law on the number of hours an employee can be required to work in a workday or a workweek, unless they are under 18 years of age (see page 95 for other limitations).

State

Provisions are the same as described above for the federal law, however, employees of health care facilities cannot be required to work overtime in excess of 40 hours per week, except in cases of unforeseeable emergencies, when the overtime is required as a last resort and is not used to fill vacancies resulting from chronic staffing shortages, and the employer has exhausted reasonable efforts to obtain staffing. In either case, overtime is strictly voluntary.

Minimum Wage

Federal

The current minimum hourly rate is $7.25.

State

Effective January 1, 2017, NJ's minimum wage rate is $8.44 per hour (up from $8.38 per hour in 2016). The minimum wage adjusts annually based on the Consumer Price Index. The minimum wage provision does not apply to employees under 18 years of age who do not possess a special vocational school graduate permit. However, such employees who work in mercantile establishments or hotel occupations or the apparel industry are covered by wage orders which specify a minimum wage which may be the same as the statutory minimum. Learners, apprentices, students and certain handicapped persons may be employed at sub-minimum rates when authorized by special certificate.

The Workweek

Federal & State

A "workweek" means seven, consecutive 24-hour days, beginning at the same time each calendar week (but on any calendar day and at any hour of the day selected by the employer). It is a fixed and regularly recurring period of time. "Workweek" is not necessarily the same as the work schedule.

Overtime hours worked in each workweek must be separately calculated and paid for - i.e., in the calculation of overtime pay, hours worked in separate weeks may not be averaged or offset against each other.

Regular Rate

Federal & State

Generally speaking, the regular rate includes all remuneration for employment, including shift premiums and nondiscretionary bonuses, but does not include the following:

1. Premiums paid for work performed on holidays, weekends, sixth or seventh day of the workweek, or before or after regular working hours, provided the premium is at least one and one-half times the employee's non-overtime rate; premiums paid for work in excess of an employee's normal or regular working hours.

(Any such premium may be offset against any statutory overtime pay which is required.)

2. Payments made for occasional periods when no work is performed due to vacations, holidays, illness, failure to provide sufficient work, etc. Similar payments which are not compensation for work performed.

3. Sums paid as gifts or in the nature of gifts at Christmas time or on other special occasions as a reward for service, the amounts of which are not dependent on or measured by hours worked, production or efficiency.

4. Bonuses or sums paid in recognition of services performed during a given period, provided that both the fact that payment is to be made and the amount of the payment are determined at the sole discretion of the employer at or near the end of the period, and not pursuant to any commitment which causes employees to expect such payments regularly.

5. Payments made pursuant to a bona fide profit-sharing plan or trust or thrift or savings plan which complies with regulations of the Secretary of Labor; payments made pursuant to a bona fide plan for providing old-age, retirement, life, accident, health insurance or similar benefits.

6. Any value or income derived from employer-provided grants or rights provided pursuant to a stock option, stock appreciation right, or bona fide employee stock purchase program.

Working Time

Federal

As a general rule, "hours worked" include all time during which an employee is required to be on duty or to be on the employer's premises or other workplace, and all time during which an employee is "suffered or permitted to work" for the benefit of the employer. Thus, work done voluntarily must be counted as working time if the employer knew or had reason to believe that it was being performed or would be performed, and allowed it to continue.

"Hours worked" do not include paid time for absences on holidays, vacations, disability, jury duty, leave of absence, etc. The payment for such absences does not require that they be counted as working time for purposes of calculating overtime compensation.

State

In addition to the requirements listed above under the federal law, an employee who by request of his employer reports for duty shall be paid for at least one hour unless the employer has made available a minimum number of hours of work which had been previously agreed to.

Working Time: Non Productive Time

Time "worked" may include certain kinds of non-productive activity and certain non-work situations. Those most frequently encountered are listed below:

Rest Periods and Meal Periods (Breaks) (There are no mandatory requirements to provide rest or meal periods, regardless of the number of hours worked, except with respect to minors—see page 95, certain drivers of motor vehicles—see page 199 and mothers expressing breast milk—see page 5).

Federal

A rest period or similar break period of 20 minutes or less and a meal period / lunch of less than a half-hour must be counted as working time.

However, a bona fide meal period of at least 1/2-hour duration during which the employee performs no work and is relieved of all duties need not be counted as time worked. This applies even though the employee is not permitted to leave the premises.

State

Working time under the NJ law will also include time when an employee is required to remain on the premises during his regular meal period (or at any other time) even if the employee performs no work. (NJ DOL has advised that they consider uninterrupted breaks of less than 30 minutes to be working time.)

Training Programs and Meetings

Federal

Attendance at training programs, lectures, meetings and similar activities (other than those attended by an employee on his own initiative) must be counted as working time unless all of the following criteria are met:

1. Attendance is outside of the employee's regular working hours.

2. Attendance is voluntary.

3. The program is not directly related to the employee's job, or the course content corresponds to those offered by independent institutions of learning.

   A program is not "directly related" if it is not designed to enable the employee to handle his job more effectively, as distinguished from preparing the employee for a different job. If a course is primarily for the latter purpose, but incidentally helps the employee in his current job, it is considered non-job-related.

   If an employee is on his own initiative attends an independent school, college or trade school after hours, the time so spent is not "hours worked," regardless of the course content.

4. The employee performs no productive work during his attendance.

State

No such provision.

Waiting for Work

Federal & State

If an employee is required to remain on the premises waiting for work to become available, the waiting time must be counted as working time.

On-Call Time

Federal

Whether on-call time must be treated as working time depends upon whether the employee can use the time effectively for his own purposes.

The answer in each case depends upon the particular facts, taking into consideration the time limits on responding to a call-in, the distance required to travel, the frequency of on-call duty, the frequency of calls, the consequences of failing to respond, etc.

State

In addition to the requirements listed above under the federal law, if an employee is required to remain at their home to receive telephone calls from customers when the office is closed it will be considered working time. If such employees have long periods of uninterrupted leisure during which they can engage in the normal activities of living, any reasonable agreement of the parties for determining the number of hours worked shall be accepted.

Travel Time

Federal

Travel on the business of his employer which requires an employee to remain away from home on one or more nights must be counted as working time to the following extent:

1. The part of the travel which is performed in any manner during those hours of the day corresponding to his customary work schedule (including travel during such hours on non-working days, such as weekends and holidays) but excluding regular meal-period time, must be treated as working time. The time spent during such hours by an employee in travel between his home and the airport or other terminal need not be counted.

    If the travel cuts across one or more time zones, the time zone at the place of departure is applied; for the return trip the time zone at the place from which the return travel commences is applied.

2. Time spent in travel as a passenger outside of such hours need not be treated as working time, except that time spent in the performance of actual work while traveling must be counted as working time, regardless of when it is performed.

3. If instead of traveling as a passenger an employee is required to drive an automobile, all of the driving time must be regarded as working time, regardless of when it is performed. However, if an employee is offered public transportation but requests and receives permission to drive his car instead, the employer may count as hours worked either the time spent driving the car or the time he would have had to count had public transportation been used.

Travel on company business which does not require an employee to remain away from home overnight is to be treated as working time in the following circumstances:

1. When an employee as part of his principal activity travels from job site to job site, all of the time spent in travel between sites must be counted as working time. Travel time to the first job site must also be counted if prior to such travel the employee is required to report to headquarters or other meeting place -- and similarly with respect to travel from the last job site -- but need not be counted where the employee travels directly between home and worksite.

2. If an employee who usually works at a fixed location is given a special, one-day assignment to travel to another city, all the time spent in traveling, regardless of whether it starts or ends at the fixed location or at the employee's place of residence, represents working time exclusive of meal periods and except the time spent traveling to and from home and the airport or other terminal.

3. If an employee after completing his normal work is summoned from home to travel a "substantial distance" to perform an emergency job at the premises of one of his employer's customers, all time spent in travel must be considered as working time, regardless of whether he goes directly to or from the customer's premises or stops en route at his employer's premises to pick up or return tools, equipment or material for the job.

State

No such provision.

Medical Examinations and Treatment; Drug and Alcohol Tests

Federal

Time spent by an employee undergoing a physical examination or a drug or alcohol test which is required by the employer constitutes working time, regardless of whether it occurs during or outside of the normal work schedule.

Time spent by an employee in waiting for and receiving medical attention on the premises or at the direction of the employer for a work-related injury or illness, during the employees' normal working hours on days when he is working, also constitutes hours worked.

State

No such provision.

Homework

Federal

Time spent by a homeworker in traveling to and from the distribution point to pick up or deliver the homeworker's own work or the work of other homeworkers must be counted as working time. Waiting at the distribution point to pick up or deliver completed work and have it inspected must also be counted.

State

No such provision.

Changing Clothes

Federal

Time spent by an employee must be treated as working time if changing clothes is "an integral part of the employee's principal activity". (An example is the case of an employee in a chemical plant who cannot perform the principal activity without putting on certain clothing).

Otherwise, with rare exceptions the federal courts have viewed clothes changing at the beginning and end of the workday as a preliminary and postliminary activity that need not be treated as working time.

State

No such provision.

Reasonable Break Time, Shielded for Nursing Mothers

Federal

An employer must provide reasonable break time for an employee to express breast milk for her nursing child each time the employee needs to express milk for one year after the child's birth. The employer must also provide a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public for an employee to use when expressing breast milk. An employer does not have to compensate an employee receiving reasonable break time to express breast milk for any work time spent expressing breast milk during the break.

Undue hardship
An employer that employs less than 50 employees is not required to provide reasonable break time or a shielded place for nursing mothers to express breast milk if these requirements would impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature or structure of the employer's business.

Retaliation
An employer can not retaliate against an employee who objects to or discloses an employer's practice that he or she reasonably believes violates the standard.

State

No such provision

Exempt Employees

Certain categories of employees are exempt from the overtime pay requirements of both the Fair Labor Standards Act and New Jersey's Wage Hour law. Those of chief importance include individuals employed as executive, administrative, professional, outside sales and computer employees. These exemptions are known as the "white collar" or "EAP" exemptions.

To be considered exempt under these rules, employees must meet certain minimum requirements related to their primary job duties and, in most instances, must be paid on a salary basis at not less than the minimum amount specified by the regulations. These requirements are commonly known as the **duties test**, the **salary basis test** and the **salary level test**. In most cases, all three tests must be met in order for an employer to claim the exemption. **Note—see page 10 in reference to details surrounding a temporary injunction on the implementation of a new salary level test by the U.S. Department of Labor.*

Duties Test

Executive Employees

Federal & State

1. The employee's primary duty must consist of management of the enterprise or a customarily recognized department or subdivision thereof.

    a. Typical management functions include interviewing, selecting and training of employees; setting and adjusting their rates of pay and hours of work; directing their work; maintaining their performance records for use in supervision or control; appraising their productivity and efficiency for the purpose of recommending promotions or other changes in their status; handling their complaints and grievances, and disciplining them when necessary; planning and apportioning the work; determining the materials, supplies, machinery, equipment or tools needed to perform the work; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of employees, planning and controlling the budget and monitoring or implementing legal compliance.

    b. "Primary" usually means the major part of the employee's time. However, the amount of time spent on management functions is not the sole determinant of "primary" duty. Other pertinent factors are the relative importance of the managerial duties as compared with his other duties, the relationship between the supervisor's salary and the wages paid to other employees for the kind of "non-exempt" work performed by him, the frequency with which he exercises discretionary powers, and the extent to which he works independently, free of supervision.

    c. The unit managed need not be physically located within an establishment; it must, however, be a recognized unit with a permanent and continuing function.

2. The employee must customarily and regularly direct the work of two or more employees - i.e., 2 full-time employees or the equivalent.

3. The employee must have the authority to hire or fire, or whose suggestions and recommendations as to hiring, firing, advancement, promotion or other change of status will be given "particular weight".

    Factors to consider in determining if an employee's suggestions and recommendations are given particular weight include whether making such suggestions/recommendations are part of the employees job duties, the frequency at which they are offered and the frequency at which they are relied upon.

Administrative Employee

Federal & State

1. The employee's primary duty must consist of the performance of office work, or non-manual work, directly related to management or general business operations of his employer or his employer's customers.

a. For explanation of "primary duty", refer to Executive Employee.

b. "Directly related to the management or general business operations" refers to work directly relating to assisting with the running or servicing of the business, as distinguished from production type work. Examples of this type of work include work in functional areas such as: finance, quality control, purchasing, marketing, research, legal compliance and human resources.

2. The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

a. In general, the "exercise of discretion and independent judgment" involves the comparison and evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. Factors to consider include whether the employee has authority to formulate, affect, interpret or implement management policies; whether major assignments are carried out; whether the work affects business operations to a substantial degree; whether the employee can commit the company financially; whether the employee has the authority to negotiate and bind the company on significant matters and whether the employee is involved in planning long or short term business objectives.

b. The employee should have the authority to make an independent choice, free from immediate direction or supervision.

c. The employee should be able to demonstrate more than the use of skill in applying well-established techniques, procedures or specific standards. Discretion and independent judgment does not include clerical or secretarial work, recording or tabulating data, or performing other mechanical, repetitive, recurrent or routine work.

State

In addition to the criteria above, "Administrative" shall also include an employee whose primary duty consists of sales activity and who receives at least 50% of his or her total compensation from commissions and a total compensation of not less than $400 per week.

Professional Employee

Federal & State

1. The employee's primary duty must consist of the performance of one of the following:

    a. 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, as distinguished from a general academic education, and from the performance of routine mental, manual or physical work

        (1) Some of the professions which usually meet the requirements for a prolonged course of specialized intellectual instruction and study are accounting; law; medicine; teaching; engineering; various types of physical, chemical and biological sciences; and pharmacy. In these professions an advanced academic degree is "a standard (if not universal) prerequisite." However, the exemption is also available to employees who have the same knowledge level and perform substantially the same work as the degreed employees but who have not obtained the advanced degree. Also, an employee working in one of these fields is not automatically "exempt"; the exemption of an individual depends upon his duties and qualifications.

        (2) Registered nurses are considered as having fulfilled these educational requirements; also, registered or certified medical technologists who have completed 3 academic years of pre-professional study in an accredited college plus a fourth year of professional course work in a school of medical technology approved by the A.M.A. Physician assistants who have completed four academic years of pre-professional and professional study which has been accredited by the proper commission will generally meet the requirements.

        (3) Technical specialists who are only highly skilled technicians ordinarily do not have sufficient academic training to qualify for exemption as "professionals".

    b. Work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor, as opposed to routine mental, manual, mechanical or physical work.

Outside Sales Representative

Federal & State

The employee's primary duty is making sales or obtaining orders or contracts for services or for the use of facilities and he is customarily and regularly engaged away from his employer's place of business. Employees who basically drive vehicles and who only incidentally or occasionally makes sales shall not qualify for this exemption.

Computer Employee

Federal & State

1. The employee's primary duty consists of at least one of the following:

    a. The application of systems analysis techniques and procedures, including consulting with users to determine hardware, software or system functional specifications.

    b. 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.

    c. The design, documentation, testing, creation or modification of computer programs related to machine operating systems.

Salary Basis Test

Federal & State

A salary basis requires that the employee regularly receives each pay period a predetermined amount which is not subject to reduction in a week in which he performs any work, regardless of the number of hours or days worked, except in accordance with the following:

1. Deductions from salary may be made for absences of a day or more (i.e. for one or more full days) on account of:

   a. Personal reasons

   b. For sickness or disability, provided the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for illness. Such deductions may be made before the employee has qualified under the plan or policy, and after the employee has exhausted their time under such a plan.

   Deductions may not be made for absences of less than a full day for personal reasons or disability except where the absence is due to a leave of absence taken pursuant to the federal Family and Medical Leave Act.

   Deductions from salary may not be made for absences occasioned by the employer or by the operating requirements of the business.

2. If an employee loses time from work during part of the week because of jury duty, attendance as a witness, or temporary military leave, the employer may offset any amount received by the employee as fees or military pay against the salary due for that week. If the employee receives no jury or witness fees or no military pay, no deduction from salary can be made.

3. Deductions may be made as a result of disciplinary suspensions for infractions of safety rules "of major significance" - i.e. only those relating to the prevention of serious danger to the plant or other employees.

   Deductions may also be made for disciplinary suspension of one or more full days for infractions of workplace conduct rules pursuant to a written policy applicable to all employees.

4. Full salary need not be paid for the initial or terminal week of an individual's employment if, as a result of his employment commencing or terminating after the start of the week, he does not work the entire week; pro rata payment will suffice.

Administrative and Professional exempt employees can be compensated on either a salary basis, as defined above, or on a fee basis. A fee basis is one characterized by payment of an agreed sum for a single job regardless of the time required for its completion. In determining the sufficiency of the payment, the amount paid is to be tested by reference to a workweek of 40 hours. A payment based on the number of hours or days worked, and not on the accomplishment of a given single task, is not considered as a fee.
Computer exempt employees, outside sales exempt employees, and doctors, lawyers and teachers who meet certain requirements need not be paid on a salary basis.

Salary Level Test

Federal & State

In general, an employee must be compensated at a standard salary level of not less than $455 per week exclusive of board, lodging or other facilities.**

Doctors, lawyers and teachers who meet certain requirements need not meet the salary level test. Outside sales exempt employees are also not subject to the salary level test.

Computer exempt employees can either be compensated on a salary or fee basis of not less than $455** per week or on an hourly basis at a rate of not less than $27.63 per hour.

Certain employees employed in a bona fide administrative capacity for an "educational establishment" can be paid a salary level which is at least equal to the entrance salary for teachers in the educational establishment by which employed, provided they are paid on a salary basis.

****On November 22, 2016, a federal court in Texas issued a nationwide temporary injunction on the implementation of new rules surrounding the salary level test by the U.S. Department of Labor. Those rules are outlined below for reference, although on hold at the time of this going to print.**

In general, an employee must be compensated at a standard salary level of not less than $913 per week exclusive of board, lodging or other facilities.

The salary level will be indexed every three years, beginning January 1, 2020, to equal the 40th percentile of weekly earnings of full time non-hourly workers in the lowest-wage Census Region in the second quarter of the year preceding the update.

Up to 10% of the salary amount required may be satisfied by the payment of nondiscretionary bonuses, incentives, and commissions that are paid quarterly or more frequently. If by the last pay period of the quarter the sum of the employee's weekly salary plus such payments received does not equal 13 times the week salary amount required, the employer may make one final payment sufficient to achieve the required level provided it is made no later than the next pay period following the end of the quarter. This provision does not apply to highly compensated employees (see next section).

Highly Compensated Employee

Federal & State

An employee with a guaranteed total annual compensation (could include commissions and other non-discretionary compensation such as bonuses) of at least $100,000 *[**$134,004, see above*] is deemed exempt provided the employee customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee as described in the duties tests. The employee must still receive at least $455 *[**$913, see above*] per week on a salary or fee basis. This exemption is not available to blue collar workers.

Safe Harbor

Federal & State

An exemption will not be lost, even if an improper pay deduction is made, provided that the employer has a clearly communicated policy prohibiting improper deductions which includes a complaint mechanism, the employee is reimbursed for any improper deduction and the employer makes a good faith commitment to comply in the future. The safe harbor is not available if the employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints.

Miscellaneous Exemptions

In addition to exempting those employees who meet the Executive, Administrative, Professional, Outside Sales, Computer and Highly Compensated Employee exemption tests, both the federal and state law provide exemptions for certain other individuals as outlined as follows. These exemptions will rarely be utilized since employers must comply with both the federal and state requirements.

Federal

1. Motor vehicle drivers, drivers' helpers, loaders and mechanics employed by a motor carrier or motor private carrier whose duties affect the safety of operation of commercial motor vehicles in transportation on public highways in interstate or foreign commerce. A commercial vehicle is defined as one with a) a vehicles weight rating or gross vehicle weight of at least 10,001 lbs (whichever is more), or, b) vehicles designed or used to transport more than 8 passengers, including the driver, for compensation, or c) vehicles designed or used to transport more than 15 passengers, including the driver, and not used to transport passengers for compensation, or d) vehicles used in transporting hazardous materials.

2. An employee of a retail or service establishment if his regular rate is at least time-and-one-half the statutory minimum rate and if more than half of his compensation for a representative period (not less than one month) represents commissions on goods sold or services performed.

3. Employees in certain industries. However, these exemptions have little practical significance in view of the broad coverage of the New Jersey Wage and Hour Law.

State

1. The overtime pay provisions do not apply to state certified "A" mechanics who work for automobile dealers, provided 1) the mechanic is paid a flat rate (defined by industry standards) or on an incentive basis, and 2) is guaranteed an hourly rate of at least the minimum wage and time and one-half for all hours actually worked in excess of 40 hours per week.

2. Limousine drivers who work for firms engaged in the business of operating limousines are also exempt. A "limousine" is defined as a vehicle with a capacity of not more than 9 passengers, including the driver, used in the business of carrying passengers for hire. "Limousine" does not include hotel or airport shuttles and buses. Further, drivers, helpers, loaders and mechanics employed by a "trucking industry employer" shall be paid an overtime rate not less than one and one-half times the minimum wage.

Enforcement

Federal

An employee or the Secretary of Labor may sue for unpaid overtime compensation plus an equal amount of liquidated damages. The latter will be awarded by a court unless the employer can show that his violation was in "good faith" and that he had reason to believe he was not in violation.

The statute of limitations on overtime-pay claims is 2 years, normally, but it is extended to 3 years where the violation is "willful". An employer's violation is willful where he knows his conduct is unlawful or where his conduct exhibits reckless disregard for whether it is unlawful.

State

Any employer who violates the provisions of the state law shall be guilty of a disorderly person's offense, fined up to $1,000 and/or imprisoned. In addition to back wages due, the Commissioner is also authorized to assess administrative fees and penalties.

Wage and Hour Record-Keeping Requirements

Federal

The federal Wage-Hour regulations require that for each "non-exempt" employee the following records be kept (for 3 years unless otherwise indicated):

1. Name (as it appears on Social Security record), home address, date of birth if under 19, sex, and occupations in which employed.

2. Pay period and date of payment; time of day and day of week on which employee's payroll week begins. (If employee is part of a workforce all of whom have the same payroll week, a single payroll notation will suffice for the entire workforce.)

3. Total wages paid in each pay period.

4. Total daily or weekly straight-time compensation, total premium pay for overtime hours.

5. For any week when overtime pay is due: the regular hourly rate of pay for each occupation at which employed, the basis of pay (hourly, weekly, etc.), and the amount and nature of each payment which is excluded from such rate.

6. Total hours worked each workday and workweek.

   It is unnecessary to show total daily and weekly hours worked by individual employees all of whom work on a fixed and recurring schedule if (a) there is a written record of the schedule, and (b) when it is adhered to, the employer indicates by a check mark or other method that the schedule was adhered to, and (c) in weeks when any employees deviate from such schedule, their exact total daily and weekly hours of work are shown.

   There is no requirement that time clocks or any other particular form of record-keeping be utilized. However, whatever records or combination of records which are used should show the time which is actually worked (disregarding slight variations). Time clock entries alone may or may not be sufficient.

7. Deductions from or additions to regular wages. (Retain for 2 years.)

8. Basic time and earnings cards which reflect daily starting and stopping times and (if relevant to the calculation of earnings) amounts or units of work produced, and tables or schedules which provide the piece rates used in computing earnings. (Retain for 2 years.)

For each "exempt" employee an employer must keep the information specified in (1), (2), and (3), above, and in addition, sufficient detail with respect to wages paid to permit calculation for each pay period of the employee' s total remuneration, including "fringe benefits".

Employers shall also preserve for 2 years originals or copies of all customer orders or invoices, incoming and outgoing shipping or delivery records, bills of lading and billings to customers, which are retained or made in the ordinary course of business.

For willful violations of the record-keeping requirements criminal penalties may be imposed.

State

New Jersey Wage and Hour regulations require that the following records be maintained for 6 years: (1) name and address of each employee, and date of birth if under 19, (2) number of hours worked each day and each workweek,* (3) the regular rate of pay, (4) gross earnings, and net earnings after itemized deductions, and (5) the basis on which wages are paid (hourly, weekly, etc.).

For failure to keep such records on employer is subject to fines, administrative penalties and imprisonment.

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* No record is required of hours worked by employees who are "exempt" under the New Jersey regulations.

Discrimination in Employment

Introduction

There are two kinds of employment discrimination: differential treatment, which usually is intentional discrimination against one or more individuals, and "adverse impact", which need not be intentional.

Adverse impact is created by a "neutral" employment practice, standard or requirement which, although applied uniformly to all individuals, results in rejecting, or adversely affecting employment opportunities of individuals in a particular protected class (minorities, females, older persons, disabled individuals, etc.) at a substantially higher rate than other individuals. Thus, a requirement that job applicants possess a specified amount or kind of education and achieve a certain score on a test in order to qualify for hire or promotion was held by the Supreme Court to be discriminatory because it resulted in the rejection of a higher proportion of black applicants than white applicants, and fulfillment of the requirement was not related to successful job performance.

Therefore, to justify the use or application of an employment practice or criterion which produces adverse impact the employer must demonstrate that it is job-related and "consistent with business necessity." However, the routine application of a bona fide seniority system does not violate the anti-discrimination laws even though it results in adverse impact. Also, barring employment of individuals because of their current use or possession of illegal drugs (those listed in Schedules I and II of the Controlled Substances Act) is not unlawful even if it produces adverse impact.

Employment tests and other selection criteria need not be "validated" (i.e., shown to be job-related) unless their use produces adverse impact.

(See Appendix, Page A-7, for the method for determining adverse impact.)

New Jersey Law Against Discrimination

It is unlawful under this law, which applies to all New Jersey employers, regardless of number of employees, to discriminate in the terms, conditions, or privileges of employment of an employee or prospective employee because of race, religious creed, color, national origin, nationality, ancestry, age, sex, present or past disability (unless the nature and extent of the disability "reasonably precludes" performance of the job), marital status, pregnancy domestic partnership, civil union status, affectional or sexual orientation (heterosexuality, homosexuality and bisexuality), gender identity or expression, atypical hereditary cellular or blood trait, genetic information, or liability for service in the armed forces of the U.S. (except that one can refuse to hire an applicant who has received an order to report for active duty).

The statute provides that it is not intended to interfere with the application of a "bonafide occupational qualification", or to prohibit the establishment and maintenance of apprenticeship requirements of "reasonable" minimum age, or to interfere with the "operation of the terms or conditions and administration" of a retirement plan, employee benefit plan or insurance plan. (But this provision does not sanction mandatory retirement on account of age, at any age, except as stated on page 16.)

It is unlawful to cause any statement or advertisement to be printed or circulated, or to make any inquiry via employment application form or otherwise, in connection with prospective employment, which directly or indirectly expresses any limitation, specification or discrimination as to the foregoing items (race, creed, color, etc.) unless it is based upon a bonafide occupational qualification, or unless it is required by federal law. (See pages 23 and 51).

Some Subjects As To Which Pre-Job-Offer Inquiry Is Lawful*

Other name under which applicant has worked or was educated.

Name, address of person (but not of "nearest relative") to be notified in case of accident or emergency.

Names of references.

Military experience in armed forces of U.S. Dates and conditions of discharge from military service.

Numbers and kinds of convictions of crime.

Languages spoken or written fluently (if job-related).

Length of residence in New Jersey.

Whether applicant is either a citizen or authorized to work in the U.S.
Other inquiry in order to comply with Immigration Law.

Whether individual can perform all of the functions of the job for which he is applying; if not, which ones?

Some Subjects As To Which Pre-Job-Offer Inquiry Is Unlawful*

Race, national origin and sex (except as required to comply with federal law**).

Applicant's original name; whether name has been changed; maiden name of female applicant. (But can ask is applicant was employed or educated under a different name.)

Names or address of any relative. (But can ask for names of any relatives currently employed by employer.)

Language native to applicant or commonly used by applicant at home. Manner in which applicant learned to read, write or speak a foreign language.

Applicant's birthplace, nationality, parentage, etc.; birthplace of parents.

Age (except in the case of applicants for the occupation of motor vehicle operator and except that applicant may be asked if he is under the age of 18. A request for the production if a driver's license is impermissible: it reveals date of birth.

Physical or mental disability.

Applicant's marital status, or questions whose answers would reveal same.

Applicant's religious affiliation; religious holidays observed; name of pastor or religious leader.

Names of clubs and organizations of which applicant is a member, other than professional or service organizations.

Color of applicant's skin, eyes, hair, etc. Request for photograph.

Membership in National Guard or Reserves. (But can inquire if applicant has received an order to report for active duty.)

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*See also, page 37.

**Federal regulations require that in order to evaluate selection procedures for their impact on female and minority applicants, records must be kept of the sex, race and ethnic group of job applicants.

Disability Discrimination

"Disabled" is defined as 1) "suffering from physical disability, infirmity, malformation or disfigurement which is caused by bodily injury, birth defect or illness, including epilepsy, and which shall include, but not be limited to, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a seeing-eye dog, wheelchair or other remedial appliance or device, or 2) suffering from any mental, psychological or developmental disability, including autism spectrum disorders, resulting from anatomical, psychological, physiological or neurological conditions which prevents the normal exercise of any bodily or mental functions or is demonstrable, medically or psychologically, by accepted clinical or laboratory diagnostic techniques." (Compare the definition in the Americans With Disabilities Act and the Rehabilitation Act.)

A blind person is defined as an individual whose "central visual acuity does not exceed 20/200 in the better eye with correcting lens or whose visual acuity is better than 20/200 if accompanied by a limit to the field of vision in the better eye to such a degree that its widest diameter subtends an angle of not greater than 20 degrees."

A deaf person is defined as one whose hearing "is so severely impaired that he is unable to hear and understand normal conversational speech through the unaided ear alone, and who must depend primarily on supportive device or visual communication such as writing, lip reading, sign language, and gestures."

The Attorney General of New Jersey has issued a formal opinion that one who illegally uses a drug which is a controlled dangerous substance is not regarded as disabled under the statute, even if he is addicted, and regardless of whether he is undergoing rehabilitative treatment. Therefore, such an individual has no particular protection against discharge or denial of employment for illegal use of drugs. However, if the individual is not presently using illegal drugs, his addiction is considered a disability.

However, if a person is an alcoholic*, as compared with a mere user or abuser of alcohol, he is then regarded as disabled under the statute, and if that fact is known to the employer, the individual has the same protection as any other disabled individual.

AIDS and HIV infection are regarded as disabilities.

It is a violation of the statute to deny employment because of a "perceived disability" which does not, in fact, exist.

An individual may be denied employment or continued employment if because of a disability he will be unable to perform a job adequately and with safety to himself, or others, or if his work or the work environment will create a materially enhanced risk of serious harm by aggravating an existing disability. In nearly all cases such action must be based on medical opinion, properly arrived at and properly expressed. (In the case of an employee, as distinguished from a job applicant, inability to perform is usually determinable by observation.) This requires (1) that the examining physician be knowledgeable about the particular disability, and be informed fully by the employer of the duties of the job, its physical and mental requirements and the work environment, (2) that the examination be thorough, and relevant to the job duties and requirements, and (3) that the medical report disclose the extent of the examination and the individual's specific physical or mental limitations, and state why those limitations either preclude him from performing the job (and identify the particular element of the job which he cannot perform), or present a probability of serious harm. The employer must review the conclusions of the physician and whatever other records exist which are relevant to the individual's physical condition.

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*The only statutory definition of an “alcoholic” appears in the New Jersey Alcohol Treatment and Rehabilitation Act, which defines an alcoholic as “any person who chronically, habitually or periodically consumes alcoholic beverages to the extent that: a) such use substantially injures his health or substantially interferes with his social or economic functioning in the community on a continuing basis, or b) he has lost the power of self-control with respect to the use of such beverages.” This definition is not necessarily relevant to the New Jersey Law Against Discrimination.

The New Jersey Division on Civil Rights has promulgated rules on the subject of employers' obligations concerning handicapped employees and job applicants. They provide that:

1. An employer must make "a reasonable accommodation to the limitations of a handicapped employee or applicant unless the employer can demonstrate that this accommodation would impose an undue hardship on the operation of its business".

Examples of reasonable accommodation include making facilities used by employees readily accessible and useable by handicapped persons; job restructuring or reassignment; acquisition or modification of equipment and devices; modified work schedules.

2. Pre-employment inquiry may be made concerning the existence of an applicant's health condition or handicap which is relevant to the particular job sought, provided that:

a. The applicant is provided with an accurate description of the duties of such job, and

b. Information is solicited from the applicant as to reasonable accommodation which could be made if such inquiry has revealed the existence of a handicap.

3. An offer of employment may be conditioned on the results of a medical exam given subsequent to such offer and prior to commencement of employment, provided that all entering employees are subjected to medical examinations. (By implication, a medical examination may not be given prior to a job offer.)

(Compare these rules with the provisions of the Americans With Disabilities Act.)

Age Discrimination

Unlike the federal Age Discrimination in Employment Act, the New Jersey statute applies to all employers and extends coverage to individuals of any age (except as noted below).

Thus, it is unlawful to terminate or compel the retirement of an employee where such action is based in whole or in part on his age. As an exception to this, the statute provides that an employer may require retirement because of age (at any age) of an employee who during the 2-year period before his retirement was employed in a "bona fide executive or high policymaking position" if he is entitled to an immediate, non-forfeitable, annual retirement benefit provided by his employer from a pension, profit-sharing, savings or deferred compensation plan, or any combination of such plans, which equals at least $27,000 in the aggregate.

1. A "bona fide executive" is defined as a "top-level" employee who exercises "substantial executive authority over a significant number of employees and a large volume of business".

2. A "high policymaking position" is one "in which a person plays a significant role in developing policy and in recommending the implementation thereof".

(But note the more stringent requirements of the federal law concerning compulsory retirement of employees in such categories—page 42.)

The New Jersey statute also declares that it is not intended to require the hiring of any person who is under age 18, or to require that a person over age 70 be hired or promoted. (Note, however, that federal law would be violated by refusing, because of age, to hire or promote an individual who was over age 70– see page 39.)

Marital Status Discrimination

It is an unlawful employment practice to discriminate on the basis of marital status. According to the NJ Division on Civil Rights, marital status means single, married, separated, divorced, or widowed. However, it is not a violation of the statute to discharge or deny employment to a married person pursuant to an employment policy prohibiting the employment of relatives in the same establishment (provided such policy is enforced uniformly against both males and females).

Discrimination Based on Affectional or Sexual Orientation

It is a violation of the law to discriminate on the basis of affectional or sexual orientation, meaning male or female heterosexuality, homosexuality or bisexuality by inclination, practice, identity, or expression, having a history thereof or being perceived, presumed or identified by others as having such an orientation.

Civil Union and/or Domestic Partner Status

It is an unlawful employment practice for an employer to discriminate on the basis of civil union or domestic partner status. The law applies to unmarried same-sex couples who choose to "share each other's lives in a committed relationship of mutual caring" and, in the case of domestic partnership, opposite-sex couples age 62 or older.

Pregnancy

Under New Jersey Pregnant Worker's Fairness Act (NJPWFA), it is unlawful for an employer "to treat, for employment-related purposes, a woman employee that the employer knows, or should know, is affected by pregnancy in a manner less favorable than the treatment of other persons not affected by pregnancy". The law defines pregnancy as including "childbirth, or medical conditions related to pregnancy or childbirth, including recover from childbirth."

Additionally an employer needs to provide reasonable accommodations in the workplace, "such as bathroom breaks, breaks for increased water intake, periodic rest, assistance with manual labor, job restructuring or modified work schedules and temporary transfers to less strenuous or hazardous work" when requested by the employer and based on advice of the employee's physician, unless it would be an undue hardship on the business operations of the employer. An accommodation must be provided in a manner no less favorable than accommodations or leave provided to other employees not affected by pregnancy but similar in their inability or inability to work.

The employer shall not retaliate against a pregnant employee with regard to terms and condition of employment for "requesting or using the accommodation or, whenever accommodation is not feasible, from taking an amount of time away from work".

Health Care and Pension Benefits

All health insurance contracts within the state of New Jersey must offer dependent coverage to civil union partners in the same manner as a spouse. In the case of same-sex domestic partners, an employer is not required to provide any dependent coverage but may voluntarily do so. If the employer chooses to do so, in the case of domestic partners, it may require the employee to contribute a portion or the full amount to the cost of the dependent coverage.

Public employees participating in the State Health Benefits Plan and/or the Public Employees Retirement System are not required to provide health or retirement benefits to domestic partners but may voluntarily adopt a resolution to do so.

An Affidavit of Civil Union Status or Domestic Partnership stamped by the local registrar or a Certificate of Civil Union or Domestic Partnership issued by the state of New Jersey is evidence of domestic partnership status.

When a domestic partnership has terminated, the employee must provide notice to the employer. An employer that suffers a loss as the result of the failure to provide notice is entitled to seek recovery against the employee for any actual loss.

Out-of-State Civil Unions

A domestic partnership, civil union or "reciprocal beneficiary relationship" entered into outside of New Jersey, which is valid under the law under which the partnership was created, is valid in the state of New Jersey.

Gender Identity Expression

It is an unlawful employment practice for an employer to discriminate on the basis of gender identity or expression, that is, having or being perceived as having a gender related identity or expression whether or not stereotypically associated with a person's assigned sex at birth.

An employer may impose a uniform dress or grooming code, except that an employer must allow an employee to appear, groom or dress consistently with the employee's gender identity or expression.

Genetic Information

It is an unlawful employment practice for an employer to discriminate on the basis of genetic information or because of the refusal of an individual to submit to a genetic test or to make available the results of a genetic test. "Genetic information" means information about genes, gene products or inherited characteristics that may derive from an individual or family member.

Religion

It is unlawful for an employer to impose a condition of employment, or any privilege or term of employment, that would require a person to violate or forgo a sincerely held religious practice or observance, including working on the Sabbath or other holy day, unless, after engaging in a good faith effort, the employer demonstrates that it is unable to reasonably accommodate the employee's religious observance or practice without an undue hardship on the operations of the business.

"Undue hardship" means an accommodation requiring unreasonable expense or difficulty, unreasonable interference with the safe and efficient operation of the workplace or a violation of a bona fide seniority system or collective bargaining agreement.

If, as a reasonable accommodation, a scheduling change results in an employee working a shift that entitles the employee to premium wages or benefits, the employer need not make such pay or provide such benefits.

"Premium wages" means additional remuneration for night, weekend or holiday work, or for standby or irregular duty.

"'Premium benefit" means if any benefit, such as paid time off or compensatory time, due to an employee for an equivalent period of work performed during the regular work schedule of the employee.

An employer cannot deny time off as a reasonable accommodation unless it would be an undue hardship. Where time off is a reasonable accommodation, the employer may require the employee to make up the time 'at some other mutually convenient time' or can be charged as paid time off, other than sick leave. Any absence not made up or charged as paid time off can be treated as unpaid time off.

Requesting Information about Wages and Other Employment Information

It is unlawful for an employer to take reprisals against any employee for requesting from any other employee or former employee of the employer, information regarding the job title, occupational category, and rate of compensation, including benefits, of any employee or former employee of the employer, or the gender, race, ethnicity, military status, or national origin of any employee or former employee of the employer, regardless of whether the request was responded to, if the purpose of the request for the information was to assist in investigating the possibility of the occurrence of, or in taking of legal action regarding, potential discriminatory treatment concerning pay, compensation, bonuses, other compensation, or benefits.

Enforcement Procedure

The statute provides that a complaint (known as a "charge") to the Division on Civil Rights must be filed within 180 days after the occurrence of the alleged act of discrimination. A charge may be filed by an individual, by the Commissioner of Labor, or by the Commissioner of Education. A charge may also be forwarded to the Division by the Equal Employment Opportunity Commission (EEOC), and this is considered to be a filing.

The Division has authority to conduct an investigation not only of a claimed violation but also to determine whether a violation has occurred. It may subpoena witnesses and documents, take depositions and serve interrogatories. As part of the investigative process it may conduct a "fact-finding conference" among the parties and a representative of the Division. After conducting an investigation if it determines that there is "probable cause" for concluding that a violation has occurred, it so notifies the employer involved, and is then required by the statute to endeavor to conduct a conciliation meeting. Attendance at such meeting is voluntary. Thereafter, if the matter has not been resolved satisfactorily to the Division, it has the authority to proceed to a formal hearing.

The hearing is conducted by the Office of Administrative Law before an Administrative Law Judge. The case on behalf of the complainant is presented by the Attorney General's office; however, at any time after 180 days from the filing of a complaint the complainant may request permission to present his case by himself or through his own attorney, and such request shall be granted unless the Director of the Division has issued a finding of "no probable cause" or has otherwise dismissed the complaint.

If as a result of the hearing the charge of violation is substantiated, the Director of the Division has the authority to issue an appropriate remedial order against the employer, which may include the duty of taking "affirmative action" aimed at preventing further violations. (The statute does not otherwise require the taking of affirmative action by an employer.) In addition, the Director has the statutory authority to award compensatory damages, and impose a penalty of up to $10,000 for a first offense and up to $50,000 for each subsequent offenses. However, he cannot award punitive damages. An order of the Director is enforceable in the courts.

An individual can by-pass the foregoing procedure and initiate suit in Superior Court without filing a complaint with the Division. If he does so, he waives any right to file with the Division. Or, he can file a complaint with the Division and then withdraw that complaint and institute suit in Superior Court unless in the interim the Division has issued a finding of "no probable cause"; in such case the finding of "no probable cause" is reviewable in the Appellate Division.

Compensatory and punitive damages are recoverable in a Superior Court proceeding. Also, either party has a right to a jury trial.

The statute of limitations applicable to suits brought in Superior Court is 2 years.

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Civil Rights Act of 1964, Title VII
(As amended by the Civil Rights Act of 1991)

General

This federal statute, which is administered by the Equal Employment Opportunity Commission (EEOC), applies to employers who have 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.

1. "Have. . .employees for each working day" does not mean performance of actual work on each working day. An employee with whom there is a continuing employment relationship during a week will be considered as having been employed each working day of that week, whether or not he receives any compensation for the week, and even though he is a part-time employee.

2. A company with fewer than this number of employees may be subject to the Act if it is owned by or affiliated with another company, where there is common management and control, and total employment in both companies is 15 or more. When a single employer maintains two or more establishments, the employees at all locations must be totaled for the purpose of determining the coverage of the statute.

3. The statute covers U.S. citizens who are employed (or applicants for employment) in foreign countries by American-owned or controlled companies, except that compliance with the statute is not required where it would cause a violation of the law of the foreign country.

The statute states that it is unlawful to fail or refuse to hire or to discharge or otherwise discriminate against any individual with respect to his "compensation, terms, conditions, or privileges of employment" because of race, national origin, color, religion or sex. The statute also prohibits any help-wanted notice or advertisement which indicates "any preference, limitation, specification or discrimination" based on race, national origin, color, religion or sex.

However, if national origin, religion or sex is a "bona fide occupational qualification reasonably necessary to the normal operation of the business", an employer may lawfully hire and employ an individual on the basis of any such factor, and specify such factor in help-wanted advertisements. (Race or color may not constitute an occupational qualification.) The preferences of co-workers, customers and others for employees of a particular sex do not ordinarily constitute a bona fide occupational qualification.

The statute provides that it is not unlawful to apply different standards of compensation or different terms or conditions of employment pursuant to a bona fide seniority, merit or incentive system, or to employees who work in different locations.

Sex Discrimination

(Other than sexual harassment—see page 24)

Females must be considered on the basis of their individual capacities and not on the basis of any assumed characteristics generally attributed to females.

Women who are affected by pregnancy, childbirth or "related medical conditions" may not, because of such factors, be treated less favorably than other disabled employees (male or female) for any "employment-related purpose." Thus, whatever leave-of-absence policy or practice is in effect for disabilities generally must be applied at least equally to pregnancy-related disabilities with respect to commencement and duration of the leave of absence, the availability of extensions, and reinstatement. There cannot be a predetermined maximum duration of pregnancy leaves that is less than for disabilities generally. Also, the same policies must apply concerning the accrual of seniority and receipt of other benefits (such as payment of insurance premiums) during the leave.

There is no requirement for preferential treatment of pregnant females, although it is permissible during the period of actual physical disability to extend more favorable treatment -- such as, for example, a longer period of leave of absence than for other disabilities. However, once the disability has ceased, no preference can lawfully be given to females with respect to the availability or duration of a leave of absence for such things as child care.

Furthermore, an employer is not obliged to allow females to receive disability benefits or use sick leave merely because they are or were pregnant where there is no inability on their part to continue or resume working. In other words, pregnancy per se is not a disability.

A health insurance plan need not cover medical expenses of employees' spouses or dependents, nor must it treat the pregnancies of employees' wives the same as the pregnancies of female employees. However, if the plan covers medical expenses of spouses of female employees, it must equally cover the medical expenses of spouses of male employees, including those which arise from pregnancy-related conditions.

EEOC has issued interpretive guidelines on the subject of pregnancy-related conditions. (See Appendix p. A-9).

There can be no differences based on sex in the amount of pension benefits or other employee benefits, nor can employees of one sex be required to make greater contributions than employees of the opposite sex in order to receive equal benefits.

In the absence of similar restrictions applicable to males, it is a violation of the statute to deny or restrict the employment of married women, or married women with pre-school-age children.

The enforcement of reasonable grooming standards as to hair length and facial hair, and of dress codes, usually does not constitute sex discrimination even though these standards are different as between males and females.

The exclusion from job opportunities of members of one sex, but not the opposite sex, on the basis of exposure to a reproductive or fetal hazard is unlawful.

Religious Discrimination

The statute defines the term "religion" to include "all aspects of religious observance and practices, as well as belief", and requires an employer to "reasonably accommodate" to the religious observance, belief or practice of an employee or prospective employee unless doing so will involve "undue hardship" on the conduct of his business. An employer may not be required, in order to "accommodate", to incur more than de minimis cost (in the form of higher pay, lost efficiency, etc.) or to impair the rights of other workers. When an employer offers an accommodation that is reasonable, it has no obligation to adopt an alternative accommodation proposed by the employee.

It is unlawful to harass or allow the harassment of an employee because of his religion.

The EEOC has established guidelines on the subject of religious discrimination. (See Appendix page A-11).

Racial Discrimination

An employer has an obligation to maintain an atmosphere in the workplace which is free of racial and ethnic harassment and intimidation.

Recruiting or promotional practices which perpetuate the preponderance of white employees (or any other racial category of employees) in the workplace may be discriminatory.

National Origin Discrimination

According to EEOC, national origin discrimination includes the denial of equal employment opportunity to an individual not only because of his or his ancestors' place of origin but also because he has the "physical, cultural or linguistic characteristics of a national origin group". Furthermore, an employer violates the law if he tolerates harassment of an employee because of his national origin.

The EEOC has issued a guideline on this subject. (See Appendix, page A-13).

Discrimination in Compensation

Title VII (as well as other federal fair employment laws) prohibits compensation discrimination on the basis of race, color, religion, sex, national origin, age, or disability. Unlike the Equal Pay Act (see page 45), there is no requirement under Title VII that the claimant's job be substantially equal to that of a higher paid person outside the claimant's protected class, nor does Title VII require the claimant to work in the same establishment as a comparator.

Compensation generally includes all payments made to, or on behalf of, an employee as remuneration for employment. The term includes all forms of compensation irrespective of the time of payment, whether paid periodically or deferred until a later date, and whether called wages, salary, profit sharing, expense account, monthly minimum, bonus, uniform cleaning allowance, hotel accommodations, use of company car, gasoline allowance, or some other name. Fringe benefits are deemed to be remuneration for employment.

The Ledbetter Fair Pay Act was enacted in 2009, which overturns the U.S. Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.* The practical application of this decision requires a compensation discrimination charge to be filed within 180 days of the date of hire (300 days in New Jersey). The Act restores the pre-*Ledbetter* position of the EEOC that each paycheck that delivers discriminatory compensation is an independent and separate harm, regardless of when the employee was hired.

Under the Act, an individual subjected to compensation discrimination under Title VII (or other federal fair employment laws) may file a charge within 180 (or 300) days of any of the following:

- when a discriminatory compensation decision or other discriminatory practice affecting compensation is adopted;
- when the individual becomes subject to a discriminatory compensation decision or other discriminatory practice affecting compensation; or
- when the individual's compensation is affected by the application of a discriminatory compensation decision or other discriminatory practice, including each time the individual receives compensation that is based in whole or part on such compensation decision or other practice.

In effect, a claimant can file an EEOC charge within 180 (or 300) days of receiving any paycheck alleged to be discriminatory.

The Act has a retroactive effective date of May 28, 2007, and applies to all claims of discriminatory compensation under any federal fair employment law pending on or after that date.

Discrimination Based on Sexual Orientation and Gender Identity

The EEOC interprets and enforces Title VII's prohibition of sex discrimination as prohibiting employment discrimination based on sexual orientation or gender identity. For example, the agency has held that discrimination against a transgender individual violates Title VII. The agency has also held that an employer's restrictions on a transgender woman's ability to use a common female restroom violates Title VII; that misuse of a transgender employee's new name and pronoun may constitute sex discrimination and/or harassment; and that an employer's failure to revise its records to accommodate a change in gender identity may violate Title VII.

Enforcement Procedure and Remedies

No complaint or "charge" of discrimination may be processed by EEOC until the aggrieved individual has first filed a complaint with the New Jersey Division on Civil Rights, alleging violation of the state law. After 60 days from such filing, or sooner if the state proceedings are earlier terminated, EEOC can acquire jurisdiction over a charge. It must be filed within 300 days of the alleged violation, or within 30 days after receiving notification that the state agency has terminated its proceedings, whichever is earlier.

If EEOC dismisses the charge or within 180 days has not instituted suit, EEOC shall notify the aggrieved individual that he may institute suit on his own behalf. Thereafter, suit by the individual must be instituted within 90 days after receipt of the notice. The court may appoint an attorney for him and may dispense with court costs and fees.

An aggrieved individual is entitled to recover back pay, with interest, but not for any period prior to 2 years before the charge was filed with EEOC. Further, a plaintiff may never recover compensatory and punitive damages, as well as attorneys' fees, although under federal law punitive damages are capped depending on the size of the employer. Such damages are not capped under New Jersey law. Under federal law, an employer will be liable for punitive damages when the complaining party can demonstrate that the employer acted "with malice or reckless indifference", as measured by the employer's knowledge that it may have been acting in violation of federal law. However, an employer will not be liable for punitive damages where a manager's discriminatory act was contrary to the employer's "good faith efforts" to comply with the law. Good faith efforts include adopting antidiscrimination policies and providing supervisory training. The New Jersey Supreme Court has not created a good faith defense, although it has stated that a company that develops an antidiscrimination policy that is widely published to all employees, and provides an effective grievance procedure and trains supervisors to recognize and prevent discrimination will have at least tried to stop the discrimination before it occurs.

If compensatory or punitive damages are sought, either party may obtain a jury trial.

Records and Reports

The statute requires employers to make and keep such records and make such reports therefrom as the EEOC shall prescribe.

"Applicant flow charts", which identify applicants according to sex, race and ethnic group, are prescribed (see Appendix, page A-5). There is also a posting requirement. (The EEOC "consolidated" poster may be used.)

No other regulations have been issued by the agency which specify that particular records must be compiled. However, it has issued a regulation that if "any personnel or employment record" is made by an employer, it shall be preserved for a period of 1 year from the date of the making of the record or the personnel action involved, whichever is later, or in the case of involuntary termination, for 1 year from date of termination. Such records include application forms, and records having to do with hiring, promotion, demotion, transfer, layoff, termination, rates of pay or other terms of compensation, requests by disabled individuals for reasonable accommodation, selection for training, etc. Also, when a charge of discrimination has been filed, all personnel records relating to the charging party and other employees in or candidates for the position held or sought by the charging party shall be preserved until the final disposition of the case.

(Although employment application forms must be retained for the prescribed period, there is no obligation to keep them in an "active" status for any particular period of time.)

EEOC regulations also require the submission annually of an Employer Information Report (which is the same one used by government contractors (see page 51), designated as Form EEO-1. It is required of all employers with 100 or more employees, either alone or in combination with an affiliated company with which there is centralized ownership, control and management. A multi-establishment company with 100 or more employees must file (1) a separate report for each establishment having 50 or more employees, (2) a report covering the principal or headquarters office and (3) a consolidated report. The consolidated report must cover the employees (including part-time employees) in all of the establishments, including those having fewer than 50 employees.

Starting with the 2017 Employer Information Report, which will be due on March 31, 2018, private employers including federal contractors and subcontractors with 100 or more employees will submit summary pay data, which includes the total number of full and part-time employees they had during that year in each of 12 pay bands listed for each EEO-1 job category. Further employers will tally and report the number of hours worked that year by all the employees accounted for in each pay band. The EEO-1 pay bands track the 12 pay bands used by the Bureau of Labor Statistics for the Occupation Employment Statistics survey.

Poster

Employers are required to post a Consolidated EEO law poster which covers all laws enforced by the EEOC. Failure to post the required notice will result in a fine of not more than $525 for each separate offense.

Sexual Harassment

Sexual harassment, as a form of sex discrimination, is unlawful under both federal and state law. An employer's responsibility and degree of liability for workplace harassment will vary, depending on the nature of the harassment and the identity of the perpetrator.

There are two kinds of sexual harassment: (1) sexual advances or requests for sexual favors, submission to which is made a condition of employment, employment status, or employee benefits, and (2) conduct of a

sexual nature, or conduct motivated by the employee's sex, which creates a hostile or abusive work environment. The former, designated as "quid pro quo" (something for something) harassment, can be committed only by a supervisor or other managerial employee who has the power and authority to control the victim's employment status or benefits. For such conduct, if it is unwelcome, the employer is absolutely liable under both federal and New Jersey law, regardless of whether he knew about it.

A hostile or abusive work environment can be created by conduct, words or workplace conditions of a sexual nature — such as sexual propositions and innuendo, display of sexually oriented pictures, sexual comments and touchings, sexual-derogatory language, or intrusive inquiry into a person's sex life. Harassment may also consist of conduct which does not include any sexual content, where the employee is mistreated or subjected to intimidation or hostility because of her sex.

For such activity to constitute unlawful harassment it must be sufficiently severe or pervasive to cause a reasonable woman, under the circumstances, to regard the work environment as hostile, abusive or offensive, and the employee must have so regarded it. In extreme cases a single incident of harassment might be sufficient to support a hostile environment claim.

Furthermore, an employee asserting a hostile-environment claim need not have been the target of the discriminatory conduct: harassment of her co-workers may be perceived by her as creating a hostile environment.

Hostile-environment harassment may be created by the conduct of a supervisor or by a coworker or coworkers. Where it results from the conduct of a supervisor in relation to a subordinate, there are some important differences between state and federal law with respect to the liability of the employer. Under New Jersey law the employer is absolutely liable for so-called "equitable" damages and relief, regardless of his awareness of the harassment and even though he attempted to prevent or remedy it. Depending on whether or not the victim of the harassment terminated her employment, the damages may include back pay, front pay, and attorney's fees; reinstatement of the victim and the disciplining, transferring or firing of the harasser may be compelled. Also, the employee may be awarded "compensatory damages" (for "pain and suffering" and emotional distress) and punitive damages.

Under federal law, the employer is absolutely liable when the harassment results in some "tangible employment action" against the victimized employee (such as discharge, loss of benefits, reassignment to a less desirable job). In the absence of such tangible harm, the employer can avoid liability if he had used reasonable care to prevent and correct promptly any sexually harassing behavior (such as by promulgating and enforcing an anti-harassment policy with a complaint procedure), and the harassed employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer (such as failure to pursue a complaint procedure contained in an anti-harassment policy).

Under both federal and state law, where the hostile environment is caused by actions of a co-worker or co-workers, there is liability for the employer only when a management-level employee knew about it, or should have known about it, and the employer failed to take prompt and adequate remedial action.

The foregoing rules are stated in the context of male versus female harassment, as that is the most prevalent form. However, they are not so limited: they are equally applicable to female versus male harassment, and even to same-sex harassment. Under New Jersey law, harassment can be based on sexual orientation, handicap or other protected classifications

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Americans with Disabilities Act (ADA)

This federal statute, which deals with discrimination against disabled individuals, has three major parts. Title I prohibits discrimination in employment by employers generally. Title II requires public entities (state and local governments and their agencies) to make their services and programs equally available to the disabled. Part III is applicable to "places of public accommodation" and to altered or newly constructed facilities; they must make their premises accessible to the disabled.

Title I

Coverage

This statute covers employers who have 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.

> "Have. . .employees for each working day" does not mean performance of actual work on each working day. An employee with whom there is a continuing employment relationship during a week will be considered as having been employed each working day of that week, whether or not he receives any compensation for the week, and even though he is a part-time employee.

Protected Individuals

The ADA declares that it is unlawful to discriminate, because of disability, against a "qualified" applicant or employee with a disability.

Such an individual is defined as one with a disability who possesses the requisite skill, experience, education and other job-related requirements to perform the essential functions of the position held or desired, with or without reasonable accommodation.

Scope

Protection of job applicants and employees against discrimination extends to job application procedures, hire, discharge, compensation, advancement, and all other terms, conditions and privileges of employment or related to employment.

More specifically, it is a violation of the statute to:

1. Limit, segregate or classify a job applicant or employee in a way that adversely affects his opportunities or status because of his disability.

2. Deny employment opportunities to an otherwise qualified individual if such denial is based on the need to make reasonable accommodation to his physical or mental limitations.

3. Fail to select and administer tests in the most effective manner so as to ensure that they measure skills and aptitudes rather than reflect impairments.

4. Utilize job criteria (standards, tests or other selection criteria) that even unintentionally screen out, or tend to screen out, an individual or class of individuals because of disability unless it can be demonstrated that such criteria are related to the position to which they are being applied and are consistent with business necessity.

5. Participate in an arrangement that has the effect of discriminating - e.g., authorizing or allowing an employment agency to discriminate.

6. Deny employment or benefits to an individual (whether or not he is disabled) because of the known disability of a person with whom the individual is known to have a family, business, social or other relationship (but no accommodation need be provided to such an individual.)

Retaliation, interference, coercion or intimidation against a person who has exercised his rights, or who has participated in any proceedings, under the ADA are also prohibited.

Disability

The definition of “disability” in the ADA is given “broad coverage.” An individual has a disability if he:

1. Has a physical or mental impairment that "substantially limits" at least one "major life activity," or

2. Has a record of such an impairment (i.e. he has recovered from an impairment which had substantially limited him, or has been misclassified as having, such an impairment), or

3. Is regarded as having such an impairment. An individual meets the requirement of “being regarded as having an impairment” if the individual establishes that he has been subjected to an action prohibited by the ADA because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity. An individual is regarded as having an impairment if he or she: :

   a. Has an impairment that does not substantially limit a major life activity but is regarded or perceived by the employer as having one. An example would be an impairment which, though limiting, is not substantially limiting because it is controlled.

   b. Has an impairment that substantially limits a major life activity only because of the attitudes of others toward the impairment. That is, the impairment is stigmatic rather than limiting.

   c. Has no impairment of any kind but is treated by the employer as though he had a substantially limiting impairment.

A physical or mental impairment includes (but is not limited to):

1. Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin and endocrine; or

2. Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

The term includes such conditions, diseases and infections as: orthopedic, visual, speech and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, HIV infection, cancer, heart disease, diabetes, emotional illness, specific learning disabilities and alcoholism.

The cause of the impairment is irrelevant. Also, two or more impairments which in combination, but not separately, substantially limit a major life activity will constitute a disability.

Typically, impairments with an actual or expected duration of six months or less are not “impairments” under the ADA. An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity.

Certain conditions are specifically excluded from the definitions of disability:

a. Transvestism; transsexualism; pedophilia; exhibitionism; voyeurism; gender identity disorders not resulting from physical impairments; homosexuality and bisexuality; or other sexual behavior disorders.

b. Kleptomania, pyromania, compulsive gambling.

c. Psychoactive substance-use disorders resulting from current illegal use of drugs.

d. Pregnancy, unless there are complications.

e. Obesity, unless the weight is more than double the norm. (However, an underlying or resultant physiological disorder may be a disability.)

f. Temporary, ailments, such as broken limbs, sprains, concussions, appendicitis, influenza, unless they take significantly longer than the normal to heal. (However, chronic, episodic conditions that are substantially limiting when active, and conditions with a high likelihood of recurrence in substantially limiting form, may be disabilities.)

g. Characteristic predisposition to disease, not the result of physiological disorder. (But see Genetic Information Nondiscrimination Act).

h. Simple physical characteristics (e.g. left-handiness, or height or weight within "normal" range), common personality traits, or environmental, cultural or economic disadvantages (e.g., lack of education).

Major Life Activities

These are the basic activities which the average person can perform with little or no difficulty. They include (but are not limited to) caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, reading, sitting, standing, reaching, lifting, bending, working, concentrating, thinking, interacting with others, sleeping and similar activities.

Major life activities also include the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

Substantially Limits

The phrase "substantially limits" means unable to perform the particular major life activity compared with the average person in the general population.

What constitutes a substantial limitation does not require extensive analysis, but the following factors may be relevant:

1. The nature and severity of the impairment.

2. Its duration or expected duration.

3. The permanent or long-term impact (i.e., the residual effect) of the impairment, or the expected permanent or long-term impact of or resulting from the impairment.

With respect to the major life activity of working, the term "substantially limits" means the inability to perform a class of jobs, or a broad range of jobs in various classes within the geographical area to which the individual has reasonable access, as compared to an average person who has comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation on the major life activity of working, unless because of a disability the individual can perform only one class of jobs.

If an individual is substantially limited in any other major life activity, no determination should be made as to whether he is limited in the activity of working, unless it is not clear whether he is limited in a major life activity.

The determination of whether an impairment substantially limits a major life activity should be made without regard to the ameliorative effects of mitigating measures such as medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics, hearing aids, oxygen equipment, assistive technologies, auxilllary aids, or learned behavioral or neurological modifications.

Essential Functions and Marginal Functions

"Essential" functions are described as the fundamental job duties, as distinguished from marginal or incidental duties.

The importance of the distinction between the essential functions of a job and those that are marginal is that applicants and employees may not be denied employment opportunities because a disability prevents them from performing marginal functions, whereas individuals whose disabilities prevent them from performing essential functions can be rejected.

A job function may be essential where, for example, the reason the position exists is to perform that particular function, or there is a limited number of employees available among whom performance of the function can be distributed, or the function is highly specialized, requiring particular expertise or ability.

The determination of whether a particular function is essential is made by reference to the following factors, among others, (1) the employer's judgment, (2) the identification of such functions in a written job description in existence at the time of interview of an applicant, (3) the amount of time spent performing the function, (4) the consequences of not performing the function, (5) the work experience of former employees on the job or of current employees in similar jobs, (6) the terms of a collective bargaining contract, (7) the manner in which the work operations and the tasks of individual workers are organized.

Reasonable Accommodation

(See Appendix pages A-31—A-35)

The ADA requires an employer to provide a "reasonable accommodation" to the physical or mental limitations of an otherwise qualified individual with a disability when such accommodation is necessary to reduce or eliminate barriers to employment that are related to a person's disability unless the employer can show that it would impose "undue hardship" on the operation of the business.

Accommodation may be required in the administering of employment tests. A test given to an individual who has a disability which impairs his sensory, manual or speaking skills shall not require the use of the impaired skill where the employer knows of such impairment, unless the test is intended to measure any such skill and that skill is necessary to the performance of an essential job function.

Accommodation must always take into consideration the specific abilities and functional limitations of a particular individual in relation to the functional requirements of the job he has or seeks.

Accommodation of an individual is not required if the employer does not know of the need for it; it is the responsibility of the individual to inform the employer that an accommodation is required. However, the employer must provide notification (by posting or otherwise) about the obligation to make accommodation. After being informed of the need for accommodation, the employer may and should solicit suggestions from the individual as to what accommodation might be made. When the need for accommodation is not obvious, or the employer does not believe that one is required, the employer has a right to require the individual to provide documentation of the need for it.

No accommodation need be made to a disabled individual who is not otherwise qualified for a job.

The best available accommodation need not be furnished, but only one which is adequate to provide the individual with equal employment opportunities. If this is offered but rejected by the individual, he ceases to be a "qualified" individual.

Accommodation may include the following:

1. Making modifications or adjustments to the work environment, or to the manner or circumstances under which a job is customarily performed, that will enable the individual to perform its essential functions. Examples:

   a. Restructuring a job by reallocating or redistributing some of its marginal functions which the applicant or employee cannot perform because of his disability.

      An employer is not required to reallocate essential functions, nor restructure the essential functions of a position to fit the skills of a disabled individual who is not otherwise able to perform it, nor create a "light-duty" job for him.

   b. Changing the time or procedures for performing essential functions - such as part-time or modified work schedules.

2. Providing or modifying equipment or devices in order to aid an individual's performance.

   Equipment or devices which will assist an individual in carrying out his daily activities both on and off the job will be considered personal items, and the employer will not be required to provide them (unless, possibly, some special adaptation is required).

3. Making existing facilities in work areas and non-work areas which are used by employees readily accessible to and usable by an individual with a disability.

   NOTE: unless a facility is being newly constructed or altered (see page 35), or is "a place of public accommodation" (see page 34), there is no requirement to make facilities accessible (such as by installing ramps, widening doors, etc.) unless and until a particular individual needs this kind of accommodation because of his particular disability.

4. Providing a "reader" or interpreter, or a personal assistant.

5. Reassigning an employee to a vacant position.

In general, this should be considered only when accommodation within the individual's current position is not possible or would pose an undue hardship for the employer.

The reassignment, if made, should be to a position which is equivalent in terms of pay, status, etc., if such a position is vacant or will become vacant in a reasonable period of time. Otherwise, the reassignment may be to a lower-graded, lower-paid position. A promotion is not required.

The ADA does not require creating a "light duty" position unless the "heavy duty" tasks which an injured worker is unable to perform are marginal functions which can be readily reallocated to co-workers as part of the accommodation process.

6. Making modifications and adjustments that enable a disabled employee to enjoy "benefits and privileges" of employment equal to (not necessarily identical to) those of other employees.

7. Adopting a flexible leave of absence policy

8. Making modifications or adjustment to the job application process that will enable a disabled applicant to be considered for the position he seeks. An example is substituting an oral test for a written one where an applicant has a reading or visual disability which would not affect job performance.

After satisfying his obligation, if any, to make an accommodation to a disabled individual, the employer may hold that individual to the same standards of performance and conduct that are required of employees generally, regardless of the nature of the individual's disability.

Accommodation is not reasonable and imposes "undue hardship on the operation of the business" if it would result in significant difficulty or expense, or would be unduly disruptive to other employees or to the functioning of the business, or if it would "fundamentally alter the nature or operation of the business." The phrase "unduly disruptive to other employees" refers to a disruption which would result from making the accommodation, not the result of employees' fears and prejudices toward the individual's disability.

Where the cost of making an accommodation for an individual would cause undue hardship to the employer, the individual may not be rejected on that account if he is willing to make his own arrangements for providing the accommodation, or to pay for that portion of the cost which would cause the undue hardship.

Factors to consider in determining whether undue hardship would result include (but are not limited to) the following:

1. The nature and net cost of making the accommodation, taking into consideration the availability of tax credits and deductions, and outside funding. The relationship of an accommodation's cost to the value (salary) of the particular position is not a consideration.

2. The financial resources of and the number of employees at the particular facility where the accommodation would be made and of the employer as a whole, and the effect on expenses and resources of the facility and the company.

3. The nature of the employer's operations, including the composition, structure and functions of the workforce, and the administrative or fiscal relationship of the particular facility to the employer as a whole, and the number and location of all facilities.

4. The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and on the facility's ability to conduct business.

Selection Standards and Criteria

The Act does not interfere with an employer's privilege to establish appropriate job qualifications (such as education and experience) or to use tests or other methods to measure or determine qualifications. However, qualification standards or selection criteria that screen out individuals or a particular individual because of disability must be "job-related and consistent with business necessity".

1. Job-related: the standard or selection process must relate to or measure the specific job it is used for - not a general class of jobs.

2. Consistent with business necessity: if a test or other selection criteria excludes an individual because of his disability, it must relate to an essential (not marginal) function of the job.

Disabled individuals must comply with health and safety standards established by other federal laws, and no showing would be required as to whether they were "job-related and consistent with business necessity." However, the employer might have to make an accommodation that would enable an individual to meet such requirements.

If an individual's disability prevents performance of a marginal function, his qualifications must be evaluated solely with respect to his ability to perform the essential functions, with or without accommodation; inability to perform the marginal functions may not be taken into account in evaluating his qualifications (or in determining his rate of pay).

Performance Standards

An employer may hold disabled employees to the same standards of performance as other employees for performing their essential functions (with or without accommodation), and for performing marginal functions where their performance is not affected by disability.

Medical Examinations and Inquiries

Differing rules apply regarding medical examinations and inquiries, depending on the stage of the employment cycle: prior to the job offer, after a job offer but prior to commencement of work, and after commencement of work.

Pre-Offer

1. Prior to extending a job offer an employer is strictly prohibited from conducting a medical examination of a job applicant or making any inquiry about his physical or mental condition, injury, impairment, medical treatment or history, etc (see page 37 for examples). It is also unlawful to request the medical histories of an applicant's blood relatives. However, employment may be made contingent upon the results of a medical examination or responses to inquiries.

2. An applicant may be questioned as to whether he can perform both the essential and marginal functions of the job which he seeks, but the question cannot be phrased in terms of disability or medical condition.

3. An applicant may be asked to describe or demonstrate how he would perform the job. Ordinarily, this may be asked only if such a request is made of all applicants in the job category. However, it may be asked of a particular applicant when the employer could reasonably believe that the applicant will be unable to perform a function because of a known disability. A disability is "known" if it is obvious or has been voluntarily disclosed.

4. A physical agility test is not a medical examination and so one may be given at any stage in the application or employment process. However, if given, they must be given to all similarly situated applicants or employees, regardless of disability.

5. It is not permissible to request information from a previous employer or other source that may not be obtained directly from the applicant. However, if the applicant has stated that he requires accommodation, a previous employer may be asked what accommodation was made by that employer.

Post-Offer

1. After an offer of employment has been made but prior to the commencement of duties, a medical examination may be required, and inquiry may be made concerning the individual's physical or mental condition, medical treatment, etc., provided all applicants for the same job category are subjected to such an examination or inquiry, regardless of whether they have disabilities. However, the scope of the examination need not be the same for all applicants; certain applicants can be given more comprehensive exams or tests than applicants generally.

2. The examination or the inquiries need not be job-related or consistent with business necessity. However, if the application of certain criteria results in screening out an individual or individuals with disabilities, the exclusionary criteria must be job-related and consistent with business necessity, and performance of the essential (not marginal) job functions cannot be accomplished with reasonable accommodation.

3. The determination of whether an individual has the capacity to perform a job must be made on the basis of his current condition - i.e., at the time of the employment decision - and should not be based on speculation as to his future capacity. (But see Threats to Health or Safety, page 33).

4. If medical examinations are given or if inquiries about disabilities are made, the information obtained about an individual's medical condition or history must be kept on separate forms and in separate medical files, with limited access. They must be treated as confidential records, except that:

a. Supervisors and managers may be informed regarding necessary restrictions on the work duties of the employees and necessary accommodation. First-aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment.

b. State workers' compensation offices or second-injury funds and insurance companies may receive collected medical information.

Post-Employment

1. An employer may require a medical examination and make health inquiries of an incumbent employee when there is a need to determine whether he is still able to perform the essential functions of a job or where the information is necessary to the reasonable accommodation process. This need might arise, for example, where the employee has sustained an injury or illness or where his job performance has deteriorated.

   The examination or inquiry must be job-related and consistent with business necessity -- i.e., it must be limited to disabilities which relate to the employee's ability to perform the essential job functions. Also, it must be restricted to the physical or mental condition that necessitates the examination.

2. Examinations or inquiries which are required by some other federal law (such as by OSHA) may be made. Also an employer may conduct voluntary medical examinations which are part of an employee health program.

3. In either case, the results of the examination or inquiries are subject to the confidentiality requirements stated above.

Safe Harbor Notice under the Genetic Information Nondiscrimination Act (GINA)

GINA prohibits an employer from requesting, acquiring and using genetic information in connection with medical inquires and examinations under the ADA.

Genetic information includes information about an individual's or family member's genetic tests as well as information about the manifestation of a disease or disorder in an individual's family members (i.e., family medical history).

To take advantage of GINA's "safe harbor" when an employer may inadvertently obtain genetic information obtaining medical reports, the a following notice can appear on the written request to the examining physician:

> The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of employees or their family members. In order to comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. "Genetic information," as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.

Alternative language may also be used, as long as individuals and health care providers are informed that genetic information should not be provided.

If an employer fails to give written or verbal notice, it may nonetheless establish that a particular receipt of genetic information in response to a request for medical information was an inadvertent acquisition if the employer's request was not made in a way that was "likely to result in obtaining genetic information."

Health Insurance

The ADA prohibits employers from discriminating on the basis of disability in the provision of health insurance to employees and their covered dependents.

1. Decisions about the employment of an individual cannot be motivated by concerns about the impact of his disability (or the disability of someone else with whom he has a relationship) on the health insurance plan.

2. The application of blanket, pre-existing-condition clauses do not violate the ADA.

3. Also permissible are limits or exclusions which apply to the coverage or treatment of a multitude of dissimilar conditions (e.g., mental illness) or to medical procedures which are not exclusively, or nearly exclusively, utilized for a particular disability.

4. In contrast, a provision in an insurance plan which limits or excludes coverage or treatment for a specific disability (e.g., deafness, AIDS, schizophrenia) or for a discrete group of disabilities, (e.g., cancer, muscular dystrophies, kidney diseases) would violate the statute unless the employer can demonstrate that the provision is not a "subterfuge to evade the purposes" of the ADA.

To demonstrate this, the employer must show that such a provision is justified by the risks or costs associated with the disability. This may be done (among other ways) by proving that:

a. The limitation or exclusion is attributable to the application of legitimate risk classification and underwriting procedures, or

b. The limitation or exclusion is necessary to maintain the fiscal soundness of the insurance plan, or

c. The limitation or exclusion is necessary to prevent a drastic increase in co-payment or deductibles, or a drastic alteration in the scope of coverage or level of benefits, that would (1) make the insurance plan unavailable to a significant number of employees, or (2) make the plan so unattractive as to result in significant adverse selection, or (3) make the plan so unattractive compared to plans of other companies that the employer cannot compete in recruiting and keeping qualified workers.

Employer Wellness Programs

(Must be read with HIPAA standards on page 227)

The ADA permits voluntary medical examinations and inquiries, including voluntary medical histories, as part of employee health programs. These health programs include many wellness programs, which often incorporate, for example: A health risk assessment (HRA) consisting of a medical questionnaire, with or without medical examinations, to determine risk factors; medical screening for high blood pressure, cholesterol, or glucose; classes to help employees stop smoking or lose weight; physical activities in which employees can engage (such as walking or exercising daily); coaching to help employees meet health goals; and/or the administration of flu shots. Such programs must be reasonably designed to promote health or prevent disease. In order to meet this standard, the program must have a reasonable chance of improving the health of, or preventing disease in, participating employees, and must not be overly burdensome or a subterfuge for violating the ADA.

Such programs must be voluntary in order to comply with the ADA. This means that employers may not require employees to participate in such programs, may not deny employees access to health coverage under any of their group health plans or particular benefits packages within a group health plan for non-participation, may not limit coverage under their health plans for such employees, except to the extent the limitation (e.g., having to pay a higher deductible) may be the result of forgoing a permissible financial incentive and may not take any other adverse action against employees who choose not to answer disability-related inquiries or undergo medical examinations.

The maximum allowable incentive for a program that involves asking disability-related questions or conducting medical examinations (such as having employees complete a HRA) or for a health-contingent program that requires participants to satisfy a standard related to a health factor may not exceed 1) 30 percent of the total cost of self-only coverage (including both the employee's and employer's contribution) where participation in a wellness program

depends on enrollment in a particular health plan; 2) 30 percent of the total cost of self-only coverage when the covered entity offers only one group health plan and participation in a wellness program is offered to all employees regardless of whether they are enrolled in the plan; 3) 30 percent of the total cost of the lowest cost self-only coverage under a major medical group health plan where the covered entity offers more than one group health plan but participation in the wellness program is offered to employees whether or not they are enrolled in a particular plan; or 4) 30 percent of the cost to a 40-year-old non-smoker of the second lowest cost Silver Plan (available under the Affordable Care Act) in the location that the employer identifies as its principal place of business.

Under the ADA, regardless of whether a wellness program includes disability-related inquiries or medical examinations, reasonable accommodations must be provided, absent undue hardship, to enable employees with disabilities to earn whatever financial incentive an employer or other covered entity offers. Providing a reasonable alternative standard and notice to the employee of the availability of a reasonable alternative under HIPAA and the Affordable Care Act as part of a health-contingent program would generally fulfill an employer's obligation to provide a reasonable accommodation under the ADA. However, under the ADA, an employer would have to provide a reasonable accommodation for a participatory program even though HIPAA and the Affordable Care Act do not require such programs to offer a reasonable alternative standard, and reasonable alternative standards are not required at all if the program is not part of a group health plan.

Notice to Employees (When health information collected or used)

Employers that offer wellness programs that collect employee health information to provide a notice to employees informing them what information will be collected, how it will be used, who will receive it, and what will be done to keep it confidential. Employers that already provide a notice that informs employees what information will be collected, who will receive it, how it will be used, and how it will be kept confidential, may not have to provide a separate notice under the ADA. However, if an existing notice does not provide all of this information, or if it is not easily understood by employees, then employers must provide a separate ADA notice that sets forth this information in a manner that is reasonably likely to be understood by employees.

The requirement to provide the notice takes effect as of the first day of the plan year that begins on or after January 1, 2017 for the health plan an employer uses to calculate any incentives it offers as part of the wellness program.
The EEOC has published the sample notice below to help employers comply with the ADA. Sample Notice here: https://www.eeoc.gov/laws/regulations/ada-wellness-notice.cfm

Programs When No Notice Required

Simple, voluntary programs typically do not collect or use health information. Examples are:

Smoking cessation class;
Subsidized gymnasium membership,
Heath fair,
Healthy diet class,
Yoga and stress reduction class,
Subsidizing healthy options in vending machine, ie: $1 for a cookies but only 25 cents for an apple,
Walking club before or after work,
Pedometer challenge with a goal of 10,000 steps a day,
Providing a secure and convenient place to store bikes at work,
“Lunch and learns”,
Encouraging employees to take the stairs, and
Healthy food choices for meetings.

Threats to Health or Safety

A disabled individual can be excluded or removed from employment if because of his disability his employment or continued employment would pose a "direct threat" to the health or safety of himself or others. There must be a significant risk (i.e., a high probability) of harm that cannot be eliminated or reduced to an acceptable level by making a reasonable accommodation.

1. The probable harm need not be life-threatening, but it must be "substantial."

2. The determination of such risk cannot be based on generalized beliefs, assumptions or speculation; it must derive from an individual assessment of the person's ability to safely perform the essential functions of the job, based on a reasonable medical judgment that relies on the most current medical knowledge and/or

on the best available objective evidence, such as the individual's behavior, work history, experience, etc.

3. Some of the factors to be considered in evaluating the "direct threat" are the duration of the risk; the nature and severity of the potential harm; the likelihood that the potential harm may occur; and the imminence of the potential harm.

4. A doctor's opinion that such a risk exists must be based upon his knowledge of the individual's occupation and the work environment.

5. An employer is not necessarily justified in relying on an evaluation by a medical doctor; in some cases the employer should seek the advice of therapists and rehabilitation experts.

An employer may lawfully refuse to assign to a job involving food handling an employee who has an infectious or communicable disease which can be transmitted through the handling of food if that disease is on a list prepared by the Secretary of Health and Human Services.

Users of Drugs and Alcohol

An individual who is currently engaged in the illegal use of drugs is not protected against discrimination because of such use.

1. Illegal use means the use of illegal drugs (those defined in Schedules I to V of the Controlled Substances Act), the abuse or unlawful use of prescription drugs that are controlled substances, and the possession or distribution of illegal drugs. It does not refer to the use of drugs as prescribed by a licensed health-care professional.

2. The term "currently" engaged means sufficiently recent to justify a reasonable belief that the involvement with drugs is an on-going problem.

3. Former addicts who have been rehabilitated and addicts who are receiving treatment for addiction but are not currently using drugs may not be discriminated against because of their addiction. However, a person who had been a casual user of illegal drugs, rather than an addict, is not so protected; casual use of drugs is not regarded as "a disability which substantially limits." Therefore, one who has a record of or who is regarded as a casual user is not "disabled."

On the other hand, alcoholism is a disability, and an individual who is an alcoholic is protected because of that disability to the same extent as other disabled persons, even though he is currently using alcohol. However, this is subject to certain qualifications.

1. An alcoholic may be excluded from employment if he cannot perform essential lob functions to the employer's standards, with or without accommodation, or if he poses a "direct threat."

2. The employer may enforce rules that prohibit the use of alcohol in the workplace and that require that employees not be "under the influence" in the workplace.

There is a clinical distinction between an alcoholic and an individual who is a mere user or abuser of alcohol. The latter is not protected under the ADA because of such use.

Testing For Substance Use

It is not a violation of the ADA to refuse to hire an applicant or to discharge or discipline an employee based upon a test result that indicates the illegal use of drugs. Because such a test is not considered to be a "medical examination", it may be given to an applicant or employee at anytime without violating the ADA.

A test for the presence of alcohol is considered to be a medical examination and therefore may be given to a job applicant only after extending a job offer.

After hire, an alcohol test, as in the case of any other physical examination, may be given when it is "job-related and consistent with business necessity." These criteria would be satisfied when testing is done to implement an employer's published rules on the subject of alcohol in the workplace.

Employers' policies and practices concerning drug and alcohol testing of employees must be in conformity with New Jersey law (see page 161).

Posting Requirements

Covered employers must post notices containing a summary of the pertinent provisions of the statute. The EEOC supplies a "consolidated poster" which incorporates the provisions of the ADA and other federal laws. Failure to post the required notice will result in a fine of not more than $525 for each separate offense.

Records

Record-retention requirements are the same as in the Civil Rights Act (page 24).

Title III

Places of Public Accommodation

Title III of the ADA requires so-called places of public accommodation to make their facilities, goods and services available to and usable by all persons with disabilities. That is, those facilities, goods and services which are available to the general public must be made equally accessible to disabled individuals.

A place of public accommodation is a facility operated by a private (non-governmental) entity in one of the following categories:

A bank

A hospital

The professional office of a health-care provider -- i.e., a location where a person or entity regulated by the state to provide professional services related to the physical or mental health of an individual makes such services available to the public

Office of an accountant or lawyer

A store, shopping center, or other sales or rental establishment. (This category does not include a wholesale establishment that sells exclusively to other businesses and not to the general public.)

An insurance office

A private school (nursery, elementary, secondary, undergraduate, postgraduate), or other private place of education

An inn, hotel, motel, or other place of lodging

A restaurant, bar, or other establishment which serves food or drink to the public

A motion-picture house, theater, concert hall, stadium, or other place of exhibition or entertainment

An auditorium, convention center, lecture hall, or other place of public gathering

A terminal, depot, or other station used for public transportation (other than air transportation)

A museum, library, gallery, or other place of public display or collection

A park, zoo, amusement park, or other place of recreation

A day-care center, senior-citizen center, homeless shelter, food bank, adoption agency, or other social-service establishment

A gymnasium, health spa, bowling alley, golf course, or other place of exercise or recreation

A laundromat, dry-cleaner, barber shop, beauty shop, shoe repair service, funeral parlor, gas station, pharmacy, or other service establishment

A place of public accommodation must remove architectural and structural barriers in existing facilities which prevent

or impede the access of disabled individuals where such removal can be easily accomplished and without much difficulty or expense. This includes providing access to the facility itself (such as by installing entrance ramps, widening doorways and providing accessible parking spaces), and providing access to public restroom facilities. Barrier removal is not required in areas of a facility which are used exclusively by employees as work areas.

Where the place of public accommodation is a rented facility, the allocation of responsibility for doing these things depends upon the terms of the lease or other contractual arrangements between the lessor and lessee.

New Construction and Alterations

Title III of the ADA requires that any new facility of a place of public accommodation or of a "commercial facility" (i.e., an office, factory, warehouse or other place of employment) be designed and constructed so that it is accessible to and usable by disabled persons.

Title III also provides that if an existing facility of a place of public accommodation or of a commercial facility (other than a religious organization or a private club) is altered in a manner that affects or could affect the usability of all or any part of the facility, the altered portion must be readily accessible and usable to the disabled, without regard to cost. Such an alteration could include remodelling, renovation, rearrangement of structural parts, changes or rearrangement of walls, partitions, etc. Normal maintenance work is not included.

Also, if the alteration is made to a "primary function area" - i.e., where there takes place a major activity for which the facility was intended - it must be made in such a manner that to the maximum extent feasible the "path of travel" to such altered area and to the bathrooms, telephones and drinking fountains serving it is readily accessible to and usable by disabled individuals - provided, the cost would not exceed 20% of the cost of the alterations to the areas of primary function.

The path-of-travel requirement is not triggered by alterations to windows, hardware, controls, electrical outlets, plumbing, hazardous material abatement or automatic sprinkler retrofitting.

The alterations must conform to the ADA Accessibility Guidelines, which have been adopted by the Department of Justice, which enforces Title III of the ADA.

Title II

Public Entities

A public entity is a state or local government or a department, agency, special purpose district, or other instrumentality of a state or local government.

Such an entity is not subject to Title III of the ADA. As an employer, it is subject to the previously described provisions of Title I and with respect to its services and activities it is also subject to the provisions of Title II of the ADA.

Title II states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of these services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."

Enforcement

Complaints of violation of Title I, of the ADA must be filed with the Equal Employment Opportunity Commission (EEOC). The remedies available and penalties are the same as those in the Civil Rights Act, except that punitive damages may not be assessed against an employer who made a good-faith effort, in consultation with a disabled complainant, to make a reasonable accommodation to the disability.

The Department of Justice may bring a civil action to enforce the provisions of Title III. In case of violations, monetary damages may be awarded to individual victims of discrimination, and civil penalties may be assessed, up to $50,000 for a first violation and up to $100,000 for a subsequent one.

The office of Federal Contract Compliance Programs (OFCCP) has jurisdiction over complaints against government contractors and subcontractors which involve both the ADA and the Rehabilitation Act of 1973.

Financial Assistance to Comply with ADA

Tax Deductions

A tax deduction up to $10,500 in any taxable year will be allowed to any employer for expenses incurred in removing specified barriers in order to make a facility more accessible to and usable by disabled (and elderly) individuals. (Internal Revenue Code, Sec. 190) Expenses qualifying for the deduction include costs of removing barriers created by narrow doors, toilet facilities, inaccessible parking spaces and steps.

Tax Credits

1. A "small business" may take a partial tax credit for the cost of making certain accommodations required by the ADA. (Internal Revenue Code, Sec. 44)

    a. A small business is defined as one which in the preceding taxable year either had gross receipts of not more than $1 million, or employed not more than 30 full-time employees. In this context an individual is considered full-time if employed at least 30 hours per week for 20 or more calendar weeks in the taxable year.

    b. The amount of the credit is 50% of the expenditures that exceed $250 but not in excess of $10,250 in the taxable year.

    c. The expenditures for which the tax credit may be taken are those which are required by the ADA in order to make facilities accessible and usable by disabled individuals, or to provide interpreters, readers, taped texts, modified equipment or similar accommodations. They do not include expenditures incurred in connection with new construction.

2. Tax credits may also be available under the federal Work Opportunity Credit Program to employers who hire disabled individuals (and others) who are referred by a vocational rehabilitation agency. The amount of the credit is 35% of the first $6,000 of the employee's first-year salary.

Relationship of ADA to Other Laws

Other federal laws are not affected by the ADA, and state laws which provide greater protection to the disabled are not invalidated.

Examples of Lawful and Unlawful Pre-offer Inquiries

Do you need any accommodation for the selection/hiring process? (Interview, tests, etc.)

> This is a permissible inquiry. If the need for accommodation is not obvious, the applicant may be required to produce documentation to support the need.

Can you perform all of the functions of the job? Can you perform certain specific functions of the job? Can you perform all of the functions of the job, with or without accommodation?

> These questions are lawful.

Can you do the job with _____ without _____ accommodation? (Check one.)

> The form of this question is illegal.

Will you need accommodation to perform the job or some particular function; if so, what kind of accommodation?

> Such inquiry is not permissible unless (a) the employer reasonably believes reasonable accommodation will be needed because a disability is either obvious or has been voluntarily disclosed by the applicant, or (b) the applicant voluntarily disclosed the need for accommodation.

Are you limited in the ability to perform any major life activity, such as working, standing, lifting, etc.?

> This question is viewed by EEOC as "almost always disability-related" because it is likely to elicit information about a disability. It is prohibited unless limited specifically to the ability to perform job functions.

Can you meet the company's attendance requirements? Except for vacations and holidays, on how many days were you absent on your previous job(s)? On how many Mondays or Fridays were you absent last year?

> These kinds of questions may be asked; but not: how many days did you lose from work because of sickness or accident?

Even if the applicant voluntarily discloses that he has a disability, or if it is apparent that he has one, he may not be asked such questions as:

> How and when did you become disabled?
>
> What is the prognosis?
>
> What is the extent or severity of the disability?
>
> Is it under control?
>
> Will it interfere with your ability to work?
>
> How much time off will you require because of the disability?

What impairments do you have?

> Although not all impairments are disabilities, and although inquiry about a particular impairment may be permissible, a broad question such as this is unlawful because it is likely to elicit information about the existence of disability.

Have you ever been hospitalized or received medical treatment, diagnosis, etc.?

> Inquiry of this nature is unlawful.

What Workers' Compensation benefits have you received or claimed?

Such a question relates directly to the severity of the individual's impairments, and violates the ADA.

Have you ever been addicted to drugs?

This is not a permissible inquiry.

Have you ever used illegal drugs or used drugs illegally; if so, when was the last time? In the last _____ months have you used illegal drugs or used drugs illegally; when?

These questions may be asked, but the applicant should not be asked to what extent he used them, whether he had been treated for drug use, etc., because the response might reveal that he had been an addict.

What drugs are you using? What medications are you using?

These questions are too broadly phrased except when an applicant has tested "positive" for drug use. Then he may be asked about any medication being taken which might have affected the test results, and whether it is being taken under a lawful prescription.

Do you drink alcohol? Have you ever been arrested for driving "under the influence"?

Such inquiry is allowed. But inquiry as to the extent of alcohol use, or whether the individual has been treated for alcohol use, etc., should not be made because it may elicit information about whether the individual is an alcoholic.

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Age Discrimination in Employment Act of 1967 (ADEA)

This federal statute which is administered by the Equal Employment Opportunity Commission (EEOC), applies to employers who have 20 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.

1. "Have. . .employees for each working day" does not mean performance of actual work on each working day. An employee with whom there is a continuing employment relationship during a week will be considered as having been employed each working day of that week, whether or not he receives any compensation for the week, and even though he is a part-time employee.

2. Application of the statute is limited to individuals who are at least 40 years of age (Compare the New Jersey law). It does not apply to relatively younger employees, General Dynamics Land System v. Cline (2004). Coverage includes U.S. citizens working abroad for either United States companies or for foreign employers which are controlled by U.S. companies.

The statute declares that it is unlawful to refuse to hire or to otherwise discriminate against any individual with respect to his "compensation, terms, conditions or privileges of employment" because of such individual's age. It is also unlawful to include in a help-wanted advertisement any statement which indicates a preference, specification, etc., based on age.

It is unlawful to harass or allow the harassment of an employee because of his age.

As exceptions to the general statutory prohibitions, it is not unlawful:

1. To apply age as a bona fide occupational qualification "reasonably necessary" to the normal operation of the employer's business.

2. To apply "a reasonable factor other than age" in differentiating between individuals. However, practices and criteria (such as tests) which have an adverse impact on employment opportunities of older individuals must have a business justification.

3. To apply a minimum or maximum age limitation to a bona fide apprenticeship program which meets certain federal standards.

4. To observe the terms of a bona fide seniority system, or a bona fide employee benefit plan, such as a retirement, pension or insurance plan, which is not "a subterfuge to evade the purposes" of the statute. However, no such plan shall excuse the failure to hire any individual, or (except as noted on page 42) shall require or permit the involuntary retirement of any employee because of his age.

A plan is not considered "bona fide" unless its terms have been accurately described in writing to all employees, and the benefits are provided in accordance with such terms.

However, the level or duration of benefits payable under certain kinds of plans may be reduced for older employees if so required by the terms of the plan and if the reduction can be justified by age-related, significant cost considerations. That is, where age is an "actuarially significant" factor in the cost of certain benefit plans, the employer may reduce his contribution which is required to maintain that benefit for older workers to the point where it approximately equals his contribution on behalf of younger workers, even though as a result the level of the benefit is not the same for each.

In those cases where a reduction would be permissible in older workers' level of benefits in a benefit plan, if the employer elects to reduce the level of their benefits, the older worker may be given the option to make the additional contribution necessary to receive the same level of benefits as younger employees. If the employer elects not to reduce the level of benefits in a contributory plan, the older worker can be required, as a condition to participation in the plan, to pay a higher dollar amount of contribution so long as the proportion of total premium cost paid by him is not thereby greater than the proportion paid by younger employees.

Cost data utilized for comparisons must be "valid and reasonable." An employer may rely on data showing his own actual costs over a representative period of time, or on cost data for a larger group of "similarly situated"

employees unless they are significantly different from his own costs. Standard actuarial data may be used. Where reliable cost information is not available, reasonable projections may be made from existing cost data.

Cost comparisons and adjustments may be made on the basis of age brackets of 5 years or less. (As in the case of life insurance -- see below.)

The permissible treatment of various kinds of benefit plans is as follows:

Life Insurance

A total elimination of such insurance at any age, because of age, would not be justified. However, the benefit level may be reduced for employees in any 5-year age bracket of 5 years or less (e.g., 60 to 65) to the extent necessary to achieve approximately the same average cost for the group as for employees within the immediately preceding 5-year age group (i.e., 55 to 60).

Where the amount of insurance is based on employees' salary, cost increases resulting from salary increases cannot be taken into account.

Retirement Plans

A defined benefit plan may not reduce or discontinue benefit accruals because of a participant's age. A defined contribution plan may not, because of a participant's age, reduce or discontinue the allocation of employer contributions or forfeitures to his account, or modify the basis on which gains, losses and income of the trust are allocated to his account. However, limitations may be placed on the amount of benefits a participant may accrue and on the number of years of service and of participation in the plan that may be taken into account for purposes of determining plan benefits, but such limitations may not be age-based.

An employee may not be excluded, because of age, from participation in either a defined benefit plan or a defined contribution plan, regardless of the age specified in the plan for normal retirement.

It is not a violation for a defined benefit pension plan to provide for:

1. Subsidization of early retirement benefits.

2. Payment of Social Security supplements to plan participants (not in amounts in excess of their Social Security benefits) who have not reached the normal retirement age specified in the plan until they qualify for Social Security benefits.

Long-Term Disability Benefits

Benefits may not be denied on the basis of age but adjustments in the level or duration of benefits may be made if justified by age-related cost considerations. The following schedule of benefit payments is permissible:

If disability occurs at or below age 60, benefits cease at age 65.
If disability occurs after age 60, benefits cease 5 years after the onset of disablement.

Also, a long-term disability plan may provide for a reduction in benefits to the extent of pension payments (other than pension amounts attributable to employee contributions):

1. Which an individual has voluntarily elected to receive, or

2. For which an individual who has attained the later of age 62 or normal retirement age is eligible.

Severance Pay

Because the amount of severance pay has no relationship, in terms of cost, to a recipient's age, it may not be given in lesser amounts to older individuals. However, if severance pay is available as a result of a "contingent event unrelated to age" (such as in the case of a plant shutdown), the following may be deducted from severance payments if such an event occurs:

1. The value of additional pension benefits which are made available solely as a result of such an event to an individual who is eligible for an immediate and full pension.

2. The value of retiree group health benefits received by an individual who is eligible for an immediate pension, if the benefits under the health plan for workers age 65 and under are comparable to those provided by Medicare and for workers over 65 are at least as valuable as 25% of Medicare benefits.

(The "value" of the retiree benefits varies with an individual's age and the number of years during which the benefits are payable, according to a formula contained in the statute.)

Health Insurance

Except in the cases of employees of the age of 65 and over, and employees' spouses who are 65 and over, an employer may require higher contributions from older employees to compensate for an increase in the cost of providing them with health benefits, so long as the proportion of the premium they pay does not thereby increase. For example, if employees generally contribute 20% of the cost of health insurance and the premium for older employees is increased by $50 per month, the increase in the contribution of the older employees cannot exceed $10 (20% of $50).

Where the employer's plan provides any benefits of the kind payable by Medicare Part A or B, each covered employee 65 or older must be offered the opportunity to elect either to continue to be covered under his employer's health plan as the primary payer of such benefits with Medicare as the secondary payer, or to reject the plan and retain Medicare coverage alone.* No reduction in benefits is permissible, regardless of cost considerations.

An employer may not offer an inducement to such an employee to elect not to continue to be covered by the employer's plan. He may not offer a group health plan (such as a "Medicare carve-out" plan) whose terms make it a secondary payer to Medicare for services covered under Medicare Part A and B, except that a health plan which is secondary to Medicare for disabled employees or disabled spouses who are under age 65 may also be a secondary payer for disabled employees and disabled spouses who are age 65 and over. Also, it is permissible to pay the Medicare B premium on behalf of an employee, or to offer a health plan which covers only non-Medicare-covered items (such as dental services); if such a plan is offered, it must be available on terms and conditions which do not vary according to age.*

The employer's health plan need not cover spouses of employees, but if spousal coverage is provided, it must be available without age distinction. If an employee age 40 or over has a spouse age 65 or over who is covered by the health plan, the spouse's medical benefits may not be less than the benefits of spouses under age 65, regardless of cost considerations. Such spouse must be given the same choice between the employer's health plan and Medicare as is afforded to age 65-and-over employees. At least 30 days before the spouse attains age 65 the employer must give notification of this option to the spouse.*

Part-time employees 65 or older may be excluded from or given reduced benefits under an employer's health plan but only if this is consistent with the treatment of younger part-timers.

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* The provisions of these paragraphs were part of the ADEA but were deleted from that statute and incorporated in the Social Security Act. For convenience, they are reported herein in their original context. (They apply only to employers of 20 or more employees—see page 39)

Mandatory Retirement

As an exception to the prohibition against mandatory retirement the statute provides it is not unlawful to require retirement at age 65 (or later) of an employee who during the 2-year period before his retirement was employed in a "bona fide executive or high policymaking position"; provided, he is entitled to an immediate, non-forfeitable, annual retirement benefit provided by his employer from a pension, profit-sharing, savings or deferred compensation plan (including a stock bonus or thrift plan), or any combination of such plans, which equals at least $44,000 in the aggregate (excluding Social Security benefits and benefits attributable to the employee's own contributions or contributions of former employers).*

A "former employer" does not include one which is a member of a "controlled group of corporations with, or under common control with", the employer which forces the employee to retire.

A "bona fide executive" is defined in the statute as one who:

1. Satisfies all of the five requirements applicable to an "executive" contained in the regulations issued under the federal Wage-Hour law, regardless of the individual's salary level, and

2. Is a "top-level" employee who exercises "substantial executive authority over a significant number of employees and a large volume of business". Examples include the head of a "significant and substantial" local or regional operation, the manager of a major department, division or product line at the corporate or regional headquarters, and (in a large organization), possibly, the immediate subordinates of such managers.

Individuals in "high policymaking" positions are those whose position and responsibility are such that they play "a significant role" in the development of corporate policy, and "effectively recommend" its implementation. A person may occupy such a position even though he has little or no authority.

The requirement that an employee be entitled to an immediate annual retirement benefit of $44,000 is satisfied if the employee has the option of receiving this amount during each year of his lifetime after retirement or a lump sum of an amount sufficient to purchase an annuity (with no ancillary benefits) which will produce this amount. "Immediate" means not later than 60 days after retirement.

The determination of the value of such benefits must be made on the basis of "reasonable actuarial assumptions" with respect to mortality and interest.

If any such retirement benefit is in a form other than a straight-life annuity (with no ancillary benefits), or if the employee contributed to any such plan, including "rollover" contributions, the minimum retirement amount required to satisfy this exception must be adjusted, in accordance with regulations, to the equivalent of a straight-life annuity of the prescribed amount with no ancillary benefits and with no employee contributions. The regulations describing the method of making such adjustment are based on Section 411(c) of the Internal Revenue Code.

Health-Care Retirement Benefits (Medicare Carve-Out Plans)

An employer may offer a "carve-out plan" for retirees (not employees) and their dependents who are eligible for Medicare benefits. A typical carve-out plan reduces the benefit available to retirees and their dependents under an employer-sponsored benefit plan by the amount payable by Medicare.

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* Also, an employee in this category may lawfully be placed in a position of lesser status (but may not then be treated less favorably, on account of age, than any similarly situated younger employee).

Record Keeping

1. A record of the following must be made for each employee, and retained for 3 years: name, address and date of birth; occupation; rate of pay and compensation earned each week.

2. If an employer "in the regular course of his business makes, obtains or uses" any of the following personnel records, such record must be kept for 1 year from the date of the personnel action to which the record relates: (a) advertisements or notices to the public or to employees relating to job openings, promotions, training programs or opportunities for overtime work; (b) job orders submitted to an employment agency or a union; (c) job applications*, resumes or any other forms of employment inquiry by any individual whenever submitted in response to an advertisement or other notice of a job opening; (d) records pertaining to the failure or refusal to hire any individual; (e) records of promotions, demotions, transfers, discharges, layoffs, recall, selection for training, (f) employment test papers completed by applicants; and (g) results of physical examinations which constitute a basis for personnel action.

3. A copy of any employee benefit plan (such as a pension or insurance plan), seniority system and merit system, or if any such plan or system is not in writing, a memorandum describing it and the manner of its communication to the employees. Such record must be maintained while the plan or system is in effect and for 1 year after its termination.

Enforcement

A complaint or "charge" must be filed with EEOC within 300 days of the act of discrimination, or if a complaint has been filed with the New Jersey Division on Civil Rights, within 30 days after notification of the termination of proceedings by the Division, whichever is earlier. (The EEOC may file a charge on its own initiative after more than 300 days.)

The remedy available for the enforcement of the statute is a suit in federal court by the aggrieved individual or by the Equal Employment Opportunity Commission.

If EEOC dismisses a charge or otherwise terminates proceedings, it must so notify the complainant, who then has 90 days to sue.

A jury trial is available to an individual complainant.

* There is no requirement that employment applications be retained in "active status" for any particular period of time.

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 affected by pregnancy or related conditions must be treated in the same manner as other applicants or employees with similar abilities or limitations.

An employer cannot refuse to hire a woman because of her pregnancy related condition as long as she is able to perform the job. An employer cannot refuse to hire her because of its prejudices against pregnant workers or the prejudices of co-workers, clients or customers.

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, by providing modified tasks, alternative assignments, disability leave or leave without pay.

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 may not have a rule which 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.

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 costs 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.

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.

Equal Pay Act

The federal Equal Pay Act of 1963 provides that "within any establishment" an employer shall not discriminate in rates of pay on the basis of sex of employees who perform "equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions". The statute is enforced by the Equal Employment Opportunity Commission (EEOC).

Physically separate places of business can constitute a "single establishment" if there is a significant, functional interrelationship between the work of the employees in the various locations.

Unless male and female employees work at different rates on jobs which are essentially alike, the statute does not apply, even though such jobs require equal amounts of skill, effort, etc. In other words, application of the equal-pay standard should involve a comparison only of jobs in the same or closely related classifications.

The terms "equal skill, effort, and responsibility" and "similar working conditions" constitute four separate tests, all of which must be met in order for the equal-pay standard to apply.

1. "Equal" does not mean identical, and insubstantial differences in the amount of skill, effort or responsibility required are to be disregarded.

2. "Skill" refers to the degree or amount of skill that is actually utilized in the performance of a job. In evaluating this quality such factors as experience, training, education or ability may be considered and differences therein as between males and females may justify rate differences.

3. "Effort" means the amount (not kind) of physical or mental exertion needed for the performance of a job.

The occasional or sporadic performance of an activity which may require extra exertion is not alone sufficient to justify a finding of unequal effort. Also, if some male employees on a particular job expend greater effort than do females on the same job, this would not warrant paying a higher rate to all of the male employees on that job, including those who expended no greater effort than the females.

4. "Responsibility" reflects "the degree of accountability required in the performance of the job, with emphasis on the importance of the job obligation". Factors to be taken into account in weighing this requirement would include responsibility for directing other employees, responsibility for the employer's equipment or product and the value thereof, the exercise of judgment and the over-all importance to the employer of the employee's work.

Differences in rates as between males and females are legal even as to jobs which are equal in skill, etc, if those differences exist pursuant to a seniority system, merit system, incentive system or any factor other than sex. However, the factor other than sex must be job-related.

1. A "system" need not be a formal one nor reduced to writing, but it should be an "established" one, the essential terms and conditions of which have been communicated to the employees.

2. Some examples cited by EEOC of permissible differentials are a shift premium, a bona fide "red circle" rate, an above-scale or below-scale rate paid during a period of temporary assignment or transfer, an "entrance" rate within an established range of entrance rates, a rate paid during a bona fide training program.

3. There should be a reasonable relationship between the amount of a wage differential and the weight properly attributable to the factor other than sex.

An underpayment of wages is treated like unpaid overtime compensation under the Wage-Hour Law.

New Jersey Equal Pay Notification Law / Gender Equity

Employers with 50 or more employees are required to conspicuously post and distribute to employees notice of their right to be free from gender inequity or bias in pay, compensation, benefits or other terms of employment. The NJ Department of Labor and Workforce Development (NJDOL) has developed the notification which is available on their website (http://lwd.dol.state.nj.us/).

Covered employers must distribute a copy of the notice: (1) to all employees no later than 30 days after it is issued by the NJDOL; (2) at the time of an employee's hiring; (3) to all employees annually on or before December 31 of each year; and (4) at any time upon the first request of an employee. Employers may distribute the notice by email, via printed material, or through an internet/intranet website provided the site is for the "exclusive use of all workers, can be accessed by all workers, and the employer provides notice to the workers of its posting."

Further, the distributed notice must be accompanied by an acknowledgment to be signed (or electronically verified) by the employee, affirming that the employee has read and understands the notice.

The notice shall be posted and distributed in both English and Spanish, and any other language for which the NJDOL has made the notification available and which the employer reasonably believes is the first language of a significant number of the employer's workforce.

Civil Rights Act of 1866

Section 1981 of this federal statute declares that "all persons . . . shall have the same right to make and enforce contracts . . . as is enjoyed by white citizens . . ." Its effect is to prohibit racial, ancestral or ethnological discrimination in the areas of hiring, promoting, discharging, and in the "enjoyment of all benefits, privileges, terms and conditions" of employment.

Under this statute suit may be brought directly against an employer - i.e., by-passing federal or state agencies. There is a 6-year statute of limitations. Compensatory damages are recoverable, and punitive damages may be obtained in certain cases.

Miscellaneous Discrimination and Retaliation

Unemployment Status

Employers cannot knowingly or purposefully publish a job posting that states (1) current employment is a qualification for the job; (2) current unemployed applicants will not be considered for hire; or (3) only currently employed job applicants will be considered for hire. The law permits an exception for employers who publish a job posting that only seeks applicants currently employed by that employer. Employers who violate the law are subject to a civil penalty of up to $1,000 for the first violation, $5,000 for the second violation and $10,000 for each subsequent violation. The law is administered by the NJ Department of Labor and Workforce Development.

Smokers' Rights

A New Jersey statute provides that no employer shall (a) refuse to hire any person, or (b) discharge an employee, or (c) take any adverse action against an employee with respect to terms and conditions of employment because that person smokes or uses other tobacco products, "unless the employer has a rational basis for doing so which is reasonably related to the employment, including the responsibilities of the employee or prospective employee."

The statute does not affect workplace rules or policies, or other applicable laws, concerning smoking or the use of other tobacco products during the course of employment (see page 200).

In case of a violation the individual has a right of action to recover damages, attorney's fee, court costs and reinstatement; the employer is also subject to civil penalties of up to $2,000 for a first violation and $5,000 for subsequent violations.

Workers' Compensation Act

The New Jersey Workers' Compensation Act provides that it is unlawful to discharge or discriminate against an employee because he has claimed or attempted to claim Workers' Compensation benefits.

A new Jersey court ruled that this section of the statute applies where although an employee had not claimed benefits, the employer had reason to know that he intended to claim them.

Labor Management Relations Act

This federal statute, which is enforced by the National Labor Relations Board, declares that it is an "unfair labor practice" for an employer, or any person acting as the agent of an employer, to encourage or discourage union membership by means of discrimination in hiring or in tenure of employment, or to discharge or otherwise discriminate against an employee because he has filed a "charge" or given testimony under this Act.

Also, as a general rule (to which there are many exceptions) employees who engage in a strike or other "concerted activity" with respect to some matter involving their wages, benefits and working conditions may not be penalized therefor by discharge, discrimination, or retaliation. "Concerted activity" need not be union-related in order to be protected: two or more employees acting together, or even a single employee acting on behalf of co-workers, may engage in concerted activity which is protected.

Mandatory Poster

POSTING OF THIS NOTICE HAS BEEN PUT ON HOLD UNTIL FURTHER NOTICE—Employers governed by the statute must post Employee Rights Under the National Labor Relations Act (Supplied by National Labor Relations Board). Where 20 percent or more of an employer's workforce is not proficient in English and speaks a language other than English, the employer must post the notice in the language employees speak. Additionally, employers who typically post personnel rules and policies on an internet or intranet site should also post the Notice of NLRA rights there, in addition to a physical posting. Employers are not required to distribute the posting by email.

Worker Freedom from Employer Intimidation Act

This New Jersey statute prohibits an employer from requiring employees to attend meetings or participate in communications, the purpose of which is to communicate the employer's opinion about religious or political matters. Political matters include political party affiliation and decisions to join or not join or participate in any lawful political, social or community organization or activity but do not include labor organization or activity. Attendance at such events must be voluntary on the part of the employee and the employer should notify its employees that they may refuse to attend, or receive communications, without penalty. There is a special exemption for religious, political and educational institutions.

Other Statutes

Various other state and federal statutes prohibit the discharge of or other punitive action against individuals because they have participated in certain legal proceedings, or exercised legal rights, or because of other related activities. Thus, it is unlawful:

1. To retaliate against an employee or applicant because he has asserted a right, made a complaint or participated in any proceeding concerning any of the federal or state anti-discrimination laws, the Uniformed Services Employment and Reemployment Rights Act, or "opposed any practice" which is unlawful under the New Jersey or federal Family Leave Acts or the anti-discrimination laws.

   An ex-employee is protected against retaliation by his former employer for having engaged in some activity which was protected under Title VII.

   Some federal courts have declared that it is retaliation to volunteer information to a prospective employer that a former employee of the company had filed a discrimination complaint, although at least one Appeals Court has held to the contrary.

2. To discharge or discriminate against an employee because he filed a complaint, participated in any proceeding, or exercised any right under the federal or New Jersey Wage-Hour law, under OSHA, or under the federal False Claims Act.

   Protection under OSHA extends to an employee who refuses to perform an assigned task if the refusal is based upon an apprehension that serious injury would result, provided there is a reasonable basis for such apprehension, there is no reasonable alternative and there is insufficient time to eliminate the danger.

3. To discharge or refuse to hire an individual because of the issuance of a garnishment, a support order, or a federal tax levy, or for his refusal to take a lie detector test.

4. To discharge, intimidate or coerce an employee because of his selection for federal or state jury service.

5. To discriminate against an employee of a federally insured depository institution because he has provided information to any federal banking agency or to the Attorney General regarding a possible violation by the institution of any law or regulation.

6. To terminate or discriminate against an individual solely because he is or has been a debtor or bankrupt under the federal Bankruptcy Act.

7. To discharge or discriminate against an employee because (a) he filed a complaint or participated in a proceeding concerning a violation of a commercial motor vehicle safety regulation, or (b) the employee refused to operate such a vehicle because its operation would violate a federal safety or health regulation, or because he had a reasonable apprehension of serious injury to himself or the public due to the vehicle's unsafe condition and he had been unable to get the employer to correct the condition. (Surface Transportation Assistance Act)

8. To discharge or otherwise discriminate against an employee because he participated in proceedings under any of various environmental protection laws, including the Toxic Substances Control Act, the Solid Waste Disposal Act, the Clean Air Act, the Water Pollution Control Act and the Energy Reorganization Act.

9. To discharge, demote, suspend, threaten, harass or otherwise discriminate against an employee of a publicly traded company who provides information or who assists in an investigation conduced by a federal agency, Congress, or a person with supervisory authority over the employee to conduct an investigation, in connection with fraud against shareholders.

NJ Conscientious Employee Protection Act - CEPA

This statute prohibits retaliatory action against any employee, including independent contractors that the employer directs or controls, because he:

1. Objects to or refuses to participate in any activity, policy or practice of his employer or of a coworker if he "reasonably believes" (a) that it is in violation of a law, or a rule or regulation promulgated pursuant to law, including any violation involving a deception of, or misrepresentation to, any shareholder, investor, client, patient, customer, employee, former employee, retiree of the employer, or any governmental agency; or (b) that it is fraudulent or criminal, or (c) that it is "incompatible with a clear mandate of public policy concerning the public health, safety, or welfare or protection of the environment," or (d) in the case of a licensed or certified health-care professional, that it constitutes improper quality of patient care.

2. Provides information to, or testifies before, a public body which is conducting an investigation, hearing or inquiry into any violation by his employer, or another employer with whom there is "a business relationship," of any law or a rule or regulation promulgated pursuant to law, including any violation involving a deception of, or misrepresentation to, any shareholder, investor, client, patient, customer, employee, former employee, retiree of the employer, or any governmental agency; or in the case of an employee who is a licensed or certified health-care professional, provides information to or testifies before a public body which is conducting an investigation, hearing or inquiry into the quality of patient care, or

3. Discloses or threatens to disclose to a supervisor or to a public body or to another employer with whom there is "a business relationship" an activity policy or practice of his employer that he "reasonably believes" is in violation of a law or a rule or regulation promulgated pursuant to law, including any violation involving a deception of, or misrepresentation to, any shareholder, investor, client, patient, customer, employee, former employee, retiree of the employer, or any governmental agency; or in the case of an employee who is a licensed or certified health-care professional, that he reasonably believes constitutes improper quality of patient care.

However, except as noted, an employee who makes such disclosure to a public body is accorded no protection under the statute unless by written notification he brings the activity, policy or practice to the attention of an individual or individuals designated by his employer, and affords a "reasonable opportunity" to correct it. The exception to this is that where "the situation is emergency in nature", such notification is not required if the employee "is reasonably certain" that the activity, policy or practice is known to a supervisor or if he "reasonably fears" physical harm will result from giving notification.

The statutory terms are defined as follows:

1. Public body: the Congress, any State legislature, any popularly elected local governmental body, or any member or employee thereof; any federal, State, or local judiciary, or any member or employee thereof, or any grand or petit jury; any federal, State, or local regulatory, administrative or public agency or authority, or instrumentality thereof; any federal, State or local law enforcement agency, prosecutorial office, or police or peace officer; any federal, State or local department of an executive branch of government; or any division, board, bureau, office, committee or commission of any of the foregoing.

2. Supervisor: an individual who has the authority to direct and control the work performance of the affected employee, or who has the authority to take corrective action regarding the claimed violation of law, rule or regulation.

3. "Improper quality of patient care means, with respect to patient care, any practice, procedure, action or failure to act of an employer that is a health-care provider which violates any law or any rule, regulation or declaratory ruling adopted pursuant to law, or any professional code of ethics."

The employer shall conspicuously display and annually distribute to all employees, written or electronic, notices of its employees' protections and obligations under this statute, and use other appropriate means to keep its employees so informed.* Each such notice shall include the name of the individual or individuals designated to receive the notification referred to above. Further, each notice posted or distributed must be in English and Spanish and any other language spoken by the majority of employees.

Upon a violation of any of the provisions of this statute an aggrieved employee or former employee may within one year institute a civil action for relief, which may include one or all of the following: reinstatement, award for lost wages and benefits, punitive damages, and a civil fine of up to $10,000 for a first offense and up to $20,000 for a subsequent offense. A jury trial is available to either party to a civil action.

*Annual distribution not applicable to employer who has less than 10 employees.

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Obligations of Government Contractors, Subcontractors and Financial Institutions

In addition to being subject to the various anti-discrimination statutes which apply to employers generally, firms (and their suppliers) who have contracts with the federal government, and financial institutions, may have certain "affirmative action" obligations imposed by Executive Order 11246, the Vietnam Era Veterans' Readjustment Act, and the Rehabilitation Act.

Contractors, and their suppliers, with the state of New Jersey or its counties or municipalities may have similar obligations under state law. (See also the requirements for maintenance of drug-free workplaces pages 162, 163).

Executive Order 11246

The Order requires firms (and their subcontractors) that have certain contracts with the federal government for the furnishing of supplies or non-personal services or for the purchase, sale or use of real or personal property to engage in "affirmative action" to promote the employment opportunities of minorities and females. "Services" include serving as a depository of federal funds; operating as an issuing and paying agent for U. S. savings bonds and savings notes; providing services in transportation, research, insurance, or construction; and furnishing utility services.

The Executive Order is enforced by the U.S. Department of Labor through the Office of Federal Contract Compliance Programs (OFCCP).

Exempt from the Order are contractors and subcontractors who do not have any single contract in excess of $10,000 unless the aggregate value of all contracts and subcontracts will exceed $10,000, or can reasonably be expected to exceed $10,000, in any 12-month period. This exemption does not apply to depositories of federal funds or issuers of U.S. savings bonds or notes, nor to government bills of lading.

The $10,000 test is applied separately to a prime contract and to a subcontract. That is, if the amount of the prime contract or contracts is for more than $10,000 but the subcontract is for less than this amount, the latter is exempt.

If a multi-establishment company becomes subject to the terms of the Order, all of its "facilities" shall be subject thereto unless the Secretary of Labor specifically exempts those which he determines are separate and distinct from the particular facility involved in the contract.

The Order states that each government contract and subcontract which is not exempt shall be deemed to include an "equal employment opportunity clause" which will require that during its performance:

1. The employer will not discriminate, and will take "affirmative action" to ensure against discrimination, in employment, recruitment, compensation, termination, upgrading, and other conditions of employment, against any employee or applicant because of race, creed, color, sex, sexual orientation, gender identity, national origin, disability or veteran status.

2. In all advertisements for employees the employer will state that all qualified applicants will be considered without regard to race, creed, color, sex, sexual orientation, gender identity, national origin, disability or veteran status. In lieu of such statement an advertisement may use the phrase "an equal opportunity employer", or may use an insignia prescribed by the Director.

3. The contractor will comply with the terms of the Order and related regulations, will furnish all information and reports required thereby and will permit access to his records by the Director of OFCCP and the contracting agency for purposes of investigation to ascertain whether there has been compliance with the Order and the regulations.

By regulation, a prime contractor, and each subcontractor, with 50 or more employees must develop a written, affirmative action program (usually, for each of its establishments where work is performed on the contract) if it:

1. Has a contract of $50,000 or more (i.e., if any single contract is for this amount), or

2. Has Government bills of lading which in any 12-month period total (or can reasonably be expected to total) $50,000 or more, or

3. Serves as a depository of Government funds, or is a financial institution which is an issuing and paying agent for U.S. savings bonds and savings notes.

A subcontractor is not excused from the obligation to develop a plan merely because its prime contractor has fewer than 50 employees.

An affirmative action program is a set of specific procedures designed to achieve equal employment opportunity in all personnel actions. It must include a statistical comparison of the utilization of minorities and females by the contractor versus their availability in the area labor market as reflected by census and other data, and the establishment of goals for correcting underutilization. Supporting documents must be kept to show compliance with the objectives of the Order.

Affirmative action plans must be updated annually.

Unless exempt from the Executive Order, a government contractor shall file an Employee Information Report (Form EEO-1), which contains workforce statistics of minority groups and summary pay data starting with the 2017 report, which will be due on March 31, 2018, if it (1) is a prime contractor or first-tier subcontractor, that (2) has 50 or more employees, AND (3) has a contract, subcontract or purchase order amounting to $50,000 or more, or serves as a depository of federal funds or is a financial institution which is an issuer and paying agent for U.S. savings bonds and savings notes.

Notification of the Executive Order must be posted. (This requirement will be satisfied by posting the Consolidated EEO Poster with Supplement, see page 133).

In the event of the contractor's or subcontractor's non-compliance with any of the foregoing, the contract may be cancelled or suspended, the contractor may be declared ineligible for further government contracts, or other sanctions may be imposed in accordance with the Order or regulations.

The OFCCP has issued regulations applicable to contractors and all levels of subcontractors on the subject of sex discrimination (see Appendix page A-17), and religious or national origin discrimination.

The agency has also issued guidelines which require contractors who are subject to the Order to prepare and maintain records which identify applicants according to minority category and sex (see Appendix, page A-5). These are referred to as "applicant flow charts". While such data are also required of employers generally, it is particularly important that they be compiled by those government contractors who are or will be obliged to develop written affirmative action programs. Their failure to comply can result in a finding by OFCCP of noncompliance with the Executive Order.

If the employer prepares personnel or employment records, they must be retained for a period of not less than 3 years from the date of the making of the record or of the action involved, whichever occurs later. (This period is shortened to one year if the employer has fewer than 150 employees or does not have a contract of at least $150,000.)

The records include, but are not limited to, applications for employment, resumes, test results, interview notes, job advertisements and postings, results of physical examinations, and other records pertaining to hiring, assignment, promotion, demotion, transfer, layoff, termination, rates of pay or other terms of compensation, selection for training and requests for reasonable accommodation.

Executive Order 13665

The Order amends Order 11246 and requires firms to include the following non-discrimination protections:

The contractor will not discharge or in any other manner discriminate against any employee or applicant for employment because such employee or applicant has inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant. This provision shall not apply to instances in which an employee who has access to the compensation information of other employees or applicants as a part of such employee's essential job functions discloses the compensation of such other employees or applicants to individuals who do not otherwise have access to such information, unless such disclosure is in response to a formal complaint or charge, in furtherance of an investigation, proceeding, hearing, or action, including an investigation conducted by the employer, or is consistent with the contractor's legal duty to furnish information.

"Compensation" means "salary, wages, overtime pay, shift differentials, bonuses, commissions, vacation and holiday pay, allowances, insurance and other benefits, stock options and awards, profit sharing, and retirement."

Vietnam Era Veteran's Readjustment Assistance Act

Vietnam Era Veteran's Readjustment Assistance Act (VEVRAA)

Contractors must fill out the VETS-4212 form under contracts covered by VEVRAA. Companies with a government contract or subcontract of 100,000 or more must, in addition to complying with the obligations imposed by Executive Order 11246, engage in affirmative action to employ and advance in employment veterans who are in various defined categories. If a contract or subcontract is for $50,000 or more, and the company employs 50 or more employees, it must include veterans in its affirmative action plan or develop a separate plan for them.

Contractors and subcontractors shall send to the appropriate local office of the State Employment Service a list of all employment openings (except as noted below) at all establishments of the employer, including those other than the one where the contract is performed (unless they are independently operated corporate affiliates).

The listing shall be made for openings which exist at the time of execution of the contract and which occur during its performance, including those not "generated by" the contract, and the listing shall be made at least concurrently with the use of any other recruitment source or effort.

No such listing is required for any of the following:

1. Executive (as defined in federal Wage-Hour regulations) and top management positions.

2. Positions that will be filled from within the contractor's own organization (including affiliates, subsidiaries and parent organization) -- i.e., those for which no consideration will be given to persons outside the organization -- and openings to be filled from a regularly established recall list.

3. Temporary openings of 3 days or less.

Rehabilitation Act /Section 503

Companies that are subject to the provisions of Executive Order 11246 are also covered by the Rehabilitation Act.

This statute requires that covered contractors and subcontractors shall not discriminate against “qualified, disabled individuals” and will “take affirmative action” in the areas of recruitment, hiring, upgrading, training, rates of pay, etc., with respect to such individuals who perform work in any of their facilities. They must be included in the employer’s affirmative action plan.

The provisions of this statute and the implementing regulations parallel those of the Americans With Disabilities Act with respect to the definitions of “disability” and “qualified disabled individuals”, and the obligation to make reasonable accommodation to disabled individuals.

If personnel or employment records are prepared for any employees or applicants, they must be preserved for a period of 3 years from the date of the making of the record (or 1 year in the case of a contractor who has fewer than 150 employees or whose contract or subcontract is for less than $150,000). The kinds of records referred to are the same as those designated on page 52.

Additional Data Collection Under Revised VEVRRA and Section 503 of the Rehabilitation Act

As of March 2014, Contractors must compile annual reports on:

- The number of applicants who identify as a protected veteran or person with a disability;
- Total number of job openings/jobs filled;
- Total number of applicants for all jobs;
- Number of protected veterans and individuals with disabilities hired;
- Contractors will have to conduct an annual utilization analysis and assessment of problem (underutilized) areas and establish specific action-oriented programs to remedy those areas. Documentation of such must be maintained for three years.
- OFCCP must be allowed to review documents related to a compliance check or focused review, whether on or off-site.
- Applicants and employees must be made aware of availability of the AAP pertaining to Veterans and Individuals with Disabilities only.

- The Handicap/Veterans portion only should be made available upon reasonable request, to any an applicant or employee.
- Job Solicitations must include the tagline EEO M/F/Disabled/Vets (minorities, females, individuals with disabilities, protected veterans).
- AAP statement must include top US executive's support of AAP.
- Records must be kept in a "data analysis file" not in a personnel or medical file.
- Notify union.

EEO Clause

Specific language is to be used for incorporation of the equal opportunity clause into sub-contracts, purchase orders or bill of lading or the like to alert subcontracts to their responsibility as a Contractor:

> ***This contractor and subcontractor shall abide by the requirements of 41 CFR §§ 60-1.4(a), 60-300.5(a) and 60-741.5(a) and 61-300.10, to the extent applicable. These regulations prohibit discrimination against qualified individuals based on their status as protected veterans or individuals with disabilities, and prohibit discrimination against all individuals based on their race, color, religion, sex, sexual orientation, gender identity or national origin. Moreover, these regulations require that covered prime contractors and subcontractors take affirmative action to employ and advance in employment individuals without regard to race, color, religion, sex, sexual orientation, gender identity or national origin, protected veteran status or disability.***
>
> ***Executive Order 13665 amends 11246 prohibiting federal contractors and subcontractors from discharging, or otherwise discriminating against their employees or job applicants for discussing, disclosing, or inquiring about compensation.***
>
> ***MUST BE BOLD TYPE***

Invitation to Self Identify

Pre-Offer:

At the same time contractor collects gender and race information:

> **VEVRA:** invitation to self identify as protected veteran
>
> **503:** invitation to self identify as a person with a disability using only OFCCP form

Post-Offer:

> **VEVRA:** Invitation to self identify as a protected veteran
>
> **503:** Invitation to self identify as a person with a disability using only OFCCP form
>
> *AND*
>
> ● invite employees within one year of effective date of 503 rule, (March, 2014)
>
> *AND*
>
> ● every 5 years thereafter
>
> *AND*
>
> ● at least one reminder in-between the 5 years to remind employees they may change their disability status at any time.

Contractors with State, Counties and Municipalities

State law (P.L. 1975, c. 127) provides that contracts with the State of New Jersey or with any county or municipality in the State or with any agency or authority created by any of the foregoing, for the furnishing of materials, equipment, supplies or services or for the construction, alteration, or repair of any building or public works must contain certain provisions on the subject of discrimination and affirmative action. The law is applicable only to a contract of a certain amount, that amount depending on the particular agency and on current requirements as to public bidding.

Specifically, the contractor and first-tier subcontractors must agree not to discriminate against any employee or applicant because of race, creed, color, national origin, ancestry, marital status, sex or age, and agree to take affirmative action to ensure equality of employment opportunities to applicants and employees without regard to such factors.

A contractor and subcontractor shall post notices setting forth the obligations under this law, and shall post copies of a notice to the union, if any, which represents their employees, setting forth the contractors' obligations hereunder. Such notices shall be provided by the contracting agency.

The law is enforced by the State Treasurer. The penalty for violation is a fine of up to $1000 per violation for each day of violation.

Executive Order 12989 - Economy and Efficiency in Government Procurement (E-Verify)

The Executive order requires that certain federal contractor and subcontractors who have contracts covered under Federal Acquisition Regulation 1.108 (FAR) utilize the E-Verify system, which is administered by the U.S. Department of Homeland Security to verify that employees working under a government contract, both existing and new, are eligible to work in the United States. This requires that a clause be inserted into new Federal contracts and solicitations, as well as applying to any existing contract that extends at least six months after the effective date.

The rule applies to prime contracts with a dollar threshold of $100,000 or greater and sub-contracts (only if the prime contract includes the E-verify clause) and the subcontract is for services or for construction with a dollar threshold of $3,000 or greater.

Participation in E-Verify does not exempt the employer from the responsibility to complete, retain, and make available for inspection Forms I-9 that relate to its employees, or from other requirements of applicable regulations or laws.

Executive Order 13673—Fair Pay and Safe Workplaces, Pay Transparency and Arbitration Agreements

For procurement contracts and subcontracts for goods and services, including construction, where the estimated value of the supplies acquired and services required exceeds $500,000, a contractor must attest, to the best of its knowledge and belief, whether there has been any administrative merits determination, arbitral award or decision, or civil judgment, as defined in guidance issued by the Department of Labor, rendered against the contractor within the preceding 3-year period for violations of any of the following labor laws and Executive Orders (labor laws):

(A) the Fair Labor Standards Act;
(B) the Occupational Safety and Health Act of 1970;
(C) the Migrant and Seasonal Agricultural Worker Protection Act;
(D) the National Labor Relations Act;
(E) the Davis-Bacon Act;
(F) Service Contract Act;
(G) Executive Order 11246 of September 24, 1965 (Equal Employment Opportunity);
(H) section 503 of the Rehabilitation Act of 1973;
(I) the Vietnam Era Veterans' Readjustment Assistance Act of 1974;
(J) the Family and Medical Leave Act;
(K) Title VII of the Civil Rights Act of 1964;
(L) the Americans with Disabilities Act of 1990;
(M) the Age Discrimination in Employment Act of 1967;
(N) Executive Order 13658 of February 12, 2014 (Establishing a Minimum Wage for Contractors); or
(O) equivalent State laws, as defined in guidance issued by the Department of Labor.

During the performance of the contract, contractors are required to provide an update every 6 months.

Paycheck Transparency

In each pay period, contractors must provide all individuals performing work under the contract for which they are required to maintain wage records under the Fair Labor Standards Act or equivalent State laws, with a document providing that individual's hours worked, overtime hours, pay, and any additions made to or deductions made from pay.

The document provided to individuals exempt from the overtime compensation requirements of the Fair Labor Standards Act need not include a record of hours worked if the contractor informs the individuals of their overtime exempt status.

If the contractor is treating an individual performing work under a contract or subcontract as an independent contractor, and not an employee, the contractor must provide a document informing the individual of this status.

Complaint and Dispute Transparency

For procurement contracts and subcontracts for goods and services, including construction, where the estimated value exceeds $1 million, a contractor must agree that any agreement to arbitrate claims arising under Title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment may only be made with the voluntary consent of employees or independent contractors after such disputes arise.*

This requirement does not apply to not apply to employees who are covered by any type of collective bargaining agreement negotiated between the contractor and a labor organization representing them; employees or independent contractors who entered into a valid contract to arbitrate prior to the contractor or subcontractor bidding on a contract covered by this order, unless the contract can be changed, renegotiated or replaced; or to contracts or subcontracts for the acquisition of commercial items or commercially available off-the-shelf items.

Required Elements of Affirmative Action Programs and Support Data

Each contractor who has 50 or more employees and (1) has a contract of $50,000 or more; or (2) has Government bills of lading which in any 12-month period, total or can reasonably be expected to total $50,000 or more; or (3) serves as a depository of Government funds in any amount; or (4) is a financial institution which is an issuing and paying agent for U.S. savings bonds and savings notes in any amount, shall develop a written affirmative action compliance program for each of its establishments.

Required Elements:

Workforce Analysis

- profiles the composition of a facility's workforce by department and identifies a progression path.

Job Group Analysis

- identifies incumbents by a regulation-specific criteria: similar job responsibility, wages and promotional opportunity.

Availability Analysis

- estimates the percentages of minorities and women who may have requisite skills for employment in each identified job group.
- identifies feeder-jobs within Company.

Goals

- annual percentage goals must be set to equal the availability (for those job groups in which underutilization exists).
- benchmark for veterans and individuals with disabilities (IWD)

*Contrast this requirement with Agreement to Arbitrate Employment Disputes, where the employee agrees to arbitrate “any and all disputes” in connection with employment.

Narrative Portion

- Responsibility for Implementation
- Identification and Correction of Problem Areas
- Development and Execution of Action-oriented Programs
- Internal Audit and Reporting
- Purpose/EEO Policy/Objective
- Handicapped/Veterans
- Compliance with Non discrimination Guidelines
- Confidentiality Statement
- Prior Year Goals
- Statement of Commitment

Support Data

In addition to the required elements of an AAP, there is also support data that is required to be maintained. The following is a sampling of support data:

- Applicant Flow/Hires/Promotions/Termination
- Copies of Contracts
- EEO-1
- Vets-4242
- Copies of Purchase Orders with EEO clause
- Advertisements for Jobs
- List of Employees on Maternity Leave (by race, job and salary)
- List of Employees in Tuition Assistance Program (by sex and race)
- Personnel Policies

Executive Order 13672—Sexual Orientation & Gender Identity

This Order adds sexual orientation and gender identity to the prohibited bases of discrimination in Order 11246. Contractors are not required to conduct any data analysis with respect to the sexual orientation or gender identity of their applicants or employees; nor are contractors required to collect any information about applicants' or employees' sexual orientation or gender identity. At the same time, this Order does not prohibit contractors from asking applicants and employees to voluntarily provide this information, although doing so may be prohibited by state or local law. Contractors may not use any information gathered to discriminate against an applicant or employee based on sexual orientation or gender identity.

Restroom Access

Contractors must ensure that their restroom access policies and procedures do not discriminate based on the sexual orientation or gender identity of an applicant or employee. In keeping with the federal government's existing legal position on this issue, contractors must allow employees and applicants to use restrooms consistent with their gender identity

Executive Order 13706—Paid Sick Leave

This Order requires up to seven days of paid sick leave for workers engaged in performing work on, or in connection with, a covered contract whose wages under the contract are governed by the Service Contract Act, Davis-Bacon Act, or Fair Labor Standards Act, including employees who are exempt under the FLSA.

There is a narrow exemption from the requirements for workers who perform work duties necessary to the performance of a covered contract - but who are not directly engaged in performing the work specified by the contract - and who spend less than 20 percent of their hours worked in any workweek performing work in connection with such contracts.

Employees accrue one hour of paid sick leave for every 30 hours worked on, or in connection with, a covered federal contract, up to 56 hours (seven days) in a year or at any point in time. "Hours worked" means time spent working and does not include hours on Paid Time Off (PTO) status.

Carryover

Unused time must be carried over to the next year.

Unless the contractor provides for frontloading, the contractor may limit the employee to accruing no more than 56 hours at any one time. For example, if the employee carried over 50 hours, the employee could accrue only six more hours until he or she must use some of the hours.

However, if the contractor frontloads the 56 hours at the beginning of the year, the employee will have the full 56 hours plus any hours that are carried over.

Permitted Uses

Employees may use paid sick leave while they are working on, or in connection with, a federal contract for:

- Their own illness or other health care needs, including preventive care;
- The care of a family member or loved one who is ill or needs health care, including preventive care;
- Issues related to domestic violence, sexual assault, or stalking, where the employee or a family member or loved one is a victim, including to obtain counseling, seek relocation, seek assistance from a victim services organization, or take legal action.

The types of illnesses and injuries for which paid sick leave must be allowed are extremely broad and include common cold, upset stomach, headache, sprained ankle, and so on.

Compliance with State, Local Law

The Order does not exempt an employer from compliance with any other state or local law requiring paid sick leave.* A federal contractor will need to comply with whichever law is more generous to the extent the requirements differ.

PTO Instead of Paid Sick Leave

An employer may use its existing PTO policy to comply with the paid sick leave requirements, so long as the employer provides at least 56 hours of PTO and any leave used for purposes required by the Executive Order is covered by the protections of the Order (including documentation, certification, and recordkeeping). The employer does not have to provide separate paid sick leave, even if the employee uses all of the PTO time for vacation.

Notice to Employees/Recordkeeping

Among other things, contractors must track the number of hours employees spend on, or in connection with, covered contracts. In addition, they must track employee accrual and use of paid sick leave.
Recognizing the administrative burden that these regulations place on contractors, the Order allows frontloading and, in certain circumstances, allows a contractor to estimate the amount of time spent in connection with (but not on) a covered contract.

Payout upon Termination

The Order does not require contractors to pay out unused paid sick leave at the time of termination. However, the unused paid sick leave must be reinstated if the employee is rehired within 12 months, provided that unused paid sick leave does not need to be reinstated if the employer paid it out to the employee upon termination.

*The following NJ Municipalities have paid sick leave ordinances: Jersey City, Newark, Passaic, East Orange, Montclair, Trenton, Paterson, Irvington, Bloomfield, Elizabeth, New Brunswick, Plainfield and Morristown. More information can be found at www.eanj.org.

Family and Medical Leaves

There are two separate statutes which mandate the granting of "family" leaves of absence: the federal Family and Medical Leave Act of 1993 (FMLA), and the New Jersey Family Leave Act. Small New Jersey employers (generally speaking, those with fewer than 50 employees) are not covered by either law or by only one of them. Others are covered by both, and must give employees the benefits of whichever of the two laws is more favorable.

Employer Coverage

Federal Law

The Act applies to every employer who employs or employed 50 or more employees for each working day during 20 or more workweeks in the current or preceding calendar year.

1. The criteria for determining who is an employee are those which are applied under the federal Wage-Hour Law (see page 181).

2. Coverage of the Act extends to all states of the U.S. and to its territories and possessions, and so employees in those locations are included in counting the size of an employer's workforce. Employees are counted irrespective of their individual eligibility for FMLA leave.

3. "Employed . . . for each working day" does not mean performance of actual work on each working day. An employee who is "maintained on the payroll" during a workweek will be considered employed each working day of that week, whether or not he receives any compensation for the week, and even though he is a part-time employee.

> This implies a continuing employment relationship. Employees will be considered as "on the payroll" while on leave of absence, disciplinary suspension, etc., if the employer has or had a reasonable expectation that they would return, but individuals on layoff, whether temporary or long-term, are not "on the payroll."

4. For the purpose of determining coverage, a corporate employer is treated as a single employer, including its separate establishments or divisions. Different entities will be deemed to be parts of a single employer if they are "integrated", which is determined by such factors as common management, interrelation between operations, centralized control of labor relations, and the degree of common ownership.

5. "Employer" includes a "successor in interest" - one which acquires the business of another entity and maintains substantial continuity of operations. Factors which point to continuity include similarity of machinery, equipment, production methods, products, services, supervisory personnel, jobs, working conditions; continuity of the workforce, etc. The successor employer may be required to assume the obligations of the predecessor even though it does not otherwise meet coverage requirements.

6. Where a joint employment relationship exists, such as in the case of employees supplied by a temporary-help agency, for purposes of determining coverage the shared employees must be counted by both employers. The "primary employer", which usually is the temporary help agency, has responsibility for complying with the notice and job restoration provisions of the law. The secondary employer must accept the returning employee if the position has been maintained. A PEO (Professional Employer Organization) may be a joint employer only if it has the right to hire, fire, assign, or direct and control the client's employees, or benefits from the work those employees perform. The client employer is generally the primary employer.

Public employers and public and private elementary and secondary schools are covered without regard to number of employees.

State Law

An employer is subject to the New Jersey law if he employed 50 or more employees for each working day in 20 or more workweeks in the current or preceding calendar year. Government entities are covered by the law regardless of size.

For coverage purposes all employees of a New Jersey employer are counted, irrespective of their individual eligibility for statutory family leave, including those working outside the state. Employees of a subsidiary, division or other related entity may be included in the count, depending on the extent of the interrelationship of the employer's operations, the degree of centralized control of labor relations, the existence of common management, and the degree of common ownership or financial control.

Eligible Employees

Federal Law

To be eligible for a family leave an employee must work for a covered employer and satisfy the following requirements:*

1. He must have been employed by the same employer (or by a predecessor and successor employer, or in joint employment) for at least 12 months before the leave commences.

a. The months need not be consecutive. If two or more periods of employment are separated by layoff or termination, they are aggregated as long as the break in service is for 7 or years or less, or unless the break is a result of military service obligations, or a written agreement exists to rehire, or the employee is maintained on payroll.

b. If an employee is "maintained on the payroll" for any part of a week, that week counts as a week of employment, and 52 such weeks are deemed to equal 12 months. No actual work in the week is required.

c. Months spent absent from employment due to military service will be credited towards the 12 month requirement.

2. He must have at least 1250 hours of service with such employer during the 12-month period immediately before the leave.

a. "Hours of service" include all time actually worked plus time spent in activities which under Wage-Hour regulations must be treated as working time (see page 2).

b. In the case of "exempt" employees for whom no hours-worked records have been kept, it is presumed that they have met the hours-of-service requirement unless the employer demonstrates otherwise.

c. A reemployed service member is to be given credit for any hours he would have worked but for the period of military service.

3. If an individual is on layoff at a time when he would otherwise become eligible to commence a family leave, he is not entitled to the leave. An individual on a leave of absence who is maintaining employee status is not precluded from obtaining FMLA leave if he is otherwise eligible (e.g. if he attains 12-months of service while on a company leave of absence, the leave may be converted into an FMLA leave for the remainder of the employee's absence).

4. He must be employed at a worksite where there are at least 50 employees within 75 miles of that worksite - i.e., there must be at least 49 other employees within 75 miles.

a. The employees who are counted are the same as those counted for coverage purposes, and the count is made at the time when the employee gives notice of the need for leave.

b. The 75-mile distance is measured by surface miles using surface transportation by the most direct route between worksites. Absent available surface transportation, the distance is measured by reference to the most frequently used mode of transportation.

c. The term "worksite" is construed in the same manner as "single site of employment" under the WARN Act (see page 85). Usually it is a single location. For an employee with no fixed worksite (such as a truck driver, salesman, or telecommuter), the worksite is the place from which his work is assigned, or to which he reports. An employee's personal residence is not a worksite. The worksite of employees of a temporary-help agency is usually the site from which their work is assigned (i.e., the temporary help office.) When an employee is jointly employed, his worksite is the primary employer's office from which the employee is assigned or reports, unless he has physically worked for at least one year at the facility of the secondary employer, which is then his worksite.

* Special rules apply to flight crews regarding eligibility, leave calculation and recordkeeping.

State Law

To be eligible for family leave an employee must have been employed in New Jersey by the same employer for at least 12 months (need not be consecutive) before the commencement of the leave and must have worked at least 1,000 base hours during the 12-month period preceding the leave.*

1. An employee is considered to have been employed in New Jersey if he worked exclusively in New Jersey, or if he routinely performed some work in New Jersey and his base of operations or the place from which such work was directed and controlled is in New Jersey.

2. "Base hours" means hours worked, including overtime work and hours for which an employee receives workers' compensation benefits, and any hours he would have worked but for a period of military service.

Reasons for Family and Medical Leave

Federal Law

An eligible employee may take an unpaid leave of absence for any of the following reasons:

1. Because of the birth of a child to an employee, in order to provide care for such child, or because of the placement of a child with the employee for adoption or foster care.

   Circumstances may require that a leave begin before the date of a child's birth or placement.

   The use of a licensed adoption agency is not required for adoption, but placement of a child for foster care requires state action.

2. In order to provide care to an employee's family member who has a serious health condition.

   The providing of "care" includes not only physical care but also "psychological comfort" and reassurance, transportation to a doctor, and arranging for third-party care or change in care.

3. Because of the employee's own serious health condition that makes him unable to perform his job.

   This means inability to perform any one or more of the essential functions of the job (within the meaning of the Americans With Disabilities Act). "Unable to perform" includes necessary absence from work to receive treatment for a serious health condition.

4. Because of any “qualifying exigency” resulting from a family member’s (the “military member”) covered active duty or notice of an impending call to covered active duty in the Armed Forces.

5. To provide care for a “covered servicemember” who is recovering from a serious illness or injury sustained in the line of active duty and to whom the employee is a family member or next-of-kin (military caregiver leave).

State Law

An eligible employee may take a leave of absence to provide care for a newborn child of the employee, the placement of a child with the employee for adoption, or the serious health condition of a family member of the employee. (Unlike the federal law, the statute does not provide for a leave for an employee's own disability or because of placement of a child for foster care.)

*If an employee is laid-off because the employer curtailed operations due to a state of emergency (e.g. Hurricane Sandy), up to 90 days of such layoff is considered as time worked for purpose of the one year and hours requirement for eligibility.

Definitions

Federal Law

"**Family member**": an employee's child (son or daughter) spouse, or parent (for a leave to care for an injured or ill servicemember only, a family member includes a person to whom the employee is next-of-kin).

1. "Son or daughter": for the purpose of determining whether an employee is eligible for family leave to care for a newborn/adopted or foster child or child with a serious health condition, a son or daughter is any of the following who either is under age 18 or is incapable of self-care because of physical or mental disability: a biological child, adopted child, foster child, stepchild, legal ward, or child of a person standing in loco parentis.

   Son or daughter for the purpose of being a covered military member in active duty or being the son or daughter of a covered servicemember is a child, as defined above, with no age limitation.

   "Incapable of self-care" means requiring active assistance or supervision in 3 or more activities of daily living, such as dressing, bathing, eating, cooking, shopping, using public transportation, telephones, etc.

   "Physical or mental disability" is an impairment that substantially limits one or more "major life activities", as defined in the Americans With Disabilities Act (ADA), as amended by the ADA Amendments Act of 2008.

2. "Spouse": a husband or wife as defined or recognized in the state where the individual was married ("place of celebration"), including common law and same sex marriages. Also includes a marriage that was validly entered into outside of the United States if it could have been entered into in at least one state.

3. "Parent": a biological, adoptive, step or foster father or mother or any other individual who stood in loco parentis (persons with day-to-day responsibilities of care and financial support)* to the employee when he was a child. The term does not include parent-in-law.

"**Serious health condition**": an illness, injury, impairment, or physical or mental condition (including one that is work-connected and compensable under the Workers' Compensation law) that requires either:

1. Inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential-care facility, or any subsequent treatment in connection with such care, or

2. Treatment by a health-care provider in any of the following situations:

   a. Incapacity of more than 3 consecutive calendar days (and also <u>any</u> subsequent treatment or period of incapacity relating to the same condition) that involves:

      (1) Treatment one or more times by a health-care provider, followed by a regimen of treatment under the supervision of the health-care provider, (provided that the first in-person treatment visit occurs within 7 days of the first day of incapacity) or

      (2) Treatment 2 or more times within 30 days of the first day of incapacity by a health-care provider, a nurse under direct supervision of a health-care provider, or by a provider of health-care service (e.g., a physical therapist) under orders of, or on referral by, a health-care provider.

   "Incapacity" means inability to work, attend school, or perform other "regular activities" due to the serious health condition, including treatment therefor or recovery therefrom.

   "Treatment" includes examinations to determine if a serious health condition exists, and evaluation of the condition. It does not include routine physical examinations, eye examinations or dental examinations.

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*According to DOL interpretation, a person could be in loco parentis if they provide either day-to-day care <u>or</u> financial support.

A "regimen of treatment" includes, for example, a course of prescription medication (such as an antibiotic), or therapy requiring special equipment to resolve or alleviate the health condition (e.g., oxygen). However, treatment that consists of the taking of over-the-counter medications (such as aspirin, antihistamines, or salves), resting in bed, drinking fluids, exercising, etc., 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.

A “health-care provider” is any of the following who is licensed in the state or foreign country where he practices: a doctor of medicine or osteopathy, chiropractor (limited), podiatrist, clinical psychologist, dentist, optometrist; a Christian Science practitioner who is listed with the mother church of Boston; a nurse practitioner, nurse-midwife, clinical social worker, or physician assistant who is authorized to practice in the state and who performs within his defined scope of practice. It also includes any health-care provider who is recognized by the employer or accepted by the benefits manager of the employer's health plan.

b. Any period of incapacity due to **pregnancy** or prenatal care. (Absences on particular days which are attributable to such incapacity qualify for FMLA leave even though no treatment is received during such absences and even though they do not last more than 3 days, e.g. severe morning sickness)

c. Any period of incapacity, or treatment for such incapacity, due to a chronic, serious health condition. Such a condition is one which requires periodic visits (at least twice a year) for treatment by a health-care provider, or by a nurse acting under his or her direct supervision, which continues over an extended period of time, and which may cause episodic incapacity. (Absences on particular days which are attributable to such incapacity qualify for FMLA leave even though no treatment is received during such absences and even though they do not last more than 3 days.)

d. A period of incapacity which is permanent or long-term for which treatment may not be effective, where the individual is under the continuous supervision of, but need not be receiving active treatment by, a health-care provider. (e.g., Alzheimer's disease, or a severe stroke.)

e. The administering of 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 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. Examples are treatment for cancer (chemotherapy, radiation, etc.), severe arthritis (physical therapy), kidney disease (dialysis).

If all other conditions of the regulations are met, restorative dental or plastic surgery after an injury or removal of cancerous growths are serious health conditions. Allergies and mental illness, may be serious health conditions.

Substance abuse may be a serious health condition if the foregoing conditions are met. However, FMLA leave may be taken only for the purpose of receiving <u>treatment</u> for substance abuse; mere absence because of the employee's use of a substance, rather than for treatment, does not qualify for FMLA leave. (Also, if the employer has promulgated a policy statement that employees may be terminated for substance use, pursuant to that policy an employee may be terminated whether or not he is taking FMLA leave.)

Conditions for which cosmetic treatments are administered 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, ulcers, headaches other than migraine, routine dental or orthodontia problems, periodontal disease, etc., are other examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave.

“Qualifying exigency”: a situation arising out of the fact that a family member is on covered active duty, or has been notified of an impending call to such duty in the Armed Forces, which involves:

1. Short-notice deployment (notification received by military member 7 or less days prior to the actual deployment). Leave for this reason can be taken for a period of seven calendar days from notification to address any issues that arise from such short notice.

2. Military events and related activities.
   To attend official events or informal briefings, family support or assistance programs sponsored or promoted by the military or associated service organizations that are related to the active duty or call to active duty status of a military member.

3. Childcare and school activities.
   To provide care for a child of a military member when such is necessitated by the active duty or call to active duty status of that military member for the following reasons: 1) To arrange for alternate childcare, 2) to provide childcare on an urgent need basis (but not on a routine, regular, or everyday basis), 3) to enroll or transfer into a new school, 4) or to attend meetings with staff at daycare or school regarding discipline or other matters.

4. Financial and legal arrangements.
   To make or update financial and legal arrangements to address the military members absence (such as executing power of attorney, preparing a will or living trust), and, for a period during and 90 days following active duty status, to act as the military members representative before various agencies in matters pertaining to military service benefits.

5. Counseling.
   To attend counseling by someone other than a health care provider for oneself, the military member or their child if such need arises from active duty or call to active duty status.

6. Rest and recuperation.
   To spend time (up to 15 days) with a military member who is on short-term temporary rest and recuperation leave during the period of deployment.

7. Post-deployment activities.
   To attend arrival ceremonies, reintegration briefings, and other official events sponsored by the military for a period of 90 days following termination of the military member's active duty status, or to address issues arising from the death while on active duty status (includes arranging and attending funeral services).

8. Parental care
   To provide care for a military member's parent who is incapable of self-care when such is necessitated by the active duty or call to active duty status of that military member for the following reasons: 1) To arrange for alternate care, 2) to provide care on an urgent need basis (but not on a routine, regular, or everyday basis), 3) to admit or transfer the parent into a care facility, 4) or to attend special meetings with staff at the health care facility, such as meetings with hospice or social service providers.

9. Additional activities.
   Other events which arise out of the covered military member's active duty status provided the employer and employee agree such leave will qualify as an exigency, and the terms.

"Covered Active duty": In general, duty during the deployment of a member of the regular or reserve component of the Armed Forces to a foreign country. Deployment of the Reserve must be in support of a contingency operation.

"Military member": For purposes of entitlement to a leave for a qualifying exigency, the employee's spouse, son, daughter or parent on covered active duty or call to active duty status. The family member could be a member of the reserve components (Guard or Reserves), a retired member of the Regular Armed Forces or Reserve, or a member of the Regular Armed Forces.

"Covered servicemember": For purposes of caring for a service member injured in the line of duty. A member of the Armed Forces, (Army, Navy, Air Force, Marines, including a member of the National Guard or Reserves), who is undergoing medical treatment, recuperation or therapy, is otherwise in outpatient status, or on the temporary disability retired list, for a serious injury or illness which occurred in the line of active duty. "Covered Servicemember" includes a veteran who was a member of the Armed Forces at any time during the 5 years* preceding the date of medical treatment, recuperation or therapy.

"Authorized health care provider": In addition to the regular definition of Health Care Provider, for purposes of caring for a service member injured in the line of duty, a United States Department of Defense (DOD) health care provider, a United States Department of Veterans Affairs health care provider or a DOD TRICARE network or non-network authorized private health care provider.

*Anytime between 10/28/09 and 3/8/13 is not counted towards the five year period.

“Outpatient status”: Assigned to a military medical treatment facility as an outpatient, or a unit established for the purpose of providing command and control of servicemembers receiving medical care as outpatients.

“Next of kin”: The nearest blood relative other than the individual’s spouse, parent, son or daughter, in the following order of priority: Blood relatives granted legal custody, brothers and sisters, grandparents, aunts and uncles, first cousins. If the servicemember has written designation of another blood relative as his next-of-kin, then only that person shall qualify.

“Serious injury or illness”: An injury or illness incurred or aggravated by a member of the Armed Forces in the line of active duty that may render the member medically unfit to perform the duties of the member’s office, grade, rank or rating. In the case of a covered veteran, such injury or illness may manifest itself before or after the member becomes a veteran and could be the continuation of a service related injury/illness, or a physical or mental condition for which a VA Service Disability rating of at least 50% is assigned, or which substantially limits gainful activity or for which the veteran has been enrolled in VA Program of Comprehensive Assistance for Family Caregivers.

State Law

"**Family member**": a child, spouse, partner in a civil union, parent or parent-in-law of the employee.

1. "Child": for the purpose of determining whether an employee is eligible for family leave to care for a child with a serious health condition, a child is any of the following who is either under age 18 or incapable of self-care because of mental or physical infirmity: a biological child, adopted child, resource family child, stepchild, legal ward, or an individual to whom the employee provides parental care or with whom he has sole or joint legal or physical custody, care, guardianship, or visitation rights.

2. "Spouse": a person to whom the employee is lawfully married, as defined by New Jersey law. (New Jersey does not recognize common-law marriages.)

3. "Parent": a person who is the biological parent, adoptive parent, resource family parent, stepparent, parent-in-law or legal guardian, having a "parent-child relationship" with a child as defined by law, or having sole or joint legal or physical custody, care, guardianship, or visitation rights with a child.

"**Care**": physical care, emotional support, visitation, transportation, arranging for a change in care, assistance with essential daily living matters, assistance in treatment, personal attendant services (but not limited to the foregoing).

The care that an employee provides may be in conjunction with care provided by others; it need not be exclusive.

"**Serious health condition**": an illness, injury, impairment, or physical or mental condition, any of which requires inpatient care in a hospital, hospice, or residential medical-care facility, or which requires continuing medical treatment or continuing supervision by a health-care provider (defined the same as under federal law).

"**Health-care provider**": a person who is licensed under federal, state, or "local" law, or the laws of a foreign nation to provide health-care services, or any person who has been authorized to provide health care by a licensed provider.

Forms of Leave

Federal Law*

There are three forms of leave which are available: consecutive, intermittent, and reduced.

1. A consecutive leave is one taken without interruption.#

2. An intermittent leave is one taken in separate blocks of time due to a single qualifying reason.

3. A reduced leave is a scheduled reduction in an employee's usual number of working hours per workweek or workday.

A consecutive leave is available for all types of leave.

An intermittent or reduced leave is not available in the case of the birth or placement of a healthy child unless the employer agrees to it.** Also, except for a "qualifying exigency" leave, there must be a medical need (as distinguished from voluntary treatment and procedures) for taking it in the form of an intermittent or reduced leave, and it must be that such medical need can be best accommodated by that kind of a leave. The employee must make a reasonable effort to schedule it so as not to disrupt the employer's operations, subject to the approval of the health-care provider. Also, when such leave is "foreseeable, based on planned medical treatment", or if the employer has agreed to permit intermittent or reduced-schedule leave for the birth or placement of a child, the employer may require the employee to transfer temporarily to a part-time or other alternate position for which he is qualified and that better accommodates the leave than does his regular job.

The alternate job must not work a hardship on the employee, and it must have equivalent pay and benefits (but not necessarily equivalent duties). If it is a part-time job, benefits previously available to the employee must be continued even though they are not otherwise available to part-timers; however, benefits and pay which are computed on the basis of hours worked or amount of earnings may be proportionately reduced. When the employee no longer needs to continue on leave and is able to return to full time work, he must be placed in the same or equivalent job he held when the leave began.

The increment of time allowed for an intermittent or reduced leave must be no greater than the shortest period of time used to account for other forms of leave, provided that it is not greater than one hour. For example, if an employer accounted for sick leave in 30 minute increments, then he must allow FMLA in 30 minute increments. On the other hand, if an employer allowed one-half day increments for other types of leave (such as sick or vacation time), the FMLA leave increment would be one hour.

In all cases, employees may not be charged FMLA leave for periods during which they are working. For example, if an employee needs FMLA leave, due to a flare-up of a chronic condition, 30 minutes before the end of his shift, the employee may not be charged with more than 30 minutes of FMLA time, even if the employer otherwise uses one hour as the shortest increment of leave. If such a flare-up occurred at the beginning of the shift however, the employee could be required to take one hour of FMLA time provided the employee does not work during that hour.

An employee who requests and is entitled to a leave may not, in lieu of the leave, be required to accept a different job.

State Law

The same three forms of leave are available as in the federal law, but they are defined somewhat differently.

1. A consecutive leave is one taken without interruption. (As in the federal law.)

2. An intermittent leave is a non-consecutive leave taken in increments of one or more full weeks, separated by intervals of work.

3. A reduced leave is one scheduled in advance in increments of not less than one workday but less than one full workweek at a time.

A consecutive leave is available in the case of a serious health condition of a family member or in the case of the birth or adoption of a child.

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* There are certain limitations on intermittent/reduced leaves and leaves taken near the end of an academic term for instructional employees of local educational agencies; public and private elementary and secondary schools.

The continuity of a leave is not interrupted by a break in service (such as vacation) during which the employee is not scheduled to work.

** If fewer than 12 weeks are taken to care for a healthy child, the balance may not be taken later in the 12-month period to care for the same child while he is healthy because this would convert the leave to an intermittent leave.

An intermittent leave is not available in the case of birth or adoption of a healthy child unless the employer agrees to it.* It is available in the case of a serious health condition of a family member when it is medically necessary to take it in that form.

A reduced leave is available in the case of a seriously ill family member, but it is not available in the case of birth or adoption of a healthy child unless the employer agrees to it.

An employee who wants an intermittent or reduced leave must make a "reasonable effort" to schedule it so as not to "unduly disrupt" the employer's operations. This means causing the employer "measurable harm, economic or otherwise, significantly greater than any measurable harm which would befall the employer if the same employee was granted a consecutive leave." The burden of proof of such harm rests with the employer.

If an employee needs intermittent or reduced leave that is foreseeable based on care of or planned medical treatment for a family member, or if an employer agrees to permit such leave for the birth of a child, the employer may require the employee to temporarily transfer to an alternate position with equal pay and benefits for which the employee is qualified and which better accommodates recurring periods of leave than does the employee's regular position. An employer may not transfer an employee in order to discourage the employee from taking leave or otherwise work a hardship on the employee. When the employee is able to return to full-time work, he must be placed in the same or equivalent job as the one he left when the leave commenced.

Amount of Leave

Federal Law

In general, an eligible employee is entitled to a total of 12 workweeks of leave during a 12-month period.

The employer is permitted to select among a variety of ways in which to measure the 12-month period during which general leaves may be taken: a calendar year, a fixed 12-month period such as the employees' anniversary year, a rolling 12-month period measured backward from the date an employee uses any leave, or the 12-month period measured forward from the start of the first family leave taken in that period. The employer must inform employees of the method selected for measuring the period. If the employer does not do so, employees will be allowed to calculate their leave entitlement by whichever method is most beneficial to them. Any change in the method chosen would require 60 days written notice to all employees.

The amount of leave taken for the purpose of caring for an injured or ill servicemember is 26 weeks in "any single 12-month period". The single 12 month period for this purpose starts when the leave commences. This leave entitlement is applied on a "per-servicemember, per-injury" basis, which means that, in a different year, an employee may be entitled to take another period of 26 workweeks of leave if a subsequent leave is needed to care for a different servicemember or to care for the same servicemember with a different injury or illness, or who is now in Veteran status. In no case may more than 26 weeks be taken in any one single 12-month period.

In the case of an intermittent or reduced leave the maximum entitlement is the equivalent of 12 workweeks (26 workweeks for a leave to care for an ill or injured servicemember). Thus, if an employee who normally worked a 5-day schedule took one day of leave, one-fifth of a week would have been used. If an employee who normally worked a 30-hour schedule changed to a reduced leave schedule of 20 hours, the 10 hours of leave would represent one-third of a week. If the employee's normal schedule varies, hours are to be averaged over the 12-month period before the leave.

If less than the allowable amount of leave is taken for one purpose, the balance may be used for another purpose, provided the restrictions applicable to each form of leave are observed.

An employee's FMLA leave entitlement may be charged only for time when the employee would otherwise be required to report for duty, except for the taking of the leave. Thus, if a plant closed for two weeks (for repairs, vacation, etc.), while an employee was on FMLA leave, the period of closing would not count against the employee's FMLA leave entitlement. However, a holiday occurring during a full week of FMLA leave would have no effect - the week would still be counted as a week of FMLA leave. If a holiday falls during a week in which the employee is only using intermittent or reduced leave the holiday would not be counted.

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* If fewer than 12 weeks are taken to care for a healthy child, the balance may not be taken later in the 12-month period to care for the same child while he is healthy because this would convert the leave to an intermittent leave.

A leave taken for the birth or placement of a child must be completed within one year from the date of birth or placement. (If a leave which is taken for this purpose under the state law extends beyond the one-year period, the part of the leave beyond that point would not count as FMLA leave.)

A husband and wife who work for the same employer and who are both eligible are limited to a combined total of 12 weeks of leave when it is taken because of the birth or placement of a child, or to care for a parent with a serious health condition, or a combined total of 26 weeks of leave when it is taken to care for an injured or ill servicemember (i.e., both, but not each, may take a maximum of 12 or 26 weeks for such purposes.) However, each of them may take the difference between the amount of leave, if any, that he or she individually took for such purposes and 12 weeks, and use it for some other FMLA purpose. (Compare the New Jersey law.)

Any leave of absence to which an employee is entitled under this statute is unaffected by the taking of any other leave of absence to which he is not entitled under this statute.

State Law

An eligible employee is entitled to a total of 12 weeks of leave in a 24-month period. The 24-month period can be the calendar year; any “fixed” 24-month period; a “rolling” period measured backwards from when any leave is taken; or a period measured forward from the start of the first family leave taken in the period. The employer must choose which calculation method to use, notify employees of the method and apply consistently to all employees. Any change in the method chosen would require 60 days written notice to all employees. If the employer fails to select a method for measuring the 24-month period, the option most beneficial to the employee will be used.

In the case of an intermittent leave or a reduced leave the maximum entitlement is the equivalent of 12 workweeks and is calculated on a pro rata basis, just as in the federal law.

Intermittent leave may be taken only if it is medically necessary to take it in that form, and the employee must make a reasonable effort to schedule it so as to not unduly disrupt the employer's operations.

The period within which an intermittent leave is taken for each "episode" of a serious health condition must conclude within 12 months, and the aggregate amount of all time taken for such leaves taken in connection with more than one episode may not exceed 12 weeks in any 24-month period.

The period during which a reduced leave may be taken may not exceed 24 consecutive weeks and only one such leave may be taken during any 24-month period.

If fewer than 12 weeks of consecutive or intermittent leave are taken, the balance may be taken in any other form of family leave, and if less than the allowable amount of reduced leave is taken, the balance may be used for consecutive or intermittent leave, provided that the restrictions applicable to each form of leave are observed.

A leave taken for the birth or placement of a child must be commenced within one year of the date of birth or placement.

Two or more employees from the same family may each take 12 weeks of leave at the same time, or separately, if they are otherwise eligible.

As in the federal law, an employee's leave entitlement may be charged only for time when the employee would otherwise be required to report for duty. (See previous page).

Any leave of absence to which an employee is entitled under this statute is unaffected by the taking of any other leave of absence to which he is not entitled under this statute.

Payment of salary is not required for any part of the leave of absence but if the employer does pay for all or part of it, the maximum period allowed for a family leave is not thereby extended.

Application of Other Accrued Leave

Federal Law

Except as noted, an employer may require or an employee may elect to use accrued paid leave (sick pay, vacation pay, personal day) as part of a family leave. The maximum period of leave of absence allowed by the FMLA will not thereby be extended. In other words the paid time would run concurrently with FMLA.

However, this provision is limited to periods of unpaid leaves of absence. The receipt by an employee of Workers' Compensation payments (WC), Temporary Disability Benefit payments (TDB), or Family Leave Insurance (FLI) during an FMLA leave converts it to a paid leave and precludes the employee from electing and prohibits the employer from requiring substitution of sick pay, vacation pay or any other form of accrued benefit for any part of the absence for which WC, TDB or FLI is paid.* In all cases, if the employer and employee agree, paid leave may be used to supplement any WC, TDB, or FLI benefits to make up the difference between such pay and the employee's full salary.

Any use of accrued paid leave is determined by the terms and conditions of the employer's normal policy. (However, the employer has the right to waive such procedures). For example, an employee does not have a right to use accrued sick pay as part of a family leave which is taken to care for an ill family member unless the employer's policy or plan allows sick pay to be used in cases of illness of family members. Similarly, an employee has no right to use paid vacation if such pay is normally reserved for a set-time such as a plant shut down as the pay is not "accrued" until such time.

An employer whose policy is to require vacations to be taken in increments of at least a full day could disallow the use of a lesser amount of vacation time as part of a reduced family leave. If an employee nevertheless chooses to use an entire day of vacation in such circumstances, the entire time could be counted against his FMLA entitlement.

State Law

An employer may require an employee to utilize vacation or other accrued paid leave as part of a family leave, but only if the employer has a policy or practice of requiring employees while on personal leaves of absence to utilize such time. Otherwise, employees have the right to choose whether or not to use it as part of a family leave.

Employer Notification to Employees and Designation of Family Leave

Federal Law

FMLA regulations provide failure to follow any of these notice requirements may constitute interference with, restraint or denial of the exercise of an employee's FMLA rights. An employer may be liable for compensation and benefits lost by reason of this violation, for actual monetary losses and for equitable or other relief such as employment, reinstatement, promotion, or any other relief tailored to the harm suffered.

General Notice

Every employer covered under the FMLA is required to post where it can be readily seen by employees and applicants a notice explaining the Act's provisions and provide information on how to file complaints of violations with the Wage and Hour Division. Such notice shall also be provided to each employee by inclusion in an employee handbook or other written guidance to employees concerning their benefit or leave rights. If no such writings exist, notice must be given to each employee upon hire.

A prototype notice is available from the local office of the federal Wage and Hour Division which employers should use, adapting it if necessary, to particular situations. Form WHD-1420.

*It appears from conversations with the DOL that an employer's requirement to use paid leave for the initial two weeks of FLI would be permissible, however, this is not confirmed.

Notice of Eligibility, Rights and Responsibilities

A. Eligibility

When an employee requests FMLA leave (or when the employer has sufficient knowledge that a leave may be for a qualifying reason) the employer must notify the employee of their eligibility to take FMLA leave within 5 business days absent extenuating circumstances.

The notice must state whether the employee is eligible for FMLA leave, and if he is not, state at least one reason why the employee is not eligible (e.g. employee only worked for the employer for ten months).

This notice may be oral or written and must given at the commencement of the first instance of FMLA leave taken in the 12-month leave period. Subsequent notice needs to be provided within 5 business days only if the employee needs to be absent for a different FMLA qualifying reason during that 12-month period and his eligibility status has changed. All FMLA absences for the same qualifying reason are considered a single leave and employee eligibility for such reason will not change for the duration of that leave year.

B. Rights and Responsibilities

Each time the "eligibility notice" explained above is provided, employers must also provide written notice detailing an employee's specific obligations and responsibilities and explain any consequences of not meeting those obligations.

This notice must include, as appropriate:

1. That the leave may be designated and counted against the employee's annual FMLA entitlement if qualifying; and the applicable 12-month period for FMLA entitlement,

2. Any requirements for the employee to furnish certification of a serious health condition, serious injury or illness or qualifying exigency,

3. The employee's right, or the employer's requirement, to substitute paid leave and the conditions of such use or the employee's right to use unpaid leave,

4. Any requirement for the employee to make premium payments to maintain health benefits, the arrangements for such payments, and consequences of failure to make those payments on a timely basis,

5. The employee's status as a "key employee", the potential consequences that restoration may be denied following the FMLA leave and the conditions for such denial,

6. The employee's right to maintenance of benefits during the FMLA leave and restoration to the same or equivalent job upon return,

7. The employee's potential liability for payment of health insurance premiums paid by the employer during the employee's unpaid FMLA leave if the employee fails to return to work following the leave,

Other information may be included such as if the employer requires the employee to supply periodic reports of their status, intent to return to work, and copies of required certification forms.

If the information provided in this notice changes, notice of the change needs to be provided within 5 business days of the employee's request for another leave that occurs after such change.

The Department of Labor has developed a prototype notice which incorporates these requirements—Form WH-381.

Designation Notice

The employer is responsible in all circumstances for designating leave as FMLA qualifying or not and for giving the employee written notice of such designation. This notice must be provided within 5 business days from when the employer has enough information to determine whether the leave is being taken for a FMLA-qualifying reason. (e.g. after receiving a certification). Only one designation notice is required for each FMLA qualifying reason per applicable 12-month period.

The designation should also include:

1) Any requirement for use of vacation or other paid leave as part of the unpaid FMLA leave.

2) Whether the employer will require the employee to present a fitness for duty certification to be returned to employment. If the certification must address the employee's ability to perform the essential functions of the employee's position, the designation notice must state this and include a list of the essential functions.

3) The amount of leave counted against the employee's FMLA entitlement (e.g. weeks or days), if known. If the amount of leave needed is not known at the time of designation, the employer must provide this information to the employee upon request (but no more often than every 30 days).

If the information provided in this notice changes (e.g. the employee exhausts FMLA leave) the employer must provide written notice of the change within 5 business days of any subsequent request for a leave. Prototype notice WH 382.

It is the employer's responsibility to ascertain from information obtained from the employee (or if the employee is incapacitated from the employee's spouse, parent, doctor, etc) whether the leave will qualify as a family leave. In any circumstance where the employer does not have sufficient information, the employer should inquire further of the employee or his spokesperson to ascertain whether leave is potentially FMLA qualifying.

If an employer does not designate leave as required, the employer may retroactively designate leave as FMLA leave with the appropriate notices, provided that the employer's failure to timely designate leave does not cause harm or injury to the employee. In all cases an employer and employee may agree that leave will be retroactively designated as FMLA. However, if the employee does not agree, and can show that he was prejudiced in some manner by the lack of timely designation, the employer may be found to have interfered with, restrained or denied the employee's FMLA rights. For example, an employee took leave to care for an ill family member believing it would not count against his FMLA entitlement, which the employee planned to use later for recovery from a surgery scheduled for a later date. In this situation, the employee may be able to show that he has been harmed or prejudiced by the employer's failure to properly designate the first FMLA leave.

NOTE: The General Notice and Rights and Responsibilities Notice may be distributed electronically. Those two notices, and the Eligibility Notice, must be provided in a language in which the employees are literate where a workforce is comprised of a significant portion of workers who are not literate in English.

State Law

There is no provision requiring the employer to inform an employee that a requested leave has been designated as a family leave. (However, it would be prudent to follow the federal rules on this subject.)

If an employer distributes written guidance to employees concerning employee benefits or leave rights, such as in an employee handbook, information concerning leave and employee obligations under the Act must be included. If an employer does not have written policies or a handbook, the employer shall provide written guidance to each employee concerning his rights and obligations under the Act. A "fact sheet" which employers may use for this purpose is on the Division on Civil Rights website. Additionally, employers must conspicuously post the official Family Leave Act Poster issued by the Division.

Notification by Employees to Employer

Federal Law

When an employee seeks leave for the first time for a FMLA-qualifying reason, the employee need not expressly assert rights under the FMLA or even mention the FMLA. However, when an employee needs leave due to a reason for which FMLA was previously granted then the employee must specifically reference either the qualifying reason or the need for FMLA. The employer should make further inquiry if additional details are necessary. An employee has the obligation to respond to an employer's questions designed to determine whether an absence is potentially FMLA qualifying. If the employee is not responsive, and the employer cannot determine if the leave is qualifying, then FMLA may be denied.

An employee should provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA leave, and the anticipated timing and duration of the leave. For example, whether there is a condition that makes the employee unable to perform the functions of his job, whether the employee or a family member requires in-patient treatment or are under the continuing care of a health care provider. If the employee is incapable of providing notice himself, in the case of an unforeseeable leave, then a spokesperson (e.g., spouse, adult family member or other responsible party) can give notice.

Before taking a leave where the need for the leave is foreseeable, an employee must give at least 30 days' advance notification, or as much as is possible and practical under the circumstances. In those cases where notice is not provided 30 days in advance, the employee must, when requested by his employer, explain why it was not practicable to supply timely notice. Notice for an unforeseeable leave or for any "qualifying exigency" should be given as soon as practicable; usually the same or next business day from when need for a leave is known.

An employer may require that employees follow the usual and customary notice and procedural requirements for requesting leave. For example, the employer may require written notice of the reason and anticipated duration of the leave. Also, the employee may be required to call a specific phone number or contact a specific person at the company for purpose of requesting FMLA leave. Absent unusual circumstances that make it impossible for an employee to follow the company's typical procedures, failure to supply notice can result in the delay or denial of FMLA leave.

In all cases, in order for an employee's FMLA leave to be delayed or denied due to lack of required notice, it must be clear that the employee was aware of the notice requirements. (Such as posting of the FMLA notice at the worksite and inclusion of notice provisions in the handbook or other distribution)

State Law

Except where "emergent" (unexpected) circumstances warrant shorter notice, employees must give at least 30 days' notice in advance of taking a leave upon the birth or adoption of a child, or of taking a leave to care for an ill family member.

In giving notice it is not necessary for the employee to specifically designate or invoke the statute. The notice provision is satisfied where the employee requests a leave of absence for any of the reasons identified in the statute.

An employer may establish a policy which requires that such notice be provided in writing, except that such policy must provide that oral notice may be substituted when written notice is impractical because of emergent circumstances. The policy may also require that written notice be submitted after oral notice has been given. A policy on this subject may not be implemented unless it has been communicated to employees.

An employer also may require an employee who requests family leave to sign a statement of the purpose for which the leave will be taken. Any employee who falsely certifies may be subject to whatever disciplinary policy the employer has established for the same or similar offenses. The statement shall include a warning of the consequences of furnishing false information. No other form of statement by an employee may be required. (However, nothing prohibits requiring an employee to orally furnish specific and detailed information to enable the employer to determine whether the employee is entitled to a family leave.)

Certification

Federal Law

An employer may require that a leave which is needed because of the serious health condition of an employee or a family member be supported by a certification from the health-care provider of that individual. An employer may also require than an employee's leave because of a qualifying exigency or to care for a covered servicemember be supported by certification.

When a certification is required, an employer should give written notice within 5 business days from when the leave is requested (this is usually provided with the "Rights and Responsibilities Notice"). If subsequent certification is needed, oral notice will suffice. The certification shall be submitted within 15 days after it has been requested unless it is not "practicable" to do so within that time despite the employee's "diligent, good faith efforts". The certification must be "complete and sufficient". If not, the employer shall notify the employee in writing what additional information is necessary and allow the employee 7 calendar days to correct any deficiencies. (More time may be required if it is not practicable for the employee to provide the information within 7 days.) A certification is "incomplete" if one or more applicable entries have not been completed. Vague, ambiguous or non-responsive information would be "insufficient". For example, if an employer included a listing of the essential job duties of an employee, and the doctor failed to indicate which functions the employee was unable to perform, the form would be "insufficient".

If the employee fails to provide the employer with a complete and sufficient certification, despite the opportunity to cure any discrepancies, or fails to provide any certification, the employer may deny the taking of FMLA leave.

Safe Harbor Notice under the Genetic Information Nondiscrimination Act (GINA)

GINA prohibits an employer from requesting, acquiring and using genetic information in connection with documentation certifying an employee's serious health condition.

Genetic information includes information about an individual's or family member's genetic tests as well as information about the manifestation of a disease or disorder in an individual's family members (i.e., family medical history).

To take advantage of GINA's "safe harbor" when an employer may inadvertently obtain genetic information when certifying a serious health condition, the a following notice can appear as an addendum on a separate sheet of paper when requesting health-related information about the employee under the FMLA or other disability leave policy:

> The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of employees or their family members. In order to comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. "Genetic information," as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.

Alternative language may also be used, as long as individuals and health care providers are informed that genetic information should not be provided.

If an employer fails to give written or verbal notice, it may nonetheless establish that a particular receipt of genetic information in response to a request for medical information was an inadvertent acquisition if the employer's request was not made in a way that was "likely to result in obtaining genetic information."

Medical Certifications for a Serious Health Condition of the Employee or Family Member (WH-380E / WH-380F)

When a leave is taken because of the employee's own serious health condition, or that of a family member, the employer may request medical certification from a health care provider.

The Wage-Hour Division has developed two forms of certification which should be used. (Another form of certification could be used, but must not require any information beyond that required by the DOL forms.)

If the certification is complete, no additional information may be requested from the health-care provider. However, after giving the employee the opportunity to cure any deficiencies, the employer may communicate with the employee's health-care provider for the purpose of obtaining clarification and authenticity of the medical certification. This contact with the health care provider can be made by the human resources professional, a leave administrator, health care provider or management official. Under no circumstances may the employee's direct supervisor contact the health care provider.

If the employer has reason to doubt the validity of the certification, the employer may require that the employee obtain an opinion from a second health-care provider designated or approved by the employer. If that opinion differs from the certification, the employer may require certification from a third health-care provider. This provider shall be jointly selected, and his opinion shall be final and binding.

The second health-care provider selected may not be one utilized on a regular basis by the employer unless the employer is located in an area where there is extremely limited access to health-care providers. The cost of obtaining the second and third medical opinions must be paid by the employer; the employee need not be reimbursed for the time he expended in obtaining them, but shall be reimbursed for reasonable "out-of-pocket" traveling expenses.

In circumstances where a medical certification is received from a health care provider in another country the employer shall accept that certification as well as a second or third opinion. When the certification is in a language other than English, the employee must provide the employer with a written translation, if requested.

During the leave the employer may require recertification of the medical condition, at the employee's expense. They must be provided within the same time limit that applies to the original certification.*

There are limitations on the frequency with which they may be requested. In general, recertification may be requested every 30 days. However, if a previous certification specified a minimum period of incapacity of more than 30 days, recertification may not be required until that minimum period has passed, or 6 months, whichever is less. In all cases, recertification may be requested earlier if:

a. Circumstances described by the previous certification have changed significantly (e.g., the duration of the illness, the nature of the illness, complications), or
b. The employer has received information that casts doubt upon the continuing validity of the certification, or
c. The employee has requested an extension of leave.

No second or third opinions may be required on recertification.

If any of the certifications or recertifications fail to confirm that the reason for the leave is or was for an FMLA reason, the employee must be notified in writing that he has no right or further right to an FMLA leave, and that any designation of the leave as an FMLA leave is withdrawn.

When the employee's need for a leave lasts beyond a single leave year, the employer may require a new medical certification in each subsequent leave year. Such new certifications are subject to the provisions for authentication and clarification, as well as second and third opinions.

An employer may have a uniformly applied policy or practice that requires (upon proper notification) all similarly situated employees (e.g., all those in similar occupations, those with the same health condition, etc.) to present a "fitness-for-duty" certification from a health-care provider before being allowed to resume work.

The certification must relate only to the particular health condition that caused the need for the leave. If the employer provided the health care provider with a listing of the employee's essential job duties (with the designation notice), the employer may require that the medical certification address the employee's ability to perform the essential job functions.

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*(Note: because the New Jersey Family Leave Act provides for only a single medical certification, the foregoing multi-certification procedure may not be utilized when the leave is taken for a reason which is taken concurrently under both the federal and state laws.)

No additional information may be requested but the employer may, as explained above, communicate with the employee's health-care provider to obtain clarification of the employee's fitness to return to work, but the clarification must be with respect to only the health condition for which the leave was taken. The employee's return to work may not be delayed pending receipt of clarification. No second or third opinions may be required on a fitness for duty certification.

Fitness for duty certification may not be requested upon return from each instance of an intermittent leave. However, if "reasonable safety concerns" exist regarding the employee's ability to perform his job, one may be requested every 30 days. Reasonable safety concerns is a fairly high standard, meaning a reasonable belief of significant risk or harm to the individual or others.

If the fitness-for-duty certification is not submitted at the time restoration to duty is sought, and the employee has exhausted his FMLA leave entitlement, he can be terminated. If all of his leave time has not been exhausted, he must submit either the fitness-for-duty certification or a new medical certification; if neither is furnished, he can be terminated.

When an employee returns from leave which was taken for his own serious health condition, he may be required to undergo a medical examination by the company physician to determine his fitness for work. An employee may not be denied return to work pending such an examination. The examination is subject to the requirements of the ADA that it be "job-related and consistent with business necessity."

Certifications to Care for A Covered Servicemember—Current (WH-385) or Veteran (WH385V)

When leave is taken to care for an ill or injured servicemember, an employer may require certification be completed by an "authorized health care provider", and the employee regarding the nature of the illness/injury, the status of the servicemember, family relationship, etc. The Department of Labor has a prototype certification which should be used to acquire the appropriate information. However, in lieu of this form the employer must accept "invitational travel orders" (ITOs) or "invitational travel authorizations" (ITAs) for the time specified on that order. If the employee seeks a leave for longer than specified, then the employer can request a new certification be completed. Verification of enrollment in the VA Program of Comprehensive Assistance for Family Caregivers is also sufficient certification.

An employer may seek authentication and clarification of this certification, but not recertification and may not require second and third opinions if supplied by a military-related healthcare provider.

Certification for Qualifying Exigency Leave (WH-384)

The first time an employee requests leave because of a qualifying exigency arising out of active duty or call to active duty status of a covered military member, the employer may require the employee to provide a copy of that individual's active duty orders or other documentation issued by the military. Additionally the employee must certify a description of the exigency, any written documentation that supports the request for a leave, the dates the exigency commenced and dates needed for leave, etc. The Department of Labor has issued a prototype notice which may be used for this purpose.

If the employee submits a complete and sufficient notice, the employer may not ask for additional information. However, if the exigency involves meeting with a third party, the employer may contact the individual with whom the employee is meeting for verification. The appropriate unit of the Department of Defense can also be contacted to verify that a covered military member is on active duty or call to active duty status.

State Law

An employer may require that any period of a family leave be supported by certification issued by a healthcare provider. Where the certification is for the serious health condition of a family member of an employee, it will be sufficient if it states the date on which such condition commenced, its probable duration, and the medical facts within the provider's knowledge showing that the family member's health condition meets the criteria of a serious health condition. Where the certification is for the birth or adoption of a child, it need state only the date of birth or placement for adoption.

If the employer has reason to doubt the validity of a certification of a serious health condition, a second or third opinion may be obtained, as in the federal law.

Continuation of Insurance

Federal Law

During a leave of absence the group health insurance coverage, if any, which the employee and his dependents had when the leave commenced shall be continued in force (subject to certain conditions).

If continued, it must be continued at the level and under the terms existing before the leave, except that if a health insurance plan is changed during an employee's leave, the employee will be entitled to the new benefits to the same extent as if he were not on leave. Also, if active employees are allowed to enroll in a plan or to change coverage (e.g., from single to family coverage), employees on family leave must be given the same privilege. An employee on family leave must be notified of the opportunity to elect a changed benefit or coverage.

Under a medical Flexible Spending Account, as long as coverage is continued, the full amount of the elected coverage minus any prior reimbursements must be available to the employee at all times, including during the leave period.

Subject to COBRA, the insurance need not be continued beyond the point where the leave itself is lawfully terminated -- e.g., because the employee is laid off, or if the employee unequivocally states that he will not return to work.

If the health insurance is on a contributory basis, it need not be continued during the leave unless an employee pays his share of the insurance premium or cost; if he does make or tender the payments on a timely basis, it must be continued, and in that case:

1. The employer may require the employee's contributions to be made to the employer directly or to the insurance carrier, and at times consistent with practice or as agreed upon, except that prepayment may not be required without the employee's consent. The employee must be informed in advance and in writing of the terms and conditions under which his payments will be made.

2. If the employee fails to make a payment when it is due, he must be given a grace period of at least 30 days. If payment is not made by the end of the period, the insurance may be canceled at that time, provided the employee has been notified that the payment has not been received. Such notice must be mailed to the employee at least 15 days before coverage is to cease, advising that coverage will be canceled on a specified date at least 15 days after the date of the letter unless payment is received by the specified date. If the employer has an established policy for other leaves that provides for the coverage to cease retroactively to the date the unpaid premium was due, the employer may drop the employee from coverage retroactively provided the 15-day notice was given.

3. If premiums are raised or lowered while an employee is on leave, resulting in changed contributions being paid by active employees, the contributions from the employee on leave would be similarly changed.

Non-health insurance (such as life insurance or disability insurance) need not be maintained during an FMLA leave unless it is the employer's practice to continue it during other kinds of leave.

Even though an employee's insurance coverage lapsed because the employee chose to make no payments or because he failed to make one or more timely payments, upon his return from the leave the insurance must be reinstated without qualification: no waiting period, no medical exam, no exclusion of new preexisting conditions, etc.

If an employee's coverage under a medical Flexible Spending Account stops during the leave because the employee revokes coverage or does not pay the required premiums, the employer must provide upon return to work a choice between: 1) resuming coverage at a level that is reduced under a prorating rule and at the original contribution level, or 2) resuming coverage at the original level and at the original contribution level, plus making up the unpaid contribution payments. However, if an employee's FSA terminates while the employee is on leave, the employee is not entitled to receive reimbursements for the remainder of that period. If that employee is reinstated, he can not retroactively elect FSA coverage.

To avoid possible problems associated with restoring lapsed health or non-health insurance the employer may elect to pay the employee's share of the premium or cost for any such insurance. In that case the employer has the right to recover the amount of that payment from the employee, whether or not he returns to work, even if the employee did not agree to this repayment arrangement before the leave began.

An employer may require an employee to resume participation in a plan upon return from leave if it also requires employees who return from unpaid non-FMLA leave to resume participation.

An employer has no right to recover his own share of the premiums or cost of insurance:

1. If the employee returns from the leave, or

2. For any portion of a leave which is a paid leave. (This would include a leave during which state disability benefits were paid such as TDB or WC).

If the employee does not return from leave, the employer has the right to recover his own share of the premiums or cost paid or incurred during the unpaid portion of the leave, except in the following circumstances:

1. The employee is a "key" employee who has been denied restoration, or

2. The failure to return was due to the continuation, recurrence or onset of a serious health condition that would otherwise entitle the employee to a family leave, or due to other circumstances beyond the control of the employee.

If the failure to return was because of the continuation, recurrence or onset of a serious health condition, the employer may require the employee to produce certification from a health-care provider stating that a serious health condition prevented the employee from being able to perform the functions of his position on the date his leave expired, or that the employee was needed to care for a family member or covered servicemember who had a serious health condition when the leave expired. If certification is not produced within 30 days after request, the employer is not precluded from recovering the amount of his share of the cost or premiums which he paid.

An employee is considered to have returned to work only if he remains at work for at least 30 calendar days. "At work" does not require performance of actual work; being in employee status will suffice.

State Law

There is no requirement to continue any ERISA regulated insurance coverage during a family leave.

Reinstatement Rights; Benefits After Reinstatement

Federal Law

Upon return from family leave an employee is entitled to be reinstated to the position he left or, at the option of the employer, to an equivalent position. He is entitled to such reinstatement even if there is no vacancy in such positions or if he has been replaced.

To be "equivalent" the position must be virtually identical to the employee's former position in terms of pay, benefits, working conditions, status, perquisites and privileges. It must involve the same or substantially similar duties, responsibilities, skill, effort and authority. Ordinarily, the employee is entitled to return to the same shift or the same or equivalent schedule.

The right to restoration to employment is subject to these conditions:

1. If the employee is unable to perform one or more of the essential functions of the position he left, he is not entitled under the FMLA to be restored to that position or any other position. (However, the employer's obligations may be governed by the Americans With Disabilities Act.)

2. The employee must not have overstayed the period of the leave to which he was entitled under the FMLA.

3. If during the leave (or before a leave would commence) the employee states unequivocally that he does not intend to return to duty after the leave, the employee will have no reinstatement rights; the leave can be terminated at that point, or denied, as the case may be.

4. If an employee had been hired for a specified term or to work only on a specific project, there would be no obligation to reinstate him if the employment term or the project had concluded and he would not otherwise have continued to be employed.

5. If an employee has engaged in conduct which would have resulted in his discharge had he not been on family leave, he loses reinstatement rights.

6. An employee who fraudulently obtains family leave will have no protection under the statute with respect to job restoration (or health insurance).

7. If during the leave the employer experienced a layoff or reduced workforce requirements which would have resulted in the employee's loss of employment had he not been on leave, at that point the leave, the health insurance and the right to reinstatement may be terminated.

However, if during his absence the employee's position was restructured and its functions distributed among other employees, this does not relieve the employer from the obligation to reinstate unless the employer can show that the restructuring had been planned before the employee requested the leave, or that circumstances changed during the leave which would have resulted in the restructuring.

Upon reinstatement an employee's pay shall include any pay increase which would have been "unconditionally" given (such as a cost-of-living increase or other general across-the-board increase) had the employee not taken the leave, but not an increase based on length of service or work performed unless it is the employer's practice to give such increases during other kinds of leaves of absence.

In addition to health insurance, other benefits (such as group life, unused sick leave, educational benefits, etc.) must be resumed in the same manner and at the same levels as when the leave began, subject to any generally applicable changes that have taken place during the leave. An employee would be entitled to any unconditional bonuses paid (such as a holiday bonus), without regard to his having taken a FMLA leave. However, if a bonus or other payment is based on the achievement of a specified goal, such as hours worked, products sold or perfect attendance, and the employee has not met that goal due to FMLA leave, then the payment may be denied if it is also denied to employees on other types of leave.

An employee is not entitled to any accrual of seniority for the period of the leave nor to benefits or changes in benefits which depend on accrual of seniority unless they are accrued during other kinds of leave. However, upon reinstatement the period of the unpaid leave shall not be treated as a break in service for purposes of vesting and eligibility under a pension or other retirement plan, but need not be treated as credited service for purposes of benefit accrual, vesting and eligibility.

An employee may not be required to accept a "light-duty" position. If he voluntary accepts one, he retains (for the balance of the applicable 12 month FMLA period) the right to be restored to his original position or an equivalent one.

Leave taken cannot be counted as an absence for purposes of discipline under attendance policies or plans, including "no-fault" attendance plans, nor used as a "negative factor" in employment decisions, such as disciplinary actions and promotions.

State Law

Upon expiration of a family leave the employee has the right to be reinstated to employment, subject generally to the same conditions as under the federal law, except for this difference: unlike the federal law, the New Jersey statute permits restoration of the employee to an equivalent position only if the position he left has been "filled".

Denial of Leave or Reinstatement to Certain Employees

Federal Law

The federal law does not allow the denial of leave to any particular category of employees but does permit denying reinstatement to "key employees" under certain limited circumstances.

A key employee is a salaried employee who is among the highest paid 10% of all of the employees within 75 miles of his worksite.

1. "Salaried" means paid on a salary basis as defined in federal Wage-Hour regulations with respect to "exempt" employees.

2. The determination of whether an employee is among the highest 10% is made as of the time he requests the leave. The calculation is made on the basis of year-to-date gross earnings divided by the number of weeks worked (including weeks in which paid leave was taken).

Reinstatement may be denied only if the employer determines that it will cause "substantial and grievous economic injury" to the operations of the employer.

Note that it must be the restoration to employment, rather than the taking of the leave, which causes the injury.

In order to exercise the right to deny reinstatement, the employer must comply with certain written notification requirements. The employee must be notified (usually at the beginning of the leave) that he is a key employee with no reinstatement rights should it be determined that such injury will occur, and when that determination is made, the employee must be notified of the basis for the determination. (This is an abbreviated explanation of the notification requirements.)

State Law

An employee who is otherwise eligible for family leave may be denied the leave if:

1. He is a salaried employee who is among the highest paid 5% of the employees or among the 7 highest paid employees, whichever number of employees is greater. The salary used to identify such employees is the base salary, excluding bonuses, overtime compensation, etc., and the employees among whom the calculations are made include out-of-state employees, and

2. The denial is necessary "to prevent substantial and grievous economic injury" to the employer's operations. This is defined as "economic harm that will befall an employer which is of such magnitude that it would substantially and adversely affect the employer's operations, considerably beyond the costs which are associated with replacing an employee who has requested family leave."

The employer must notify the employee of intent to deny the leave at the time when the employer determines the denial is necessary. If the leave has already commenced at the time this notice is given, the employee must return within 10 working days after receiving it; otherwise his leave may be canceled.

Records

Federal Law

In addition to the records which are generally required under the Wage-Hour law, the following information must be kept for at least 3 years, but only by employers who have "eligible" employees:

1. Dates when family leave has been taken by employees. Leave must be designated in records as family leave. (Include only those leaves, or portions of leaves, taken under the federal law.)

2. The hours of the leaves if taken in increments of less than one full day.

3. Copies of notices of leave furnished by employees to the employer, and copies of all general and specific notices given to employees as required under the statute and the regulations.

4. Any documents (including written and electronic records) describing employee benefits or employer policies and practices regarding the taking of paid and unpaid leaves.

5. Insurance premiums paid.

6. Records of any disputes between the employer and employees regarding designation of leave as family leave, including any written statement from the employer or employees of the reasons for the designation and for the disagreement.

7. Written agreements with "exempt" employees who take leaves on an intermittent or reduced schedule as to their normal schedule or average hours worked each week.

Records and documents relating to medical certifications, recertifications and medical histories of employees shall be maintained in conformity with ADA confidentiality requirements.

State Law

No record-keeping requirements are specified

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Correlation of Federal and State Laws

The FMLA and the New Jersey Family Leave Act

The federal Family and Medical Leave Act does not supersede the New Jersey Family Leave Act; New Jersey employers must comply with both statutes and in some cases must apply the provisions, substantive and procedural, of whichever one is more generous.

In this connection there are three different situations which must be distinguished.

1. An employee meets the eligibility tests of the New Jersey law but not those of the federal law, or his employer meets the coverage test of the New Jersey law but not of the federal law. In either case the employee would have no right to the benefits of the federal statute. Conversely, the employee might be eligible under only the federal law and so would have no rights under the state law.

2. An employee and his employer meet the eligibility and coverage tests of both laws, but the employee takes a leave of absence for a purpose which is allowed under only one of them -- e.g., because of his own serious health condition. In such case the benefits and limitations of only that law apply, and the amount of the leave taken under that law is not charged against the leave entitlement under the other law.

3. Same as (2), except that the employee takes a leave of absence for a purpose which is authorized under both laws -- e.g., to care for a seriously ill family member.

In this case the employee is entitled to the benefits of both laws (assuming he has not previously used and exhausted the amount of leave available under either law). For example, the federal law governs with respect to continuation of the health insurance during the leave, while the New Jersey law governs as to reinstatement rights. The amount of leave taken is charged simultaneously against the leave entitlement under each law.

The following examples will serve to illustrate the application of the foregoing principles and the interaction of the two statutes. (Assume that in each example the employee has met the eligibility requirements of each statute.)

1. The employee takes 12 weeks of leave during a 12-month period to care for her ill mother. Since a leave is authorized for this purpose under both statutes, it counts against the amount allowed under each. No further leave is available under either law during the 12-month period; during the following 12 -month period she may take another 12-week leave under the federal law. Her health insurance must be maintained during both periods of leave.

2. The employee takes 12 weeks of FMLA leave for her pregnancy-related disability, at which point her disability ceases. Then she is entitled to and takes under the New Jersey law another 12 weeks of leave within the same 12-month period to care for the child. The first leave was for a purpose which is authorized under the federal law only, so the amount taken is not charged against the amount allowed under the state law. Her health insurance must be maintained only during the first leave.

3. The employee takes a leave to provide care to her mother-in-law. Since a leave for this purpose is authorized under the state law only, the insurance need not be maintained. No part of the period of the leave is chargeable to her FMLA entitlement.

4. Within a 12-month period an employee takes 4 weeks of leave upon the birth of a child and 3 weeks to care for his wife. These 7 weeks are charged against both federal and state allowances. He then takes 5 weeks' leave for his own disability (thereby exhausting the amount of federal leave available for the period). Since this last leave was not authorized under the state law, it is not chargeable to the allowable amount under that law, and he has a balance of 5 weeks available to him which may be used for any family leave which is authorized under the New Jersey law. The health insurance must be maintained for the first 12 weeks.

5. Within a 12-month period the employee takes 8 weeks' leave for her own serious health condition (by federal law only), then 2 weeks' leave to care for her ill mother-in-law (N.J. law only), then requests leave to care for her ill spouse.

   She is entitled to a maximum of 10 weeks' leave for her ill spouse. Since both federal and state laws authorize a leave for this purpose, the amount of leave taken will be chargeable against the amounts allowed under each law. Thus, the first 4 weeks of such leave will exhaust the amount available under the federal law (since 8 weeks had been taken earlier), and they will also be charged against the available balance remaining under the state law. That balance was 10 weeks (2 weeks having been taken earlier), so 6 more weeks are available under the New Jersey law.

6. In some cases (eg., a maternity situation) an employee may be out for two reasons simultaneously:

   1) her own serious health condition. (Pregnancy disability, childbirth and the subsequent recovery).
   2) care for a newborn.

   Both of these reasons qualify for federal leave, which may begin on the first day of absence and continue for up to 12 weeks. The state leave only covers the second reason (care for a newborn), which will begin after the child is born AND the woman is no longer disabled OR the federal leave is exhausted and the employee requests state leave, whichever comes first.

The FMLA and the ADA

The provisions of the Americans With Disabilities Act (ADA) - see page 25 - may confer rights on disabled employees with respect to leaves of absence and reinstatement which are in addition to FMLA rights.

The most important difference between the two statutes concerns the obligation of the employer to make a "reasonable accommodation" to a disabled employee.

The FMLA does not require making any accommodation, so if after exhausting the amount of leave to which he was entitled under the FMLA an employee remained unable to perform all of the essential duties of his job without accommodation, he could be discharged without violating the FMLA.

However, under the ADA if such employee continued to be disabled (but only as defined in the ADA) the required "reasonable accommodation" might take the form of some accommodation to enable the employee to return to and perform the duties of his job, or a transfer to a vacant, equivalent job.

Furthermore, according to EEOC, where an employee has an injury or illness which constitutes a disability under the ADA, the duty of making accommodation may require (1) extending the duration of a disability leave beyond the maximum period mandated by the FMLA or allowed by the employer's own policy, where the employee is unable to return to work, and (2) granting a disability leave of absence where the employee is not eligible for such a leave under the FMLA or the employer's own policy.

However, several federal courts have declared that the ADA does not require granting a leave of absence of long duration or of indefinite duration.

Note that in all of these situations accommodation is not required unless it is requested (although no particular form or manner of request need be made), nor need be made if it would not be reasonable under the circumstances.

Miscellaneous

Federal Law

If the employer has a uniformly applied policy governing outside or supplemental employment, it may continue to be applied to an employee on leave. An employer that does not have such a policy may not terminate an employee who works a second job while on leave.

Employees cannot waive their prospective rights under the statute, and employers are prohibited from inducing an employee to waive his rights. This does not prevent the settlement or release of FMLA claims by employees for past employer conduct.

State Law

An employee on family leave may not take another full-time job unless he commenced it prior to the leave. Part -time work which is commenced during a family leave is permitted for no more than half of the employee's hours scheduled by the employer. Part-time work which commenced prior to the family leave may be continued for the same number of hours that were regularly scheduled prior to the leave.

Whether an employee must be allowed to return to work before the prearranged date of return shall be governed by the employer's policy with respect to other kinds of leaves of absence. If it is permitted for other leaves, it shall be permitted for family leaves if doing so will not cause the employer undue hardship or expense.

A covered employer shall display a conspicuous notice of employees' rights and obligations under the Act, and "use other appropriate means" to keep employees informed thereof.

Enforcement

Federal Law

Complaints of violation may be filed by aggrieved individuals in either federal or state court, or with the Wage-Hour Division of the U.S. Department of Labor. The limitation period is 2 years, or 3 years for a willful violation. For violations, recovery may be had of back pay and other monetary losses including expense incurred by an employee, plus an additional, equal amount as liquidated damages. When appropriate, the employee may obtain equitable relief such as reinstatement and promotion, and may recover attorney and witness fees and other costs. There can be a fine of $163 per day for failure to post the required notice.

Corporate officers may be individually liable for violations.

State Law

Complaints of violation may be filed by or on behalf of aggrieved individuals with the New Jersey Division on Civil Rights, or in New Jersey Superior Court. Actual damages and punitive damages are recoverable for violations. In addition, the Attorney General may asses fines ranging from $2,000 to $5,000.

Comparison of Major Provisions of the Two Statutes

	Federal Law	New Jersey Law
Employer Coverage	50 or more employees (wherever located) on payroll during 20 weeks in current or preceding calendar year.	50 or more employees (wherever located) who perform work in 20 weeks in current or preceding calendar year.
Employee Eligibility	On payroll for 1 year Work total of 1250 hours Be employed within 75 miles of 49 other employees	Employed 1 year in New Jersey (for current employer) Work 1,000 base hours
Maximum Amount of Leave	12 weeks in a 12-month period (26 weeks to care for a covered servicemember)	12 weeks in a 24-month period
Purposes For Which Leave is Available	Because of birth or placement for adoption of a child Because of placement of a child for foster care To provide care for ill child, spouse or parent Because of a “qualifying exigency” arising out of active military duty To provide care for a “covered servicemember” to whom the employee is a parent, son, daughter, spouse, or next-of-kin Because of employee's own disability	Same Not available Same. But "parent" includes in-law; civil union partner also included Not available Not available Not available
Types of Leave	Consecutive, intermittent, reduced	Same
Minimum Amounts of Leave	For intermittent leave; no required minimum duration of periods of leave For reduced schedule; no required minimum amount of reduction in work schedule	Increments of intermittent leave may not be less than a full week Work schedule may not be reduced by less than a full day or by more than one week
Benefits During Leave	Continuation of health insurance	None required for ERISA plans
Reinstatement After Leave - exceptions	To same or an equivalent position Reinstatement not required if employee would have been laid off May be denied to certain high-paid employees under certain conditions	To same position unless it has been filled, then to equivalent position Same No such exception
Denial of Leave	No provision	May be denied to certain high-paid employees under certain conditions
Medical Certification	May be required when leave is for serious health condition or a covered servicemember	May be required for all family leaves
Posting of Notices and Additional Notification to Employees	Required	Required
Records	Extensive requirements	None specified

Correlation of Federal-State Laws	Employee who meets the eligibility requirements of both laws may be entitled to the benefits of whichever of the two is more favorable.

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EMPLOYEE RIGHTS AND RESPONSIBILITIES UNDER THE FAMILY AND MEDICAL LEAVE ACT

Basic Leave Entitlement

FMLA requires covered employers to provide up to 12 weeks of unpaid, job-protected leave to eligible employees for the following reasons:

- for incapacity due to pregnancy, prenatal medical care or child birth;
- to care for the employee's child after birth, or placement for adoption or foster care;
- to care for the employee's spouse, son, daughter or parent, who has a serious health condition; or
- for a serious health condition that makes the employee unable to perform the employee's job.

Military Family Leave Entitlements

Eligible employees whose spouse, son, daughter or parent is on covered active duty or call to covered active duty status may use their 12-week leave entitlement to address certain qualifying exigencies. Qualifying exigencies may include attending certain military events, arranging for alternative childcare, addressing certain financial and legal arrangements, attending certain counseling sessions, and attending post-deployment reintegration briefings.

FMLA also includes a special leave entitlement that permits eligible employees to take up to 26 weeks of leave to care for a covered service-member during a single 12-month period. A covered servicemember is: (1) a current member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness*; or (2) a veteran who was discharged or released under conditions other than dishonorable at any time during the five-year period prior to the first date the eligible employee takes FMLA leave to care for the covered veteran, and who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness.*

***The FMLA definitions of "serious injury or illness" for current servicemembers and veterans are distinct from the FMLA definition of "serious health condition".**

Benefits and Protections

During FMLA leave, the employer must maintain the employee's health coverage under any "group health plan" on the same terms as if the employee had continued to work. Upon return from FMLA leave, most employees must be restored to their original or equivalent positions with equivalent pay, benefits, and other employment terms.

Use of FMLA leave cannot result in the loss of any employment benefit that accrued prior to the start of an employee's leave.

Eligibility Requirements

Employees are eligible if they have worked for a covered employer for at least 12 months, have 1,250 hours of service in the previous 12 months*, and if at least 50 employees are employed by the employer within 75 miles.

***Special hours of service eligibility requirements apply to airline flight crew employees.**

Definition of Serious Health Condition

A serious health condition is an illness, injury, impairment, or physical or mental condition that involves either an overnight stay in a medical care facility, or continuing treatment by a health care provider for a condition that either prevents the employee from performing the functions of the employee's job, or prevents the qualified family member from participating in school or other daily activities.

Subject to certain conditions, the continuing treatment requirement may be met by a period of incapacity of more than 3 consecutive calendar days combined with at least two visits to a health care provider or one visit and a regimen of continuing treatment, or incapacity due to pregnancy, or incapacity due to a chronic condition. Other conditions may meet the definition of continuing treatment.

Use of Leave

An employee does not need to use this leave entitlement in one block. Leave can be taken intermittently or on a reduced leave schedule when medically necessary. Employees must make reasonable efforts to schedule leave for planned medical treatment so as not to unduly disrupt the employer's operations. Leave due to qualifying exigencies may also be taken on an intermittent basis.

Substitution of Paid Leave for Unpaid Leave

Employees may choose or employers may require use of accrued paid leave while taking FMLA leave. In order to use paid leave for FMLA leave, employees must comply with the employer's normal paid leave policies.

Employee Responsibilities

Employees must provide 30 days advance notice of the need to take FMLA leave when the need is foreseeable. When 30 days notice is not possible, the employee must provide notice as soon as practicable and generally must comply with an employer's normal call-in procedures.

Employees must provide sufficient information for the employer to determine if the leave may qualify for FMLA protection and the anticipated timing and duration of the leave. Sufficient information may include that the employee is unable to perform job functions, the family member is unable to perform daily activities, the need for hospitalization or continuing treatment by a health care provider, or circumstances supporting the need for military family leave. Employees also must inform the employer if the requested leave is for a reason for which FMLA leave was previously taken or certified. Employees also may be required to provide a certification and periodic recertification supporting the need for leave.

Employer Responsibilities

Covered employers must inform employees requesting leave whether they are eligible under FMLA. If they are, the notice must specify any additional information required as well as the employees' rights and responsibilities. If they are not eligible, the employer must provide a reason for the ineligibility.

Covered employers must inform employees if leave will be designated as FMLA-protected and the amount of leave counted against the employee's leave entitlement. If the employer determines that the leave is not FMLA-protected, the employer must notify the employee.

Unlawful Acts by Employers

FMLA makes it unlawful for any employer to:

- interfere with, restrain, or deny the exercise of any right provided under FMLA; and
- discharge or discriminate against any person for opposing any practice made unlawful by FMLA or for involvement in any proceeding under or relating to FMLA.

Enforcement

An employee may file a complaint with the U.S. Department of Labor or may bring a private lawsuit against an employer.

FMLA does not affect any Federal or State law prohibiting discrimination, or supersede any State or local law or collective bargaining agreement which provides greater family or medical leave rights.

FMLA section 109 (29 U.S.C. § 2619) requires FMLA covered employers to post the text of this notice. Regulation 29 C.F.R. § 825.300(a) may require additional disclosures.

For additional information:
1-866-4US-WAGE (1-866-487-9243) TTY: 1-877-889-5627
WWW.WAGEHOUR.DOL.GOV

U.S. Department of Labor | Wage and Hour Division

WHD Publication 1420 · Revised February 2013

DERECHOS Y RESPONSABILIDADES DEL EMPLEADO BAJO LA LEY DE AUSENCIA FAMILIAR Y MÉDICA

Derechos Básicos de Ausencia

La Ley de Ausencia Familiar y Médica (FMLA-por sus siglas en inglés) exige que todo empresario bajo el alcance de la Ley provea a sus empleados elegibles hasta 12 semanas de ausencia del trabajo, no pagadas y con protección del puesto, por las siguientes razones:

- por incapacidad causada por embarazo, atención médica prenatal o parto;
- para atender a un hijo del empleado después de su nacimiento, o su colocación para adopción o crianza;
- para atender a un cónyuge, hijo, hija, o padres del/de la empleado(a), el/la cual padezca de una condición de salud seria; o
- a causa de una condición de salud seria que le impida al empleado desempeñar su puesto.

Derechos de Ausencia Para Familias Militares

Empleados elegibles con un cónyuge, hijo, hija, o padre que estén en servicio activo o se le haya avisado de una llamada a estado de servicio activo bajo cobertura pueden usar su derecho de ausencia de 12 semanas para atender ciertas exigencias calificadoras. Las exigencias calificadoras pueden incluir la asistencia a ciertos eventos militares, la fijación del cuidado alternativo de hijos, para atender ciertos arreglos financieros y legales, para asistir a ciertas consultas con consejeros, y para asistir a sesiones de reintegración pos-despliegue.

FMLA también incluye un derecho especial de ausencia que concede a empleados elegibles ausentarse del trabajo hasta 26 semanas para atender a un miembro del servicio militar bajo el alcance de la Ley durante un período único de 12 meses. Un miembro del servicio bajo el alcance de la Ley es: (1) un miembro actual de las Fuerzas Armadas, incluyendo un miembro de la Guardia Nacional o Reservas, que esté atravesando tratamiento médico, recuperación o terapia, es de cualquier otra forma paciente externo, o está de cualquier otra forma en la lista de retiro temporal por discapacidad, debido a una lesión o enfermedad grave*; o (2) un veterano que fue licenciado o relevado bajo condiciones no deshonrosas en cualquier momento durante el periodo de cinco años antes de la primera fecha en la que el empleado elegible toma la ausencia bajo la FMLA para cuidar de un veterano bajo el alcance de la Ley, y que esté atravesando tratamiento médico, recuperación o terapia por una lesión o enfermedad grave.*

***Las definiciones de la FMLA de "lesión o enfermedad grave" para los actuales miembros del servicio y veteranos son diferentes a la definición de "condición de salud seria".**

Beneficios y Protecciones

Durante una ausencia bajo FMLA, el empresario ha de mantener en vigor el seguro de salud del empleado bajo cualquier "plan de seguro colectivo de salud" con los mismos términos como si el empleado hubiese seguido trabajando. Al regresar de una ausencia de FMLA, a la mayor parte de los empleados se le ha de restaurar a su puesto original o puesto equivalente con sueldo, beneficios y otros términos de empleo equivalentes.

El tomar una ausencia bajo FMLA no puede resultar en la pérdida de ningún beneficio de empleo acumulado antes de que el empleado comenzara una ausencia.

Requisitos Para Elegibilidad

Los empleados son elegibles si han trabajado para el empresario bajo el alcance de la Ley durante por lo menos 12 meses, por 1,250 horas durante los previos 12 meses*, y si el empresario emplea por lo menos a 50 empleados dentro de un área de 75 millas.

***Aplican requisitos especiales de horas de servicio para empleados que son miembros de tripulación de vuelo.**

Definición de una Condición de Salud Seria

Una condición de salud seria es una enfermedad, lesión, impedimento, o condición física o mental que involucra una pernoctación en un establecimiento de atención médica, o el tratamiento continuo bajo un servidor de atención médica por una condición que le impide al empleado desempeñar las funciones de su puesto, o impide al miembro de la familia que califica participar en actividades escolares o en otras actividades diarias.

Dependiendo de ciertas condiciones, se puede cumplir con el requisito de tratamiento continuo con un período de incapacidad de más de 3 días civiles consecutivos en combinación con por lo menos dos visitas a un servidor de atención médica o una visita y un régimen de tratamiento continuo, o incapacidad a causa de un embarazo, o incapacidad a causa de una condición crónica. Otras condiciones pueden satisfacer la definición de un tratamiento continuo.

Uso de la Ausencia

El empleado no necesita usar este derecho de ausencia todo de una vez. La ausencia se puede tomar intermitentemente o según un horario de ausencia reducido cuando sea médicamente necesario. El empleado ha de esforzarse razonablemente cuando hace citas para tratamientos médicos planificados para no interrumpir indebidamente las operaciones del empresario. Ausencias causadas por exigencias calificadoras también pueden tomarse intermitentemente.

Substitución de Ausencia Pagada por Ausencia No Pagada

El empleado puede escoger o el empresario puede exigir el uso de ausencias pagadas acumuladas mientras se toma ausencia bajo FMLA. Para poder usar ausencias pagadas cuando toma la ausencia bajo FMLA, el empleado ha de cumplir con la política normal del empresario que rija las ausencias pagadas.

Responsabilidades del Empleado

El empleado ha de proveer un aviso con 30 días de anticipación cuando necesite ausentarse bajo FMLA cuando la necesidad es previsible. Cuando no sea posible proveer un aviso con 30 días de anticipación, el empleado ha de proveer aviso en cuanto sea factible y, en general, ha de cumplir con los procedimientos normales del empresario de llamar.

Los empleados han de proporcionar suficiente información para que el empresario determine si la ausencia califica para la protección de FMLA, con la fecha y la duración anticipadas de la ausencia. Suficiente información puede incluir que el empleado no puede desempeñar las funciones del puesto, que el miembro de la familia no puede desempeñar las actividades diarias, la necesidad de ser hospitalizado o de seguir un régimen continuo bajo un servidor de atención médica, o circunstancias que exijan una necesidad de ausencia familiar militar. Además, los empleados han de informar al empresario si la ausencia solicitada es por una razón por la cual se había previamente tomado o certificado la ausencia bajo FMLA. También se le puede exigir al empleado que provea certificación y re-certificación periódicamente constatando la necesidad para la ausencia.

Responsabilidades del Empresario

Los empresarios bajo el alcance de FMLA han de informar a los empleados solicitando ausencia si son o no elegibles bajo FMLA. Si lo son, el aviso ha de especificar cualquier otra información exigida tanto como los derechos y las responsabilidades de los empleados. Si no son elegibles, el empresario ha de proveer una razón por la inelegibilidad.

Los empresarios bajo el alcance de la Ley han de informar a los empleados si la ausencia se va a designar protegida por FMLA y la cantidad de tiempo de la ausencia que se va a contar contra el derecho del empleado para ausentarse. Si el empresario determina que la ausencia no es protegida por FMLA, el empresario ha de notificar al empleado de esto.

Actos Ilegales Por Parte del Empresario

La ley FMLA le prohíbe a todo empresario:

- que interfiera con, limite, o niegue el ejercicio de cualquier derecho estipulado por FMLA; y
- que se despida a, o se discrimine en contra de, alguien que se oponga a una práctica prohibida por FMLA o porque se involucre en cualquier procedimiento bajo FMLA o relacionado a FMLA.

Cumplimiento

Un empleado puede presentar una reclamación ante el Departamento de Trabajo de los Estados Unidos o puede iniciar una demanda civil particular contra el empresario.

FMLA no afecta ninguna otra ley federal o estatal que prohíba la discriminación, o invalida ninguna ley estatal o local o ninguna negociación colectiva que provea derechos familiares o médicos superiores.

La Sección 109 de FMLA (29 U.S.C. § 2619) exige que todo empresario bajo el alcance de FMLA exhiba el texto de este aviso. Los Reglamentos 29 C.F.R. § 825.300(a) pueden exigir divulgaciones adicionales.

Si precisa información adicional:

1-866-4US-WAGE (1-866-487-9243) TTY: 1-877-889-5627

WWW.WAGEHOUR.DOL.GOV

Departamento de Trabajo de los Estados Unidos | División de Horas y Salarios

WH1420SP REV 09/2013 · Revisado en Febrero 2013

Certification of Health Care Provider for Employee's Serious Health Condition (Family and Medical Leave Act)

U.S. Department of Labor
Wage and Hour Division

DO NOT SEND COMPLETED FORM TO THE DEPARTMENT OF LABOR; RETURN TO THE PATIENT

OMB Control Number: 1235-0003
Expires: 5/31/2018

SECTION I: For Completion by the EMPLOYER

INSTRUCTIONS to the EMPLOYER: The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA protections because of a need for leave due to a serious health condition to submit a medical certification issued by the employee's health care provider. Please complete Section I before giving this form to your employee. Your response is voluntary. While you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 C.F.R. §§ 825.306-825.308. Employers must generally maintain records and documents relating to medical certifications, recertifications, or medical histories of employees created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 C.F.R. § 1630.14(c)(1), if the Americans with Disabilities Act applies, and in accordance with 29 C.F.R. § 1635.9, if the Genetic Information Nondiscrimination Act applies.

Employer name and contact: _____

Employee's job title: _____ Regular work schedule: _____

Employee's essential job functions: _____

_____

Check if job description is attached:

SECTION II: For Completion by the EMPLOYEE

INSTRUCTIONS to the EMPLOYEE: Please complete Section II before giving this form to your medical provider. The FMLA permits an employer to require that you submit a timely, complete, and sufficient medical certification to support a request for FMLA leave due to your own serious health condition. If requested by your employer, your response is required to obtain or retain the benefit of FMLA protections. 29 U.S.C. §§ 2613, 2614(c)(3). Failure to provide a complete and sufficient medical certification may result in a denial of your FMLA request. 20 C.F.R. § 825.313. Your employer must give you at least 15 calendar days to return this form. 29 C.F.R. § 825.305(b).

Your name: _____
First Middle Last

SECTION III: For Completion by the HEALTH CARE PROVIDER

INSTRUCTIONS to the HEALTH CARE PROVIDER: Your patient has requested leave under the FMLA. Answer, fully and completely, all applicable parts. Several questions seek a response as to the frequency or duration of a condition, treatment, etc. Your answer should be your best estimate based upon your medical knowledge, experience, and examination of the patient. Be as specific as you can; terms such as "lifetime," "unknown," or "indeterminate" may not be sufficient to determine FMLA coverage. Limit your responses to the condition for which the employee is seeking leave. Do not provide information about genetic tests, as defined in 29 C.F.R. § 1635.3(f), genetic services, as defined in 29 C.F.R. § 1635.3(e), or the manifestation of disease or disorder in the employee's family members, 29 C.F.R. § 1635.3(b). Please be sure to sign the form on the last page.

Provider's name and business address: _____

Type of practice / Medical specialty: _____

Telephone: (_____)_____ Fax:(_____)_____

PART A: MEDICAL FACTS

1. Approximate date condition commenced: _____

   Probable duration of condition: _____

   Mark below as applicable:
   Was the patient admitted for an overnight stay in a hospital, hospice, or residential medical care facility?
   ___No ___Yes. If so, dates of admission:

   _____

   Date(s) you treated the patient for condition:

   _____

   Will the patient need to have treatment visits at least twice per year due to the condition? ___No ___ Yes.

   Was medication, other than over-the-counter medication, prescribed? ___No ___Yes.

   Was the patient referred to other health care provider(s) for evaluation or treatment (e.g., physical therapist)?
   ____No ____Yes. If so, state the nature of such treatments and expected duration of treatment:

   _____

2. Is the medical condition pregnancy? ___No ___Yes. If so, expected delivery date: _____

3. Use the information provided by the employer in Section I to answer this question. If the employer fails to provide a list of the employee's essential functions or a job description, answer these questions based upon the employee's own description of his/her job functions.

   Is the employee unable to perform any of his/her job functions due to the condition: ____ No ____ Yes.

   If so, identify the job functions the employee is unable to perform:

   _____

4. Describe other relevant medical facts, if any, related to the condition for which the employee seeks leave (such medical facts may include symptoms, diagnosis, or any regimen of continuing treatment such as the use of specialized equipment):

   _____

   _____

   _____

   _____

   _____

   _____

   _____

PART B: AMOUNT OF LEAVE NEEDED

5. Will the employee be incapacitated for a single continuous period of time due to his/her medical condition, including any time for treatment and recovery? ___No ___Yes.

   If so, estimate the beginning and ending dates for the period of incapacity: _____

6. Will the employee need to attend follow-up treatment appointments or work part-time or on a reduced schedule because of the employee's medical condition? ___No ___Yes.

   If so, are the treatments or the reduced number of hours of work medically necessary? ___No ___Yes.

   Estimate treatment schedule, if any, including the dates of any scheduled appointments and the time required for each appointment, including any recovery period:

   _____

   Estimate the part-time or reduced work schedule the employee needs, if any:

   _____ hour(s) per day; _____ days per week from _____ through _____

7. Will the condition cause episodic flare-ups periodically preventing the employee from performing his/her job functions? ____No ____Yes.

   Is it medically necessary for the employee to be absent from work during the flare-ups? ____ No ____Yes. If so, explain:

   _____

   _____

   Based upon the patient's medical history and your knowledge of the medical condition, estimate the frequency of flare-ups and the duration of related incapacity that the patient may have over the next 6 months (e.g., 1 episode every 3 months lasting 1-2 days):

Frequency : _____ times per _____ week(s) _____ month(s)

Duration: _____ hours or ___ day(s) per episode

ADDITIONAL INFORMATION: IDENTIFY QUESTION NUMBER WITH YOUR ADDITIONAL ANSWER.

_____

_____

_____

_____

_____

_____

Signature of Health Care Provider **Date**

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

If submitted, it is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 20 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Ave., NW, Washington, DC 20210. **DO NOT SEND COMPLETED FORM TO THE DEPARTMENT OF LABOR; RETURN TO THE PATIENT.**

Certification of Health Care Provider for Family Member's Serious Health Condition (Family and Medical Leave Act)

U.S. Department of Labor
Wage and Hour Division

DO NOT SEND COMPLETED FORM TO THE DEPARTMENT OF LABOR; RETURN TO THE PATIENT.

OMB Control Number: 1235-0003
Expires: 5/31/2018

SECTION I: For Completion by the EMPLOYER

INSTRUCTIONS to the EMPLOYER: The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA protections because of a need for leave to care for a covered family member with a serious health condition to submit a medical certification issued by the health care provider of the covered family member. Please complete Section I before giving this form to your employee. Your response is voluntary. While you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 C.F.R. §§ 825.306-825.308. Employers must generally maintain records and documents relating to medical certifications, recertifications, or medical histories of employees' family members, created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 C.F.R. § 1630.14(c)(1), if the Americans with Disabilities Act applies, and in accordance with 29 C.F.R. § 1635.9, if the Genetic Information Nondiscrimination Act applies.

Employer name and contact: _____

_____

SECTION II: For Completion by the EMPLOYEE

INSTRUCTIONS to the EMPLOYEE: Please complete Section II before giving this form to your family member or his/her medical provider. The FMLA permits an employer to require that you submit a timely, complete, and sufficient medical certification to support a request for FMLA leave to care for a covered family member with a serious health condition. If requested by your employer, your response is required to obtain or retain the benefit of FMLA protections. 29 U.S.C. §§ 2613, 2614(c)(3). Failure to provide a complete and sufficient medical certification may result in a denial of your FMLA request. 29 C.F.R. § 825.313. Your employer must give you at least 15 calendar days to return this form to your employer. 29 C.F.R. § 825.305.

Your name: _____
First Middle Last

Name of family member for whom you will provide care:_____
First Middle Last

Relationship of family member to you: _____

If family member is your son or daughter, date of birth:_____

Describe care you will provide to your family member and estimate leave needed to provide care:

_____

_____

_____

_____ ____ _____
Employee Signature Date

CONTINUED ON NEXT PAGE

SECTION III: For Completion by the HEALTH CARE PROVIDER

INSTRUCTIONS to the HEALTH CARE PROVIDER: The employee listed above has requested leave under the FMLA to care for your patient. Answer, fully and completely, all applicable parts below. Several questions seek a response as to the frequency or duration of a condition, treatment, etc. Your answer should be your best estimate based upon your medical knowledge, experience, and examination of the patient. Be as specific as you can; terms such as "lifetime," "unknown," or "indeterminate" may not be sufficient to determine FMLA coverage. Limit your responses to the condition for which the patient needs leave. Do not provide information about genetic tests, as defined in 29 C.F.R. § 1635.3(f), or genetic services, as defined in 29 C.F.R. § 1635.3(e). Page 3 provides space for additional information, should you need it. Please be sure to sign the form on the last page.

Provider's name and business address:_____

Type of practice / Medical specialty: _____

Telephone: (_____)_____ Fax:(_____)_____

PART A: MEDICAL FACTS

1. Approximate date condition commenced: _____

   Probable duration of condition: _____

   Was the patient admitted for an overnight stay in a hospital, hospice, or residential medical care facility?
   ___No ___Yes. If so, dates of admission: _____

   Date(s) you treated the patient for condition: _____

   Was medication, other than over-the-counter medication, prescribed? ___No ___Yes.

   Will the patient need to have treatment visits at least twice per year due to the condition? ___No ____ Yes

   Was the patient referred to other health care provider(s) for evaluation or treatment (e.g., physical therapist)?
   ____ No ____Yes. If so, state the nature of such treatments and expected duration of treatment:

   _____

   _____

2. Is the medical condition pregnancy? ___No ___Yes. If so, expected delivery date: _____

3. Describe other relevant medical facts, if any, related to the condition for which the patient needs care (such medical facts may include symptoms, diagnosis, or any regimen of continuing treatment such as the use of specialized equipment):

_____

_____

_____

_____

PART B: AMOUNT OF CARE NEEDED: When answering these questions, keep in mind that your patient's need for care by the employee seeking leave may include assistance with basic medical, hygienic, nutritional, safety or transportation needs, or the provision of physical or psychological care:

4. Will the patient be incapacitated for a single continuous period of time, including any time for treatment and recovery? ___No ___Yes.

   Estimate the beginning and ending dates for the period of incapacity: _____

   During this time, will the patient need care? __ No __ Yes.

   Explain the care needed by the patient and why such care is medically necessary:

   _____

   _____

   _____

   _____

   _____

5. Will the patient require follow-up treatments, including any time for recovery? ___No ___Yes.

   Estimate treatment schedule, if any, including the dates of any scheduled appointments and the time required for each appointment, including any recovery period:

   _____

   Explain the care needed by the patient, and why such care is medically necessary: _____

   _____

6. Will the patient require care on an intermittent or reduced schedule basis, including any time for recovery? __ No __ Yes.

   Estimate the hours the patient needs care on an intermittent basis, if any:

   _____ hour(s) per day; _____ days per week from _____ through _____

   Explain the care needed by the patient, and why such care is medically necessary:

   _____

   _____

   _____

   _____

7. Will the condition cause episodic flare-ups periodically preventing the patient from participating in normal daily activities? ____No ____Yes.

   Based upon the patient's medical history and your knowledge of the medical condition, estimate the frequency of flare-ups and the duration of related incapacity that the patient may have over the next 6 months (e.g., 1 episode every 3 months lasting 1-2 days):

   Frequency: _____ times per _____ week(s) _____ month(s)

   Duration: _____ hours or ___ day(s) per episode

   Does the patient need care during these flare-ups? ____ No ____ Yes.

   Explain the care needed by the patient, and why such care is medically necessary: _____

_____

_____

_____

_____

ADDITIONAL INFORMATION: IDENTIFY QUESTION NUMBER WITH YOUR ADDITIONAL ANSWER.

_____

_____

_____

_____

_____

_____

_____ _____

Signature of Health Care Provider **Date**

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

If submitted, it is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 20 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Ave., NW, Washington, DC 20210.
DO NOT SEND COMPLETED FORM TO THE DEPARTMENT OF LABOR; RETURN TO THE PATIENT.

Notice of Eligibility and Rights & Responsibilities (Family and Medical Leave Act)

U.S. Department of Labor
Wage and Hour Division

OMB Control Number: 1235-0003
Expires: 5/31/2018

In general, to be eligible an employee must have worked for an employer for at least 12 months, meet the hours of service requirement in the 12 months preceding the leave, and work at a site with at least 50 employees within 75 miles. While use of this form by employers is optional, a fully completed Form WH-381 provides employees with the information required by 29 C.F.R. § 825.300(b), which must be provided within five business days of the employee notifying the employer of the need for FMLA leave. Part B provides employees with information regarding their rights and responsibilities for taking FMLA leave, as required by 29 C.F.R. § 825.300(b), (c)**.**

[Part A – NOTICE OF ELIGIBILITY]

TO: _____
Employee

FROM: _____ _____
Employer Representative

DATE: _____ _____

On _____, you informed us that you needed leave beginning on _____ for:

_____ The birth of a child, or placement of a child with you for adoption or foster care;

_____ Your own serious health condition;

_____ Because you are needed to care for your ____ spouse; _____child; _____ parent due to his/her serious health condition.

_____ Because of a qualifying exigency arising out of the fact that your ____ spouse; _____son or daughter; _____ parent is on covered active duty or call to covered active duty status with the Armed Forces.

_____ Because you are the ____ spouse; _____son or daughter; _____ parent; _____ next of kin of a covered servicemember with a serious injury or illness.

This Notice is to inform you that you:

_____ Are eligible for FMLA leave (See Part B below for Rights and Responsibilities)

_____ Are **not** eligible for FMLA leave, because (only one reason need be checked, although you may not be eligible for other reasons):

_____ You have not met the FMLA's 12-month length of service requirement. As of the first date of requested leave, you will have worked approximately ___ months towards this requirement.
_____ You have not met the FMLA's hours of service requirement.
_____ You do not work and/or report to a site with 50 or more employees within 75-miles.

If you have any questions, contact _____ or view the FMLA poster located in _____.

[PART B-RIGHTS AND RESPONSIBILITIES FOR TAKING FMLA LEAVE]

As explained in Part A, you meet the eligibility requirements for taking FMLA leave and still have FMLA leave available in the applicable 12-month period. **However, in order for us to determine whether your absence qualifies as FMLA leave, you must return the following information to us by _____.** (If a certification is requested, employers must allow at least 15 calendar days from receipt of this notice; additional time may be required in some circumstances.) If sufficient information is not provided in a timely manner, your leave may be denied.

____ Sufficient certification to support your request for FMLA leave. A certification form that sets forth the information necessary to support your request ____**is/**____ **is not** enclosed.

____ Sufficient documentation to establish the required relationship between you and your family member.

____ Other information needed (such as documentation for military family leave): _____

_____

_____

____ No additional information requested

CONTINUED ON NEXT PAGE

If your leave does qualify as FMLA leave you will have the following **responsibilities** while on FMLA leave (only checked blanks apply):

____ Contact _____ at _____ to make arrangements to continue to make your share of the premium payments on your health insurance to maintain health benefits while you are on leave. You have a minimum 30-day (or, indicate longer period, if applicable) grace period in which to make premium payments. If payment is not made timely, your group health insurance may be cancelled, provided we notify you in writing at least 15 days before the date that your health coverage will lapse, or, at our option, we may pay your share of the premiums during FMLA leave, and recover these payments from you upon your return to work.

____ You will be required to use your available paid _____ **sick**, _____ **vacation**, and/or _____**other leave** during your FMLA absence. This means that you will receive your paid leave and the leave will also be considered protected FMLA leave and counted against your FMLA leave entitlement.

____ Due to your status within the company, you are considered a "key employee" as defined in the FMLA. As a "key employee," restoration to employment may be denied following FMLA leave on the grounds that such restoration will cause substantial and grievous economic injury to us. We ___**have**/____ **have not** determined that restoring you to employment at the conclusion of FMLA leave will cause substantial and grievous economic harm to us.

____ While on leave you will be required to furnish us with periodic reports of your status and intent to return to work every _____. (Indicate interval of periodic reports, as appropriate for the particular leave situation).

If the circumstances of your leave change, and you are able to return to work earlier than the date indicated on the this form, you will be required to notify us at least two workdays prior to the date you intend to report for work.

If your leave does qualify as FMLA leave you will have the following **rights** while on FMLA leave:

- You have a right under the FMLA for up to 12 weeks of unpaid leave in a 12-month period calculated as:

  _____ the calendar year (January – December).

  _____ a fixed leave year based on _____.

  _____ the 12-month period measured forward from the date of your first FMLA leave usage.

  _____ a "rolling" 12-month period measured backward from the date of any FMLA leave usage.

- You have a right under the FMLA for up to 26 weeks of unpaid leave in a single 12-month period to care for a covered servicemember with a serious injury or illness. This single 12-month period commenced on _____.
- Your health benefits must be maintained during any period of unpaid leave under the same conditions as if you continued to work.
- You must be reinstated to the same or an equivalent job with the same pay, benefits, and terms and conditions of employment on your return from FMLA-protected leave. (If your leave extends beyond the end of your FMLA entitlement, you do not have return rights under FMLA.)
- If you do not return to work following FMLA leave for a reason other than: 1) the continuation, recurrence, or onset of a serious health condition which would entitle you to FMLA leave; 2) the continuation, recurrence, or onset of a covered servicemember's serious injury or illness which would entitle you to FMLA leave; or 3) other circumstances beyond your control, you may be required to reimburse us for our share of health insurance premiums paid on your behalf during your FMLA leave.
- If we have not informed you above that you must use accrued paid leave while taking your unpaid FMLA leave entitlement, you have the right to have **____ sick, ____vacation,** and/or **___ other leave** run concurrently with your unpaid leave entitlement, provided you meet any applicable requirements of the leave policy. Applicable conditions related to the substitution of paid leave are referenced or set forth below. If you do not meet the requirements for taking paid leave, you remain entitled to take unpaid FMLA leave.

  ____For a copy of conditions applicable to sick/vacation/other leave usage please refer to _____ available at: _____.

  ____Applicable conditions for use of paid leave:_____

  _____

  _____

  _____

  _____

Once we obtain the information from you as specified above, we will inform you, within 5 business days, whether your leave will be designated as FMLA leave and count towards your FMLA leave entitlement. If you have any questions, please do not hesitate to contact:

_____at _____.

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

It is mandatory for employers to provide employees with notice of their eligibility for FMLA protection and their rights and responsibilities. 29 U.S.C. § 2617; 29 C.F.R. § 825.300(b), (c). It is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 10 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Ave., NW, Washington, DC 20210. **DO NOT SEND THE COMPLETED FORM TO THE WAGE AND HOUR DIVISION.**

Designation Notice (Family and Medical Leave Act)

U.S. Department of Labor
Wage and Hour Division

U.S. Wage and Hour Division

OMB Control Number: 1235-0003
Expires: 5/31/2018

Leave covered under the Family and Medical Leave Act (FMLA) must be designated as FMLA-protected and the employer must inform the employee of the amount of leave that will be counted against the employee's FMLA leave entitlement. In order to determine whether leave is covered under the FMLA, the employer may request that the leave be supported by a certification. If the certification is incomplete or insufficient, the employer must state in writing what additional information is necessary to make the certification complete and sufficient. While use of this form by employers is optional, a fully completed Form WH-382 provides an easy method of providing employees with the written information required by 29 C.F.R. §§ 825.300(c), 825.301, and 825.305(c).

To: _____

Date: _____

We have reviewed your request for leave under the FMLA and any supporting documentation that you have provided. We received your most recent information on _____ and decided:

_____ **Your FMLA leave request is approved. All leave taken for this reason will be designated as FMLA leave.**

The FMLA requires that you notify us as soon as practicable if dates of scheduled leave change or are extended, or were initially unknown. Based on the information you have provided to date, we are providing the following information about the amount of time that will be counted against your leave entitlement:

_____ Provided there is no deviation from your anticipated leave schedule, the following number of hours, days, or weeks will be counted against your leave entitlement: _____

_____ Because the leave you will need will be unscheduled, it is not possible to provide the hours, days, or weeks that will be counted against your FMLA entitlement at this time. You have the right to request this information once in a 30-day period (if leave was taken in the 30-day period).

Please be advised (check if applicable):

_____ You have requested to use paid leave during your FMLA leave. Any paid leave taken for this reason will count against your FMLA leave entitlement.

_____ We are requiring you to substitute or use paid leave during your FMLA leave.

_____You will be required to present a fitness-for-duty certificate to be restored to employment. If such certification is not timely received, your return to work may be delayed until certification is provided. A list of the essential functions of your position ___ **is** ___ **is not** attached. If attached, the fitness-for-duty certification must address your ability to perform these functions.

___ **Additional information is needed to determine if your FMLA leave request can be approved:**

_____ The certification you have provided is not complete and sufficient to determine whether the FMLA applies to your leave request. You must provide the following information no later than _____, unless it is not
(Provide at least seven calendar days)
practicable under the particular circumstances despite your diligent good faith efforts, or your leave may be denied.

_____
(Specify information needed to make the certification complete and sufficient)

_____

_____ We are exercising our right to have you obtain a second or third opinion medical certification at our expense, and we will provide further details at a later time.

_____ Your FMLA Leave request is Not Approved.
_____ The FMLA does not apply to your leave request.
_____ You have exhausted your FMLA leave entitlement in the applicable 12-month period.

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

It is mandatory for employers to inform employees in writing whether leave requested under the FMLA has been determined to be covered under the FMLA. 29 U.S.C. § 2617; 29 C.F.R. §§ 825.300(d), (e). It is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. § 2616; 29 C.F.R. § 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 10 – 30 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Ave., NW, Washington, DC 20210. **DO NOT SEND THE COMPLETED FORM TO THE WAGE AND HOUR DIVISION.**

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Certification of Qualifying Exigency For Military Family Leave (Family and Medical Leave Act)

U.S. Department of Labor

Wage and Hour Division

OMB Control Number: 1235-0003
Expires: 5/31/2018

SECTION I: For Completion by the EMPLOYER

INSTRUCTIONS to the EMPLOYER: The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA leave due to a qualifying exigency to submit a certification. Please complete Section I before giving this form to your employee. Your response is voluntary, and while you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 CFR 825.309.

Employer name: _____

Contact Information: _____

SECTION II: For Completion by the EMPLOYEE

INSTRUCTIONS to the EMPLOYEE: Please complete Section II fully and completely. The FMLA permits an employer to require that you submit a timely, complete, and sufficient certification to support a request for FMLA leave due to a qualifying exigency. Several questions in this section seek a response as to the frequency or duration of the qualifying exigency. Be as specific as you can; terms such as "unknown," or "indeterminate" may not be sufficient to determine FMLA coverage. Your response is required to obtain a benefit. 29 CFR 825.310. While you are not required to provide this information, failure to do so may result in a denial of your request for FMLA leave. Your employer must give you at least 15 calendar days to return this form to your employer.

Your Name: _____
First Middle Last

Name of military member on covered active duty or call to covered active duty status:

_____
First Middle Last

Relationship of military member to you: _____

Period of military member's covered active duty: _____

A complete and sufficient certification to support a request for FMLA leave due to a qualifying exigency includes written documentation confirming a military member's covered active duty or call to covered active duty status. Please check one of the following and attach the indicated document to support that the military member is on covered active duty or call to covered active duty status.

A copy of the military member's covered active duty orders is attached.

Other documentation from the military certifying that the military member is on covered active duty (or has been notified of an impending call to covered active duty) is attached.

I have previously provided my employer with sufficient written documentation confirming the military member's covered active duty or call to covered active duty status.

PART A: QUALIFYING REASON FOR LEAVE

1. Describe the reason you are requesting FMLA leave due to a qualifying exigency (including the specific reason you are requesting leave):

_____

_____

_____

_____

2. A complete and sufficient certification to support a request for FMLA leave due to a qualifying exigency includes any available written documentation which supports the need for leave; such documentation may include a copy of a meeting announcement for informational briefings sponsored by the military; a document confirming the military member's Rest and Recuperation leave; a document confirming an appointment with a third party, such as a counselor or school official, or staff at a care facility; or a copy of a bill for services for the handling of legal or financial affairs. Available written documentation supporting this request for leave is attached.

Yes ☐ No ☐ None Available ☐

PART B: AMOUNT OF LEAVE NEEDED

1. Approximate date exigency commenced: _____

Probable duration of exigency: _____

2. Will you need to be absent from work for a single continuous period of time due to the qualifying exigency?

Yes☐ No☐

If so, estimate the beginning and ending dates for the period of absence:

_____

3. Will you need to be absent from work periodically to address this qualifying exigency? Yes☐ No☐

Estimate schedule of leave, including the dates of any scheduled meetings or appointments:

_____

_____

_____

Estimate the frequency and duration of each appointment, meeting, or leave event, including any travel time (i.e., 1 deployment-related meeting every month lasting 4 hours):

Frequency: _____ times per _____ week(s) _____ month(s)

Duration: _____ hours ___ day(s) per event.

PART C:

If leave is requested to meet with a third party (such as to arrange for childcare or parental care, to attend counseling, to attend meetings with school, childcare or parental care providers, to make financial or legal arrangements, to act as the military member's representative before a federal, state, or local agency for purposes of obtaining, arranging or appealing military service benefits, or to attend any event sponsored by the military or military service organizations), a complete and sufficient certification includes the name, address, and appropriate contact information of the individual or entity with whom you are meeting (i.e., either the telephone or fax number or email address of the individual or entity). This information may be used by your employer to verify that the information contained on this form is accurate.

Name of Individual: _____ Title: _____

Organization: _____

Address: _____

Telephone: (_____) _____ Fax: (_____) _____

Email: _____

Describe nature of meeting: _____

_____

_____

_____

_____

_____

_____

_____

PART D:

I certify that the information I provided above is true and correct.

Signature of Employee _____ Date _____

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

If submitted, it is mandatory for employers to retain a copy of this disclosure in their records for three years. 29 U.S.C. 2616; 29 CFR 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 20 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution AV, NW, Washington, DC 20210. **DO NOT SEND THE COMPLETED FORM TO THE WAGE AND HOUR DIVISION; RETURN IT TO THE EMPLOYER.**

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Certification for Serious Injury or Illness of a Current Servicemember - -for Military Family Leave (Family and Medical Leave Act)

U.S. Department of Labor

Wage and Hour Division

DO NOT SEND COMPLETED FORM TO THE DEPARTMENT OF LABOR; RETURN TO THE PATIENT

OMB Control Number: 1235-0003
Expires: 5/31/2018

Notice to the EMPLOYER

INSTRUCTIONS to the EMPLOYER: The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking FMLA leave due to a serious injury or illness of a current servicemember to submit a certification providing sufficient facts to support the request for leave. Your response is voluntary. While you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 CFR 825.310. Employers must generally maintain records and documents relating to medical certifications, recertifications, or medical histories of employees or employees' family members created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 CFR 1630.14(c)(1), if the Americans with Disabilities Act applies, and in accordance with 29 CFR 1635.9, if the Genetic Information Nondiscrimination Act applies.

SECTION I: For Completion by the EMPLOYEE and/or the CURRENT SERVICEMEMBER for whom the Employee Is Requesting Leave

INSTRUCTIONS to the EMPLOYEE or CURRENT SERVICEMEMBER: Please complete Section I before having Section II completed. The FMLA permits an employer to require that an employee submit a timely, complete, and sufficient certification to support a request for FMLA leave due to a serious injury or illness of a servicemember. If requested by the employer, your response is required to obtain or retain the benefit of FMLA-protected leave. 29 U.S.C. 2613, 2614(c)(3). Failure to do so may result in a denial of an employee's FMLA request. 29 CFR 825.310(f). The employer must give an employee at least 15 calendar days to return this form to the employer.

SECTION II: For Completion by a UNITED STATES DEPARTMENT OF DEFENSE ("DOD") HEALTH CARE PROVIDER or a HEALTH CARE PROVIDER who is either: (1) a United States Department of Veterans Affairs ("VA") health care provider; (2) a DOD TRICARE network authorized private health care provider; (3) a DOD non-network TRICARE authorized private health care provider; or (4) a health care provider as defined in 29 CFR 825.125

INSTRUCTIONS to the HEALTH CARE PROVIDER: The employee listed on Page 2 has requested leave under the FMLA to care for a family member who is a current member of the Regular Armed Forces, the National Guard, or the Reserves who is undergoing medical treatment, recuperation, or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list for a serious injury or illness. For purposes of FMLA leave, a serious injury or illness is one that was incurred in the line of duty on active duty in the Armed Forces or that existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces that may render the servicemember medically unfit to perform the duties of his or her office, grade, rank, or rating.

A complete and sufficient certification to support a request for FMLA leave due to a current servicemember's serious injury or illness includes written documentation confirming that the servicemember's injury or illness was incurred in the line of duty on active duty or if not, that the current servicemember's injury or illness existed before the beginning of the servicemember's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces, and that the current servicemember is undergoing treatment for such injury or illness by a health care provider listed above. Answer, fully and completely, all applicable parts. Several questions seek a response as to the frequency or duration of a condition, treatment, etc. Your answer should be your best estimate based upon your medical knowledge, experience, and examination of the patient. Be as specific as you can; terms such as "lifetime," "unknown," or "indeterminate" may not be sufficient to determine FMLA coverage. Limit your responses to the servicemember's condition for which the employee is seeking leave. Do not provide information about genetic tests, as defined in 29 CFR 1635.3(f), or genetic services, as defined in 29 CFR 1635.3(e).

SECTION I: For Completion by the EMPLOYEE and/or the CURRENT SERVICEMEMBER for whom the Employee Is Requesting Leave:

(This section must be completed first before any of the below sections can be completed by a health care provider.)

Part A: EMPLOYEE INFORMATION

Name and Address of Employer (this is the employer of the employee requesting leave to care for the current servicemember):

_____

Name of Employee Requesting Leave to Care for the Current Servicemember:

_____

First Middle Last

Name of the Current Servicemember (for whom employee is requesting leave to care):

_____

First Middle Last

Relationship of Employee to the Current Servicemember:

Spouse☐ Parent ☐ Son ☐ Daughter ☐ Next of Kin ☐

Part B: SERVICEMEMBER INFORMATION

(1) Is the Servicemember a Current Member of the Regular Armed Forces, the National Guard or Reserves?
Yes☐ No☐

If yes, please provide the servicemember's military branch, rank and unit currently assigned to:

_____

Is the servicemember assigned to a military medical treatment facility as an outpatient or to a unit established for the purpose of providing command and control of members of the Armed Forces receiving medical care as outpatients (such as a medical hold or warrior transition unit)?
Yes☐ No☐

If yes, please provide the name of the medical treatment facility or unit:

_____

(2) Is the Servicemember on the Temporary Disability Retired List (TDRL)?
Yes☐ No☐

Part C: CARE TO BE PROVIDED TO THE SERVICEMEMBER

Describe the Care to Be Provided to the Current Servicemember and an Estimate of the Leave Needed to Provide the Care:

_____

_____

SECTION II: For Completion by a United States Department of Defense ("DOD") Health Care Provider or a Health Care Provider who is either: (1) a United States Department of Veterans Affairs ("VA") health care provider; (2) a DOD TRICARE network authorized private health care provider; (3) a DOD non-network TRICARE authorized private health care provider; or (4) a health care provider as defined in 29 CFR 825.125. If you are unable to make certain of the military-related determinations contained below in Part B, you are permitted to rely upon determinations from an authorized DOD representative (such as a DOD recovery care coordinator).

(Please ensure that Section I above has been completed before completing this section. Please be sure to sign the form on the last page.)

Part A: HEALTH CARE PROVIDER INFORMATION

Health Care Provider's Name and Business Address:

_____

Type of Practice/Medical Specialty: _____

Please state whether you are either: (1) a DOD health care provider; (2) a VA health care provider; (3) a DOD TRICARE network authorized private health care provider; (4) a DOD non-network TRICARE authorized private health care provider, or (5) a health care provider as defined in 29 CFR 825.125:

_____

Telephone: ( ) _____ Fax: ( ) _____ Email: _____

PART B: MEDICAL STATUS

(1) The current Servicemember's medical condition is classified as (Check One of the Appropriate Boxes):

☐ **(VSI) Very Seriously Ill/Injured** – Illness/Injury is of such a severity that life is imminently endangered. Family members are requested at bedside immediately. (Please note this is an internal DOD casualty assistance designation used by DOD healthcare providers.)

☐ **(SI) Seriously Ill/Injured** – Illness/injury is of such severity that there is cause for immediate concern, but there is no imminent danger to life. Family members are requested at bedside. (Please note this is an internal DOD casualty assistance designation used by DOD healthcare providers.)

☐ **OTHER Ill/Injured** – a serious injury or illness that may render the servicemember medically unfit to perform the duties of the member's office, grade, rank, or rating.

☐ **NONE OF THE ABOVE** (Note to Employee: If this box is checked, you may still be eligible to take leave to care for a covered family member with a "serious health condition" under § 825.113 of the FMLA. If such leave is requested, you may be required to complete DOL FORM WH-380-F or an employer-provided form seeking the same information.)

(2) Is the current Servicemember being treated for a condition which was incurred or aggravated by service in the line of duty on active duty in the Armed Forces? Yes☐ No☐

(3) Approximate date condition commenced: _____

(4) Probable duration of condition and/or need for care: _____

(5) Is the servicemember undergoing medical treatment, recuperation, or therapy for this condition? Yes☐ No☐

If yes, please describe medical treatment, recuperation or therapy:

_____

PART C: SERVICEMEMBER'S NEED FOR CARE BY FAMILY MEMBER

(1) Will the servicemember need care for a single continuous period of time, including any time for treatment and recovery? Yes☐ No☐

If yes, estimate the beginning and ending dates for this period of time: _____

(2) Will the servicemember require periodic follow-up treatment appointments? Yes☐ No☐

If yes, estimate the treatment schedule: _____

(3) Is there a medical necessity for the servicemember to have periodic care for these follow-up treatment appointments? Yes☐ No☐

(4) Is there a medical necessity for the servicemember to have periodic care for other than scheduled follow-up treatment appointments (e.g., episodic flare-ups of medical condition)?
Yes☐ No☐

If yes, please estimate the frequency and duration of the periodic care:

_____

_____

Signature of Health Care Provider: _____ Date: _____

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

If submitted, it is mandatory for employers to retain a copy of this disclosure in their records for three years, in accordance with 29 U.S.C. 2616; 29 CFR 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 20 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution AV, NW, Washington, DC 20210. **DO NOT SEND THE COMPLETED FORM TO THE WAGE AND HOUR DIVISION; RETURN IT TO THE PATIENT.**

Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave (Family and Medical Leave Act)

U.S. Department of Labor

Wage and Hour Division

DO NOT SEND COMPLETED FORM TO THE DEPARTMENT OF LABOR; RETURN TO THE EMPLOYEE

OMB Control Number: 1235-0003
Expires: 5/31/2018

Notice to the EMPLOYER

The Family and Medical Leave Act (FMLA) provides that an employer may require an employee seeking military caregiver leave under the FMLA leave due to a serious injury or illness of a covered veteran to submit a certification providing sufficient facts to support the request for leave. Your response is voluntary. While you are not required to use this form, you may not ask the employee to provide more information than allowed under the FMLA regulations, 29 CFR 825.310. Employers must generally maintain records and documents relating to medical certifications, recertifications, or medical histories of employees or employees' family members, created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 CFR 1630.14(c)(1), if the Americans with Disabilities Act applies, and in accordance with 29 CFR 1635.9, if the Genetic Information Nondiscrimination Act applies.

SECTION I: For completion by the EMPLOYEE and/or the VETERAN for whom the employee is requesting leave

INSTRUCTIONS to the EMPLOYEE and/or VETERAN: Please complete Section I before having Section II completed. The FMLA permits an employer to require that an employee submit a timely, complete, and sufficient certification to support a request for military caregiver leave under the FMLA leave due to a serious injury or illness of a covered veteran. If requested by the employer, your response is required to obtain or retain the benefit of FMLA-protected leave. 29 U.S.C. 2613, 2614(c)(3). Failure to do so may result in a denial of an employee's FMLA request. 29 CFR 825.310(f). The employer must give an employee at least 15 calendar days to return this form to the employer.

(This section must be completed before Section II can be completed by a health care provider.)

Part A: EMPLOYEE INFORMATION

Name and address of employer (this is the employer of the employee requesting leave to care for a veteran):

_____

Name of employee requesting leave to care for a veteran:

_____
First Middle Last

Name of veteran (for whom employee is requesting leave):

_____
First Middle Last

Relationship of employee to veteran:

Spouse☐ Parent☐ Son☐ Daughter☐ Next of Kin ☐ (please specify relationship):

Part B: VETERAN INFORMATION

(1) Date of the veteran's discharge:

_____

(2) Was the veteran **dishonorably** discharged or released from the Armed Forces (including the National Guard or Reserves)? Yes☐ No☐

(3) Please provide the veteran's military branch, rank and unit at the time of discharge:

_____

(4) Is the veteran receiving medical treatment, recuperation, or therapy for an injury or illness?
Yes☐ No☐

Part C: CARE TO BE PROVIDED TO THE VETERAN

Describe the care to be provided to the veteran and an estimate of the leave needed to provide the care:

_____

_____

SECTION II: For completion by: (1) a United States Department of Defense ("DOD") health care provider; (2) a United States Department of Veterans Affairs ("VA") health care provider; (3) a DOD TRICARE network authorized private health care provider; (4) a DOD non-network TRICARE authorized private health care provider; or (5) a health care provider as defined in 29 CFR 825.125.

INSTRUCTIONS to the HEALTH CARE PROVIDER: The employee named in Section I has requested leave under the military caregiver leave provision of the FMLA to care for a family member who is a veteran. For purposes of FMLA military caregiver leave, a serious injury or illness means an injury or illness incurred by the servicemember in the line of duty on active duty in the Armed Forces (or that existed before the beginning of the servicemember's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces) and manifested itself before or after the servicemember became a veteran, and is:

(i) a continuation of a serious injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed Forces and rendered the servicemember unable to perform the duties of the servicemember's office, grade, rank, or rating; or
(ii) a physical or mental condition for which the covered veteran has received a U.S. Department of Veterans Affairs Service Related Disability Rating (VASRD) of 50 percent or greater, and such VASRD rating is based, in whole or in part, on the condition precipitating the need for military caregiver leave; or
(iii) a physical or mental condition that substantially impairs the covered veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service, or would do so absent treatment; or
(iv) an injury, including a psychological injury, on the basis of which the covered veteran has been enrolled in the Department of Veterans' Affairs Program of Comprehensive Assistance for Family Caregivers.

A complete and sufficient certification to support a request for FMLA military caregiver leave due to a covered veteran's serious injury or illness includes written documentation confirming that the veteran's injury or illness was incurred in the line of duty on active duty or existed before the beginning of the veteran's active duty and was aggravated by service in the line of duty on active duty, and that the veteran is undergoing treatment, recuperation, or therapy for such injury or illness by a health care provider listed above. Answer fully and completely all applicable parts. Several questions seek a response as to the frequency or duration of a condition, treatment, etc. Your answer should be your best estimate based upon your medical knowledge, experience, and examination of the patient. Be as specific as you can; terms such as "lifetime," "unknown," or "indeterminate" may not be sufficient to determine FMLA military caregiver leave coverage. Limit your responses to the veteran's condition for which the employee is seeking leave. Do not provide information about genetic tests, as defined in 29 CFR 1635.3(f), or genetic services, as defined in 29 CFR 1635.3(e).

(Please ensure that Section I has been completed before completing this section. Please be sure to sign the form on the last page and return this form to the employee requesting leave (See Section I, Part A above). **DO NOT SEND THE COMPLETED FORM TO THE WAGE AND HOUR DIVISION.**)

Part A: HEALTH CARE PROVIDER INFORMATION

Health care provider's name and business address:

_____

Telephone: ( ) _____ Fax: ( ) _____ Email: _____

Type of Practice/Medical Specialty: _____

Please indicate if you are:

☐ a DOD health care provider

☐ a VA health care provider

☐ a DOD TRICARE network authorized private health care provider

☐ a DOD non-network TRICARE authorized private health care provider

☐ other health care provider

PART B: MEDICAL STATUS

Note: If you are unable to make certain of the military-related determinations contained in Part B, you are permitted to rely upon determinations from an authorized DOD representative (such as, DOD Recovery Care Coordinator) or an authorized VA representative.

(1) The Veteran's medical condition is:

☐ A continuation of a serious injury or illness that was incurred or aggravated when the covered veteran was a member of the Armed Forces and rendered the servicemember unable to perform the duties of the servicemember's office, grade, rank, or rating.

☐ A physical or mental condition for which the covered veteran has received a U.S. Department of Veterans Affairs Service Related Disability Rating (VASRD) of 50% or higher, and such VASRD rating is based, in whole or in part, on the condition precipitating the need for military caregiver leave.

☐ A physical or mental condition that substantially impairs the covered veteran's ability to secure or follow a substantially gainful occupation by reason of a disability or disabilities related to military service, or would do so absent treatment.

☐ An injury, including a psychological injury, on the basis of which the covered veteran is enrolled in the Department of Veterans' Affairs Program of Comprehensive Assistance for Family Caregivers.

☐ None of the above.

(2) Is the veteran being treated for a condition which was incurred or aggravated by service in the line of duty on active duty in the Armed Forces? Yes☐ No☐

(3) Approximate date condition commenced: _____

(4) Probable duration of condition and/or need for care: _____

(5) Is the veteran undergoing medical treatment, recuperation, or therapy for this condition? Yes☐ No☐

If yes, please describe medical treatment, recuperation or therapy:

_____

PART C: VETERAN'S NEED FOR CARE BY FAMILY MEMBER

"Need for care" encompasses both physical and psychological care. It includes situations where, for example, due to his or her serious injury or illness, the veteran is unable to care for his or her own basic medical, hygienic, or nutritional needs or safety, or is unable to transport him or herself to the doctor. It also includes providing psychological comfort and reassurance which would be beneficial to the veteran who is receiving inpatient or home care.

(1) Will the veteran need care for a single continuous period of time, including any time for treatment and recovery? Yes☐ No☐

If yes, estimate the beginning and ending dates for this period of time: _____

(2) Will the veteran require periodic follow-up treatment appointments? Yes☐ No☐

If yes, estimate the treatment schedule: _____

(3) Is there a medical necessity for the veteran to have periodic care for these follow-up treatment appointments?
Yes☐ No☐

(4) Is there a medical necessity for the veteran to have periodic care for other than scheduled follow-up treatment appointments (e.g., episodic flare-ups of medical condition)? Yes☐ No☐

If yes, please estimate the frequency and duration of the periodic care:

_____

_____

Signature of Health Care Provider: _____ Date: _____

PAPERWORK REDUCTION ACT NOTICE AND PUBLIC BURDEN STATEMENT

If submitted, it is mandatory for employers to retain a copy of this disclosure in their records for three years, in accordance with 29 U.S.C. 2616; 29 CFR 825.500. Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. The Department of Labor estimates that it will take an average of 20 minutes for respondents to complete this collection of information, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. If you have any comments regarding this burden estimate or any other aspect of this collection information, including suggestions for reducing this burden, send them to the Administrator, Wage and Hour Division, U.S. Department of Labor, Room S-3502, 200 Constitution Ave., NW, Washington, DC 20210. **DO NOT SEND THE COMPLETED FORM TO THE WAGE AND HOUR DIVISION; RETURN IT TO THE EMPLOYEE REQUESTING LEAVE (As shown in Section I, Part "A" above).**

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New Jersey Safe Act Leave

The Department of Labor and Workforce Development has issued the required poster but no regulatory or recordkeeping guidance on the implementation of this law. For more information regarding "best practice" please call EANJ.

The NJ Security and Financial Empowerment Act – NJ SAFE Act - provides for 20 unpaid days of job protected leave to an eligible employee who is a victim of domestic violence or sexual assault or whose family member is a victim.

Employer Coverage

The Act applies to every employer who employs or employed 25 or more employees for each working day in 20 or more workweeks in the current or preceding calendar year. Government entities are covered by the law regardless of size.

Eligible Employees

To be eligible for leave an employee must have been employed by the same employer for at least 12 months and must have worked at least 1,000 base hours during the immediate preceding 12-month period.*

Reasons for NJ SAFE leave

If the employee or their family member is a victim of domestic violence or a sexually violent offense, an eligible employee must be granted a leave of absence for the following reasons as they relate to that incident for either the employee or their family member:

(1) seeking medical attention for, or recovering from, physical or psychological injuries;
(2) obtaining services from a victim services organization;
(3) obtaining psychological or other counseling;
(4) participating in safety planning, temporarily or permanently relocating, or taking other actions to increase safety
(5) seeking legal assistance or remedies to ensure health and safety;
(6) attending, participating in, or preparing for a criminal or civil court proceeding relating to an incident of domestic or sexual violence

Definitions

"Incident of domestic violence": includes the act of homicide, assault, terroristic threats, kidnapping, criminal restraint, false imprisonment, sexual assault, criminal sexual contact, lewdness, criminal mischief, burglary, criminal trespass, harassment, or stalking.

"Victim of domestic violence" is:

- any person who is 18 or older (or who is an emancipated minor) and who has been subjected to domestic violence by a spouse, former spouse, or any other person who is a present or former household member.
- any person, regardless of age, who has been subjected to domestic violence by a person with whom the victim has a child in common or whom the victim anticipates having a child in common
- any person subjected to domestic violence by a person with whom the victim has a dating relationship.

"Sexually violent offence": in general includes sexual assault, aggravated sexual assault, aggravated criminal sexual contact and any offense for which a court makes a specific finding that the offense should be considered a sexually violent offense.

"Family member": a child, parent, spouse, domestic partner or civil union partner

*If an employee is laid-off because the employer curtailed operations due to a state of emergency (e.g. Hurricane Sandy) up to 90 days of such layoff is considered as time worked for purpose of the one year and hours requirement for eligibility.

Amount/Forms of Leave

An employee shall be entitled to unpaid leave of up to 20 days in one 12-month period, which begins following any incident of domestic violence or sexually violent offense. Each separate incident will constitute a separate offense for which the employee is entitled to unpaid leave; however, although each incident allows for 20 days, the aggregate amount of all time taken for such leaves may not exceed 20 days in any 12-month period.

The unpaid leave may be taken intermittently in intervals of no less than one day at the employee's option.

Application of Other Accrued Paid Leave

Payment of salary is not required for any part of the leave of absence. An employer may require or an employee may request to utilize vacation or other accrued paid leave as part of an unpaid NJ SAFE Act leave, which will run concurrently with, and not extend, the leave.

Employer Notice to Employees

An employer must display notice of the employees' rights and responsibilities under this Act and use other appropriate means to keep its employees informed. The poster is supplied by the Department of Labor and Workforce Development

There is currently no provision requiring the employer to inform an employee that a requested leave has been designated as NJSAFE leave. (However, it would be prudent to notify the employee of their status.)

Employee Notice to Employer

When the need for the leave is foreseeable, the employee shall provide the employer with written notice of the need for the leave as far in advance as is reasonable and practical under the circumstances.

Supporting Documentation

An employer may require that any period of a NJSAFE leave be supported by certification of the domestic violence or sexually violent offense which is the basis for the leave.
Sufficient documentation provided by the employee may include one or more of the following:

(1) a domestic violence restraining order or other documentation of equitable relief issued by a court;
(2) a letter from the county or municipal prosecutor documenting the offense;
(3) documentation of the conviction of a person for the offense;
(4) medical documentation of the domestic or sexual violence;
(5) certification from a certified Domestic Violence Specialist or Rape Crisis Center director;
(6) other documentation provided by a social worker, member of the clergy, shelter worker, or other professional who has assisted the victim.

All documentation and other information regarding the leave provided to the employer must be kept strictly confidential, unless the disclosure is voluntarily authorized in writing by the employee or is otherwise required by law.

Prohibited Acts

An employer many not discharge, harass or otherwise discriminate or retaliate with respect to compensation, terms, conditions or privileges of employment on the basis that the employee took or requested leave to which they were entitled or on the basis that the employee refused to authorize the release of information deemed confidential.

Record Keeping Requirements

No record-keeping requirements are specified.

Penalties

An employee or former employee may bring a civil action in Superior Court within one year of a violation. In addition to remedies available under common law tort actions, the court may order other relief such as civil fines of $1,000 to $5,000 for each violation, reinstatement, compensation for any lost wages and benefits and payment of costs and attorney's fees

Coordination with Other Laws

If an employee requests a leave covered by this Act and the Federal Family and Medical Leave Act (FMLA) or the New Jersey Family Leave Act (FLA), the time will count simultaneously against the employee's entitlement under each such law. Rights and obligations under each law will still apply.

Benefits During Leave

There is no requirement to continue group health insurance during a leave. Any benefits accrued prior to the leave, such as earned vacation, should not be reduced because the employee takes a leave.

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Notification of Plant Closing or Layoff

Worker Adjustment and Retraining Notification Act (WARN)

This federal statute requires, generally, that employers give 60 days' advance notice to employees before implementing a layoff, or closing all or part of a facility, affecting a substantial number of employees. In addition to the federal WARN Act, employers in New Jersey must comply with the state WARN Act which provides 60 days notice prior to any mass layoff or termination.

Covered Employers

Federal

The statute applies to any "business enterprise" that employs, in all of its locations, either (a) 100 or more employees of all categories except part-time employees, or (b) 100 or more employees of all categories, including part-time employees, who worked an aggregate of at least 4,000 hours per week, exclusive of overtime hours -- i.e., hours in excess of 40 per week.

1. As a general rule, separately incorporated or organized subsidiaries of a parent company will be treated as separate business enterprises for the purpose of determining coverage of the Act. However, this will depend upon the degree of their independence from the parent. Some of the factors to be considered in making this determination are common ownership, common directors and/or officers, de facto exercise of control, uniformity of personnel policies emanating from a common source, centralized control of labor relations, and integration of operations.

2. Ordinarily, the employee count is made as of the date that notice would first be required, and the 4,000-hour calculation is made for the week preceding that date. If the employment level at that time is clearly unrepresentative of the ordinary or average employment level, then a more representative number can be used to determine coverage. A more representative number may be an average number of employees over a recent period of time or the number of employees on an alternative date which is more representative of normal employment levels.

3. Individuals on layoff or on leave of absence should be included in the employee count for coverage purposes only if they have "a reasonable expectation of recall" or return to work. An individual has a reasonable expectation when he understands "through notification or through industry practice" that his employment has been interrupted only temporarily and that he will be recalled or will return to the same or to a similar job.

4. Although foreign sites of employment are not subject to the statute, U.S. workers at such sites are counted in determining coverage of an employer.

State

The statute applies to any employer that employs 100 full-time employees. The law does not state whether or not employees outside of New Jersey count toward the 100-employee test for coverage, although it is safe to assume that all employees, in and outside of New Jersey, should be counted. “Part-time” employees are not counted. Part time employees are employees who are employed for an average of fewer than 20 hours per week or who have been employed for fewer than six of the 12 months preceding the date on which the notice is required.

Circumstances Requiring Notification

Federal

Except as hereafter stated, all covered employers shall give notice 60 calendar days prior to either of the following events:

1. A plant closing: the permanent or temporary shutdown of a "single site of employment," or one or more facilities or distinct operating units within a single site, which results in an "employment loss" at the single site for 50 or more employees* during any 30-day period (or, in some cases, during any 90-day period).

A cessation of production or of the work performed by an operating unit is a "shutdown" even if a few employees remain.

2. A layoff (reduction in force) which is not the result of a plant closing, and which during any 30-day period (or, in some cases, during any 90-day period) causes an "employment loss" at a single site of employment (a) for 50 or more employees* if they comprise 33% or more of the total number of active employees*, or (b) for 500 or more employees.*

A plant closing may be accomplished in phases, and if successive layoffs are in furtherance of a closing, the 33% requirement would be inapplicable.

(Note that the 60-day notice requirement is triggered only if the specified number of employees (50 or 500) suffer "employment loss" (as defined); also, where notice is required, only the particular employees who suffer employment loss are entitled to receive it.)

The employees who may suffer employment loss are not only incumbents in positions that are to be eliminated - i.e., those who are immediately and directly affected -- but also, if they can reasonably be identified at the beginning of the 60-day period, other employees at the same site of employment who will likely suffer an employment loss including those who will be "bumped" from their jobs. Such employees are counted in determining whether the 50-employee (or 500-employee) "threshold" has been reached (and they are entitled to receive the 60-day notice).

The same applies where a facility or operating unit within an employment site is shut down: other similarly affected employees at the same site are counted and are entitled to receive notice if they are identifiable.

However, if as a result of a plant closing or layoff at or within a particular site employees at a different site suffer employment loss, they are not counted in determining whether the threshold amount has been reached (although they are entitled to receive notice if they are identifiable.)

If a sale of all or part of a business affects the specified number of employees, the seller is responsible for providing notice of any layoffs which take place up to and including the effective date of the sale and the buyer is responsible for providing notice of layoffs that take place thereafter. Employees hired by the buyer do not suffer an "employment loss."

State

Covered employers shall give not less than 60-days notice (or the period of time required under the federal WARN Act) under the following circumstances:

1. A mass layoff: a reduction in force which is not the result of a transfer or termination of operations and which results in the termination of employment at an establishment during any 30-day period (or in some cases 90 days) of 500 or more full-time employees, or 50 or more of the full-time employees representing one-third or more of the full-time employees at the establishment.

2. The termination of 50 or more employees as the result of a transfer or termination of operations.

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* Exclusive of part-time employees, as defined.

Explanation of Terms

Federal

1. Part-time employee: one who works an average of fewer than 20 hours per week, or who has been employed for fewer than 6 of the 12 months preceding the date on which the notice is required. (Note that this definition may exclude newly hired employees.) The period during which the average is calculated is 90 days before the anticipated notice date, or the time actually worked, whichever is shorter.

2. Employment loss: a layoff exceeding 6 months, or a reduction of 50% or more in base hours of work during each month of any 6-month period, or an involuntary termination of employment other than "for cause" (not defined).

a. Employees who are laid off but recalled to work within 6 months have not suffered an "employment loss."

b. Generally, an employee who is laid off from one position but then transferred to another position has not suffered an employment loss.

c. In the case of relocation or consolidation of all or part of the employer's business, an employee will not be deemed to suffer an employment loss if on or before the closing or layoff the employer offers him a transfer, with no more than a 6-month break in employment, either to a different site of employment within a reasonable commuting distance and time, or to any site of employment and the employee accepts within 30 days of the layoff or closing, or within 30 days of the offer, whichever is later.

> A "relocation or consolidation" of part or all of an employer's business means that some definable business, whether customer orders, product lines, or operations, is removed to a different site of employment and that removal results in a plant closing or layoff.

d. Where a termination or layoff is involved, an employment loss does not occur to an employee who is reassigned or transferred to an employer-sponsored program, such as retraining or job search activities, as long as the reassignment does not constitute a constructive discharge or other involuntary termination.

e. A layoff which has commenced and which at its outset was announced to be for 6 months or less, but which in fact exceeds 6 months in duration, will not be deemed an employment loss if the extension beyond 6 months "is caused by business circumstances (including unforeseeable changes in price or cost) not reasonably foreseeable" at the commencement of the layoff, and notice is given at the time it becomes reasonably foreseeable that an extension beyond 6 months will be required. (If the extension is for any other reason, the layoff shall be considered an employment loss from the date of its commencement.)

3. Single Site of Employment

a. A "single site of employment" can be either a single building or a group of buildings.

Two buildings which are not in the same geographical area constitute separate "single sites".

If they are in the same geographical area but not in close proximity to each other, they will constitute one single site if they are used for the same operational purposes, share the same equipment, and share the same staff by interchange of personnel. But if they are used for different purposes or do not share staff, each will be regarded as a separate single site.

If two buildings are in close proximity to each other, but have separate management at the plant level, different purposes or products and separate workforces, each will constitute a separate single site.

b. For workers whose primary duties require travel from point to point, who are outstationed, or whose primary duties involve work outside any of the employer's regular employment sites, (e.g., salesman),

the single site of employment to which they are assigned as their home base, from which their work is assigned, or to which they report will be the single site in which they are covered for WARN purposes.

4. "Facility" refers to a building within a single site which has more than one building, and the term "operating unit" is defined as an "organizationally or operationally distinct product, operation or specific work function within or across facilities at the single site".

State

The “transfer of operations” means the permanent or temporary transfer of a single establishment, or one or more facilities or operating units within a single establishment, to another location, inside or outside the state.

The “termination of operations” means the permanent or temporary shutdown of a single establishment, or one or more facilities or operating units within a single establishment, but not because of flood, fire, national disaster or emergency.

“Facility” means a building.

“Operating Unit” means an organizationally distinct product, operation, or specific work function within or across facilities at a single establishment.

“Establishment” may mean a single location or a group of contiguous locations, including groups of facilities, which form an office or industrial park, or separate facilities just across the street from each other.

“Termination of employment” means a layoff of an employee without a commitment to reinstate the employee to his previous employment within six months of the layoff. It does not include voluntary departures, retirements, or discharges or suspensions for misconduct.

A layoff of more than six months which, at its outset, was announced to be a layoff of six months or less, is not a “termination of employment” if the extension beyond the six months was caused by business circumstances not reasonably foreseeable at the time of the initial layoff; provided that notice is given at the time it becomes reasonably foreseeable that the extension beyond six months is required.

A “termination of employment” does not mean the layoff of any seasonal employee or if the employer offers to an employee, at a location within New Jersey and not more than 50 miles away from the previous place of employment. The same or equivalent job, with the same pay, benefits and conditions of employment.

Application of the Time Periods

Federal

The statute requires that the 60-day advance notification be given if the specified number (50 or 500) of employment losses occurs in a 30-day period. However, the statute also provides that if at a single site there are employment losses among 2 or more "groups," each of which involves fewer than the specified minimum number and percent of employees, the number of losses in all groups shall be aggregated within a 90-day period, rather than a 30-day period, unless the employer demonstrates that the employment losses were "the result of separate and distinct actions" and not an attempt to evade the statutory requirements. But if there are 2 or more layoffs and any one of them results in employment losses in excess of the specified number and percent, the 30-day period would be used.

Example: at an employment site where 300 workers are employed the following layoffs occurred, not resulting from "separate actions":

On 5/2: 20 employees

On 5/23: 60 employees

On 6/1: 10 employees

On 7/20: 60 employees (20 of whom were recalled within 6 months)

The layoffs on 5/2 and 6/1 each involved fewer than 50 employees. The 60 employees laid off on 5/23 did not represent 33% of the 300-man workforce. The number of employees who suffered employment loss on 7/20 is reduced to 40 because the layoff of 20 of the 60 was for less than 6 months.

Because on each of the 4 dates there was an employment loss on the part of fewer than 50 employees, representing 33% of the workforce, a 90-day period rather than a 30-day period is the appropriate one to use to measure the aggregate number of such losses. Since the aggregate number of losses (130) exceeds the specified minimum (50 employees and 33% of the workforce), the 60-day advance notification must be given with respect to each of the 4 groups of employees. So, the first notice must be given 60 days before 5/2.

State

Same as federal WARN Act.

Exceptions and Modifications to Requirement of Notice

Federal

1. After a required notification has been given, and before a closing or layoff has been implemented, if the event is postponed beyond the announced date, the employer must issue an additional written communication to all of the persons who were entitled to receive the original notification.

a. If the postponement is for less than 60 days, this communication should be given as soon as possible to such persons (it need not be given 60 days in advance of the new layoff or closing date) and should include reference to the earlier notice, the date (or 14-day period) to which the planned action is postponed, and the reasons for the postponement.

b. If the postponement is for 60 days or more, the additional notice should be treated as new notice subject to all of the statutory provisions on the subject of "employment loss", calculation of the number of affected employees, content of the notification, etc.

Rolling notice, in the sense of routine repeated notices, given whether or not a plant closing or layoff is impending and with the intent to evade the purpose of the Act, rather than specific notice as required by WARN, is not acceptable.

2. The statute allows a shortened period of notice in any of the following circumstances:

a. A shutdown (but not a layoff) at a single site of employment if, as of the time that notice would otherwise have been required, the employer was "actively seeking capital or business" which, if obtained, would have enabled the employer to avoid or postpone the shutdown.

That is, the employer must have been seeking financing or refinancing through the arrangement of loans, the issuance of stocks, bonds, or other methods of internally generated financing or the employer must have been seeking additional money, credit, or business through any other commercially reasonable method. The employer must be able to identify specific actions taken to obtain capital or business.

Attempting to sell the business is not "actively seeking capital".

There must have been a realistic opportunity to obtain the financing or business sought.

The financing or business sought must have been sufficient, if obtained, to have enabled the employer to avoid or postpone the shutdown. The employer must be able to objectively demonstrate that the amount of capital or the volume of new business sought would have enabled him to keep the facility, operating unit, or site open for a reasonable period of time.

The employer must be able to objectively demonstrate that he reasonably and in good faith believed that a potential customer or source of financing would have been unwilling to provide the new business or capital if notice were given; that is, if the employees, customers or the public were made aware that the facility, operating unit, or site might have to close. This condition may be satisfied if the employer

can show that the financing or business source would not choose to do business with a troubled company or with a company whose workforce would be looking for other jobs.
The actions of an employer relying on this exception will be viewed in a company-wide context. Thus, a company with access to capital markets or with cash reserves may not avail itself of this exception by looking solely at the financial condition of the facility, operating unit, or site to be closed.

b. A plant closing or layoff caused by "business circumstances that were not reasonably foreseeable as of the time that notice would have been required". An "indicator" of such a circumstance is some sudden and unexpected action or condition outside the employer's control, such as the termination of a major contract, a strike at a major supplier, an unanticipated major economic downturn, etc.

c. A closing or layoff which is directly due to any form of natural disaster, such as flood, earthquake, drought, storm, etc.

In these 3 situations, the employer "shall give as much notice as is practicable", and at that time shall give a brief statement of the basis for reducing or dispensing with the notification period otherwise required.

State

In cases of natural disaster, flood, fire, national emergency, ect. notice should be given as soon as practicable.

Recipients of Notification

Federal

The notification shall be given, in writing, to the following:

1. Except as noted, to all employees who will experience an employment loss (as defined), wherever located - i.e., at all sites of employment, except foreign sites. This includes those who will be bumped from their jobs, provided they can be reasonably identified at the beginning of the 60-day period.

a. Part-time employees are entitled to receive notice.

b. Temporary employees are entitled to receive notice unless the closing is of a temporary facility or the closing or layoff is the result of the completion of a particular project or undertaking, and the affected employees were hired with the understanding that their employment was limited to the duration of the facility or the project or undertaking.

c. Laid off employees who have "reasonable expectation" of being recalled must also be notified.

d. Notice need not be given in the case of a strike, the replacement of an economic striker, or a lockout.

This exception is limited to those employees who are directly involved in the labor dispute and is not applicable to non-striking employees at the site of the labor dispute who experience an employment loss. Similarly, employees at plants which have not been struck but where plant closings or layoffs occur as a direct result of the strike are not exempt from notification. However, in either situation one of the exceptions in 2 (a) or (b), previous page, may apply.

2. If any of the foregoing categories of employees are members of a bargaining unit, in lieu of notifying them individually the notice shall be given to the highest elected official of the bargaining unit representative. If an employer has both union and non-union employees who will be "affected" notification must be given to or for both categories. If both a local and a national union are parties to the collective bargaining agreement, the officers of both should be notified.

3. The state dislocated worker unit. In New Jersey: Coordinator, Department of Labor Response Team, State Dislocated Worker Unit, Labor Building, 7th floor, CN 058, Trenton, NJ 08625-0058. FAX (609) 777-3202.

4.The chief elected official of the unit of local government within which the closing or layoff will occur. If there

is more than one such unit, the person to be notified is the official of the unit to which the employer paid the highest taxes for the preceding year.

The notification must be received by all recipients 60 days in advance. Mailing of the notification by first-class mail to an employee's last known address, including it with the paycheck, or hand delivery are acceptable methods of notification to employees.

State

Same as federal WARN Act, except part-time employees are excluded. Notice must be given to every employee before the first termination of employment occurs.

Content of Notification

Federal

The notifications shall contain the following information.

1. To the bargaining unit officer:

    a. Name and address of the employment site where the closing or layoff will occur.

    b. Whether the planned action is expected to be temporary or permanent, and if the entire plant is to be closed, a statement to that effect.

    c. The expected date* of the first separation and the anticipated schedule for making later separations. (A subsequent notification may be required if the employer has insufficient information when the first notification is given.)

    d. The titles of positions to be affected and the names of the workers currently in such positions.

    e. The name and telephone number of a company official to contact for further information.

2. To each affected employee who is not represented by a union:

    a. The expected date* when the closing or layoff will commence and the expected date* when the individual employer will be separated.

    b. An "indication" whether or not bumping rights exist.

    c. The information specified in 1(b) and 1(e), above.

3. To the state and local government units:

    a. The titles of positions to be affected and the number of affected employees in each such position.

    b. The name of each union representing affected employees and the name and address of the chief elected officer of each such union.

    c. The information specified above in 1(a), 1(b), 1(c), 1(e), and 2(b).

    As an alternative, the state and local government units may be provided with a written notice stating the name and address of the employment site, the expected date of the first separation, the number of affected employees, and the name and telephone number of the company official. The other information listed must be maintained on-site and readily accessible.

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*As used in this section, the term "date" refers to a specific date or to a 14-day period during which a separation or separations are expected to occur. If separations are planned according to a schedule, the schedule should indicate the specific dates on which or the beginning date of each 14-day period during which any separations are expected to occur. Where a 14-day period is used, notice must be given at least 60 days in advance of the first day of the period.

Notice may be given conditional upon the occurrence or nonoccurrence of an event, such as the renewal of a major contract, only when the event is definite and the consequences of its occurrence or nonoccurrence will necessarily, in the normal course of business, lead to a covered plant closing or mass layoff less than 60 days after the event. The employer may give notice 60 days in advance of the projected closing date, which specifies that the closing will occur on that date if the event occurs.

State

Same as federal WARN Act.

Penalties

Federal

For failure to give the notification required by the statute an employer shall be liable to each employee who suffers an employment loss for back pay for each calendar day of violation, up to a maximum of 60 days, and for loss of benefits under an employee benefits plan, including the cost of medical expenses incurred by employees which would have been covered under the plan if the employment loss had not occurred.

The amount of such liability shall be reduced by:

1. Any wages and benefits paid by the employer to the employee for the period of the violation.

2. "Any voluntary and unconditional payment by the employer to the employee that is not required by any legal obligation." (This would include severance pay, to the extent that such payment was not required by the terms of a contract, policy statement, etc.)

An employer is also liable for a civil penalty of up to $500 per calendar day for failure to give the required notification to the unit of local government.

State

Failure to provide 60-days notice (or 90-days where appropriate) requires the payment of severance.

Under the federal WARN Act, the penalty for failing to provide notice is calculated by the day. For example, if an establishment gave only 59-days notice, the penalty would be 1 day of pay; 55 days notice would result in 5 days pay, etc. Under the New Jersey law, however, an employee who does not receive the full 60 days' notice is entitled to severance pay equal to one week of pay for every year of service with the company. Thus an employer who misses the 60-day notice requirement by even one day is potentially liable for the full severance penalty, just as if no notice had been given at all. Also, unlike the federal statute, the severance penalty cannot be offset against other severance benefits being provided by the employer pursuant to a severance plan or policy or collective bargaining agreement.

Employees can file suit in the superior court to collect severance and apply for reimbursement of attorneys' fees. Severance liability applies regardless of any other severance obligation owed by employer.

Unemployment Notification of Mass Separations

An employer must notify the local Unemployment Compensation office of a "mass separation" of employees (25 or more). The notice should be given at least 48 hours in advance, if possible; otherwise it must be given no later than 24 hours after the event.

The notice must include:

The name and address of the employer
A statement of the cause of separation
The number and job titles of employees affected
The expected duration of the period of unemployment
Whether the employer will have sufficient employees to handle requests for wage information

The issuance of notices when required by the WARN Act will satisfy the foregoing requirement.

Labor Management Relations Act

Although this statute does not expressly require that an employer give advance notification to a union which represents his employees of a plant closing or similar action which will cause employment loss, it has been interpreted to require notification in certain circumstances and for certain purposes.

In cases of complete or partial closing of a facility, a relocation of a facility, a transfer of work, or a sale or merger of a business, ordinarily the employer must bargain with the union concerning the effect or impact on the employees. In order to fulfill this obligation notification of the event must be given sufficiently far in advance to afford the union adequate opportunity to engage in meaningful bargaining.

Depending on the nature of the transaction and the reason for it, there may also be an obligation to bargain concerning the managerial decision to effectuate it.

Comparison of WARN & New Jersey Plant Closing / Mass Layoff Law

FEDERAL WARN	NEW JERSEY STATE
Employer	
• Any business enterprise with 100 or more employees, excluding part-time; or 100 or more employees, including part-time, who work a combined total of at least 4,000 regular hours per week	• An individual or private business entity operated by an employer for a period longer than three years and employs 100 or more full-time employees
Covered Actions	
• **Plant Closings**—The permanent shutdown of a single site of employment, if the shutdown results in an employment loss during any 30 day period for 50 or more employees • **Mass Layoffs**—Results in an employment loss of at least 33% of the workforce at a single site of employment during any 30 day period, provided at least 50 employees are affected. If 500 employees are affected, the one third requirement does not apply	• A transfer of operations or a termination of operations during any continuous period of 30 days which results in the termination of employment of 50 or more full-time employees, or • mass layoff that results in an employment loss at an establishment during any 30 day period for 500 or more full-time employees, or for 50 or more full-time employees representing one third or more of the full-time employees at the establishment.
Notice Requirement	
60 days	60 days
Notice Provided to	
• The affected employees ***or*** their bargaining representative • The chief elected official of the unit of local government • The state dislocated worker unit	• Each employee to be terminated ***and*** any collective bargaining units • The chief elected official of the municipality • The Commissioner of Labor and Workforce Development
Content of Notice	
• The name and address of the employment site where the plant or mass layoff will occur • A statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed a statement to that effect • Job titles of positions to be affected and the number of affected employees in each job classification • An indication as to whether bumping rights exist • The name and telephone number of a company official to contact	• A statement of the number of employees to be terminated and the date or dates of the mass layoff or termination of operations • A statement of the reasons for the mass layoff or transfer or termination of operations • A statement of any employment available to employees at any other establishment operated by the employer, and information regarding the benefits, pay and other terms and conditions of that employment and the location of the other establishment • A statement of any employee rights with respect to wages, severance pay, benefits, pension or other terms of employment as they relate to the termination, including any rights based on a collective bargaining agreement or other existing employer policy • A disclosure of the amount of the severance pay which is payable. A statement of the employees' rights to receive from the response team, information, referral and counseling regarding public programs which may make it possible to delay or prevent the transfer, termination of operations or mass layoff; public programs and benefits to assist the employees; and employee rights based on law
Severance	
• None	• Provided to each full-time terminated employee to whom the employer provides less than the number of days of notification. Calculation is equal to one week of pay for each full year of employment and is in addition to any other severance paid for any reason. Back pay provided by the employer to conform to the WARN law is credited towards meeting this severance pay criteria
Response Team Services	
• At the employer's discretion	• Provides for on-site work-time access
Disputes	
• Settled in District Court	• Settled in Superior Court

Child Labor Laws

Prohibited Occupations & Hours Limitations

Ages 18 and over

Federal & State

There are no limitations or requirements as to meal periods, kinds of work, maximum hours of work*, rest periods, breaks, or the like, for any employees 18 or older except with respect to certain motor vehicle drivers**—see page 198 for details.

* New Jersey law provides that mandatory overtime beyond 40 hours a week is prohibited except in emergent circumstances for certain hourly direct-care healthcare facility workers.

** Federal law requires reasonable breaks for nursing mothers to express breast milk – see page 5 for details.

Prohibited Occupations— Ages 16 and 17

Federal

1. Working in most occupations (a) in plants manufacturing, handling or storing explosives, explosive compounds and ammunition, (b) forest fire fighting and prevention; forestry services, (c) in slaughtering, meatpacking and rendering plants, and (d) in mining.

2. Operating a motor vehicle (automobile, truck, tractor, motorcycle, etc.) on any public highway; riding outside the cab on a motor vehicle operated on a public highway for the purpose of assisting in transporting or delivering of goods (if under the age of 17).

   Employees who are age 17 may drive automobiles or trucks in public roadways only if:

   > The minor holds a state license valid for the type of driving involved in performing the job and has successfully completed a State-approved driver education class, such driving is restricted to daylight hours, and is incidental to the employee's employment; the employee has no record at time of hire of any moving violation; the gross weight if the vehicle does not exceed 6,000 pounds and is equipped with a seat belt or other similar restraining device for the driver and for any passengers and the employer has instructed the employee that such belts must be used; and the use of the vehicle does not exceed certain other prescribed limitations.

   The combination of these restrictions and those of the Department of Transportation results in the following:

   a. Under age 17 - cannot drive on a public roadway.

   b. Age 17 - can drive only under the conditions specified above, and only within a municipality or commercial zone and not transporting certain hazardous materials.

   c. Ages 18, 19 and 20 - can drive only as permitted by DOT regulations—see p. 199.

   d. Age 21 and over - no restrictions.

3. Performing the following work in connection with fixed or portable power-driven wood-working machines or tools used or designed for cutting, shaping, surfacing, nailing, stapling, wire stitching, fastening, assembling, pressing or printing wood or veneer:

   a. Operating, including supervising or controlling the operation.

   b. Setting up, adjusting, repairing, oiling or cleaning such machines or tools.

c. Helping the operator to feed material into such machines, (but the placing of material on a moving chain or in a hopper or slide for automatic feeding is permissible).

d. Removing material directly from the saw table or point of operation of a circular saw or veneer clipper.

4. Working in a room which contains certain radioactive substances or which involves exposure to ionizing radiations in excess of 0.5 rems per year.

5. Work of operating, tending, riding upon, working from, repairing, servicing, or disassembling an elevator, freight elevator, crane, derrick, hoist, or high-lift truck (including forklifts, backhoes, front-end loaders and Bobcat loaders). However, 16 and 17 year olds may:

   a. Operate and ride inside an unattended automatic passenger elevator.

   b. Ride upon a freight elevator operated by an assigned operator.

6. Operating (or helping to operate), set up, adjust, repair, oil or clean all power-driven metal-forming, punching and shearing machines (other than machine tools), such as the following:

   a. All rolling machines (such as beading, straightening, corrugating, flanging or bending rolls; and hot and cold-rolling mills).

   b. All pressing or punching machines, (such as punch presses, power presses and plate punches), except punch presses which are equipped with full automatic feed and ejection and with a fixed barrier guard to prevent the operator's hands or fingers from entering the area between the dies.

   c. All bending machines (such as apron brakes and press brakes).

   d. All hammering machines (such as drop hammers and power hammers)

   e. All shearing machines (such as guillotine or squaring shears, alligator shears and rotary shears).

7. Operation of balers and compactors (designed or used to process paper or other materials), and paper-product machines, including the setting up, loading, adjusting, repairing, oiling or cleaning of any such machines.

   Paper products machines include arm-type wire stichers or staplers, circular or band saws, corner cutters or mitering machines, envelope die-cutting machines, laminating or combining machines, sheeting machines, platen die-cutting and printing press or punch press machines which involves feeding of the machine.

8. Operation, setting up, adjusting, repairing, oiling or cleaning of circular saws, band saws, guillotine shears, chain saws, reciprocating saws, wood chippers, and abrasive cutting discs. This equipment is prohibited regardless of the materials being processed by such equipment.

9. Occupations in the operation, setting-up, adjusting, repairing, oiling or cleaning of power-driven meat-processing machines and occupations involving slaughtering, meat and poultry packing, processing or rendering.

   Meat-processing machines include: deli slicers, meat patty forming machines, meat and bone cutting saws, poultry scissors or shears, knives (except bacon-slicing machines) guillotine cutters.

10. Operating or assisting in operation of and performing other tasks on, certain power-driven bakery machines, including setting up or adjusting a cookie or cracker machine. However, the use of portable counter-top mixers similar to those used in private homes is permitted if certain conditions are met. Additionally operation of certain pizza-dough rollers are permitted under specific circumstances.

11. Performing certain work in or about establishments where clay construction products, silica brick or other silica refractories are manufactured.

12. Performing roofing, demolition or excavating work.

State Law (Prohibited Occupations for 16 & 17 year olds)

1. Operating, or assisting in the operation of:

    a. Punch presses or stamping machines if the clearance between the ram and the die or stripper exceeds one-fourth inch.

    b. Guillotine shears and cutting machines having a guillotine action.

    c. Grinding, abrasive, polishing or buffing machines.

    d. Circular saws and band saws; power-driven woodworking machinery.

    e. Corrugating, crimping or embossing machines.

    f. Calendar rolls or mixing rolls in rubber manufacturing.

    g. Dough brakes or mixing machines in bakeries; cracker machinery.

    h. Paper lace machines.

    i. Centrifugal extractors, or mangles in laundry or dry-cleaning establishments.

2. Setting up, adjusting, repairing, oiling or cleaning circular saws, band saws, guillotine shears and shearing machines.

3. Oiling, wiping or cleaning machinery in motion or assisting therein.

4. Operating or repairing of elevators or other hoisting apparatus (except operating as a passenger of an automatic, passenger elevator). A forklift truck is a "hoisting apparatus".

5. Operating, loading or transporting merchandise on a freight elevator, or other nonpassenger-type elevator.

6. Transporting of payroll cash or payroll checks, except within the premises of employer.

7. Servicing single-piece or multiple-piece rim wheels.

8. Working "in, about or in connection with":

    a. Ore reduction works, smelters, hot rolling mills, furnaces, foundries, forging shops, or any other workroom or area in which the heating, melting, or heat treating (including welding) of metals is carried on.

    b. Dangerous or poisonous acids or dyes, if these materials would be handled by the minor.

    c. The manufacture or packing of paints, colors, white lead or red lead.

    d. The manufacture, transportation or use of explosives.

    e. Corrosive materials and pesticides.

    f. Steam boilers with a pressure in excess of 15 pounds.

g. Compactors, other than residential types. (16 and 17-year-olds may load, but not unload or operate, certain compactors—but compare with federal law p. 96)

h. Fabrication or assembly of ships.

i. Highly flammable substances. (This does not apply to gasoline at a service station that is pumped by hose into automobiles.)

j. Most occupations in slaughtering and meatpacking, rendering, and meat-processing establishments.

k. Construction: the erection, alteration, repair, renovation, demolition, or removal of any building or structure (other than the repair or painting of fences, buildings and structures not exceeding 12 feet in height); the excavation, filling and grading of sites; the excavation, renovation, repair, or paving of roads; and any function performed within 30 feet of the foregoing operations.

l. Certain agricultural machinery.

9. Working in:

a. A workroom where they may be exposed to toxic and hazardous dust, gases, vapors, fumes or substances, including benzol or any benzol compound which is volatile or which can penetrate the skin. A toxic or hazardous substance is one having a threshold limit value listed in the tables in Section 1910.1000 of subpart Z of 29 CFR Part 1910 (OSHA).

b. A place where they may be exposed to certain carcinogenic substances or to certain radioactive substances, or ionizing radiation in excess of 0.5 rem per year.

c. A place where there is exposure to infectious or contagious disease; removing or disposing of waste generated in the treatment of such disease.

d. An establishment (other than a restaurant) where alcoholic liquors are distilled, rectified, compounded, brewed, manufactured, or bottled, or are sold for consumption on the premises, except that minors age 16 or more may be employed in the "executive offices", maintenance department or pool or beach areas of a hotel or motel. However, minors under age 18 may not engage in the preparation, sale or serving of alcoholic beverages.

e. A junk or scrap-metal yard.

f. Mine or quarry.

g. An adult bookstore or massage parlor, or in a video store where x-rated movies are rented or sold.

None of the foregoing applies to apprentices nor to student learners who are engaged in cooperative vocational educational programs, and most of them do not apply to graduates of vocational schools who engage in those pursuits in which they majored in school.

Hours of Work – Ages 16 & 17

Federal

There are no limitations on hours of work for employees of these ages.

State

An employee of these ages may not lawfully work:

1. More than 8 hours in any day nor more than 6 consecutive days in any week nor more than 40 hours in any week.

   As used herein, the term "week" has no reference to a calendar week or the employer's workweek or payroll week: it means any period of 7 consecutive days; similarly, the term "day" means any 24-hour period. Thus, neither is necessarily a fixed or recurring period of time. This definition of "week" should be distinguished from its meaning in the Wage-Hour law.

2. More than 5 hours continuously without a meal period of 30 minutes or more. Work is "continuous" unless it is interrupted by a non-work interval of at least 30 consecutive minutes.

3. Before 6:00 A.M. or after 11:00 P.M., with these exceptions:

   a. The minor may work until midnight (1) on a day which does not precede a regularly scheduled school day if there is written permission (which must be on file with the employer) from his parents or guardian, stating the hours he is permitted to work, or (2) during a regular school vacation.

   b. The minor may not work after 10:00 P.M. in a factory (i.e., a production area) during his regular school vacation.*

   c. In restaurant occupations (including those in company cafeterias and company restaurants) the minor may work after 11:00 P.M. (and beyond midnight) if the employment is a continuation of a workday which began before 11:00 P.M. (1) on a workday which did not begin on a day which preceded a regularly scheduled school day, and where written permission has been obtained from his parents or guardian, stating the hours he is permitted to work, or (2) during regular school vacation. Provided, however, that such minor may not work between 3:00 A.M. and 6:00 A.M. on a day which precedes a regularly scheduled school day.

* This statutory provision is illogical in allowing work in a factory only until 10:00 P.M. during school vacation, whereas such work may be performed until 11:00 P.M. when school is in session.

Ages 14 and 15

Federal

Employees age 14 and 15 may only perform work in occupations which are specifically permitted by the Secretary of Labor, under authorized conditions and not performed in areas or industries specifically prohibited.

Permitted Occupations

1. Office and clerical work, including the operation of office machines.

2. Work of an intellectual or artistically creative nature such as, but not limited to, computer programming, software writing, teaching or performing as a tutor, serving as a peer counselor or teacher's assistant, singing, playing an instrument and drawing. Artistically creative work is limited to work in a recognized field of artistic or creative endeavor.

3. Cashiering, selling, modeling, art work, work in advertising departments, window trimming and comparative shopping.

4. Price marking and tagging by hand or machine, assembling orders, packing, and shelving.

5. Bagging and carrying out customers' orders. Errand and delivery work by foot, bicycle and public transportation.

6. Clean up work, including the use of vacuums and floor waxers, and the maintenance of grounds but not including the use of power-driven mowers, cutters, trimmers, edgers or similar equipment.

7. Kitchen work and other work involved in preparing and serving food and beverages, including operating machines used in performing such work such as, but not limited to, dishwashers, toasters, dumbwaiters, popcorn poppers and heating lamps. Minors may occasionally enter freezers momentarily to retrieve items in conjuncture with restocking or food preparation. Cooking with electric or gas grills which does not involve cooking over an open flame. Using deep fryers that utilize a device to automatically raise and lower the basket into the hot oil or grease.

8. Cleaning vegetables and fruits, and the wrapping, sealing, labeling, weighing, pricing, and stocking of items, including vegetables, fruits, and meats, when performed in areas physically separate from a freezer or meat cooler.

9. Loading and unloading from motor vehicles of the light, non-power-driven, hand tools and personal protective equipment the minor uses as part of his or her employment at the worksite. Light tools would include, but are not limited to, rakes, shovels and brooms.

10. Lifeguards. The employment of 15 year-olds (but NOT 14 year-olds) to perform permitted lifeguard duties at traditionally swimming pools and water amusement parks when such youth have been certified by the American Red Cross or similar organization. However, a 15 year old may not work as a dispatcher on elevated water slides or at a natural swimming environment such as lakes, rivers, oceans, or piers.

11. Employment inside and outside of places of business where machinery is used to process wood products. This occupation is limited to very specific circumstances.

12. Work in connection with cars and trucks, confined to the following: dispensing gasoline and oil, courtesy service, car cleaning, washing and polishing by hand. Such work shall not include work involving the use of pits, racks or lifting apparatus or involving the inflation of any tire.

13. Work in connection with riding inside a passenger compartment of motor vehicles except when the work involves transporting, or assisting with transporting, other person or property.

State

New Jersey law does not contain a list of specifically permitted occupations.

Prohibited Occupations—Ages 14 & 15

Federal

In addition not to performing any occupations specifically prohibited or deemed hazardous by federal or state law to those ages 16 and 17, it shall also be prohibited for 14 and 15 year olds to engage in the following occupations.

1. Manufacturing, mining or processing occupations, including occupations requiring the performance of duties in work rooms or work places.

2. Occupations that involve operating, tending, setting up, adjusting, cleaning, oiling or repairing hoisting apparatus or power-driven machinery, including, but not limited to lawn mowers, golf carts, all terrain vehicles, trimmers, cutters, weed-eaters, edgers, food slicers, food grinders, food choppers, food processors, food cutters or food mixers.

3. Work performed in or about boiler or engine rooms or in connection with the maintenance or repair of the establishment, machines or equipment.

4. Outside window washing that involves sills and all work requiring the use of ladders, scaffolds or their substitutes.

5. All baking and cooking, except as specifically permitted in list of permitted occupations.

6. Operation of, or work in or about, motor vehicles, except as specifically permitted in list of permitted occupations.

7. Work in freezers and meat coolers and all work in the preparation of meats for sale, except as specifically permitted in the list of permitted occupations.

8. Youth peddling, which entails the selling of goods or services to customers at locations other than the youth employer's establishment (e.g. customers' residents, street corners, public transportation stations).

9. Loading and unloading goods or property from motor vehicles, except as specifically permitted in the list of permitted occupations.

10. Catching and cooping of poultry in preparation for transport or for market.

11. Public messenger service.

12. Occupations in connection with: transportation of persons or property by rail, highway, air, water, pipeline or other means; warehousing and storage; communications and public utilities; construction; except such office work or sales work which does not involve the performance of duties on trains, vehicles, aircraft, vessels or other media of transportation or at the actual site of construction operations.

State

In addition to not performing any occupations specifically prohibited or deemed hazardous by federal or state law to those ages 16 and 17, minors under the age of 16 shall not:

1. Be employed, permitted or suffered to work in, about, or in connection with power-driven machinery, including, but not limited to lawn mowers, woodworking and metal working tools. Power driven machinery shall not include standard office type machines; standard domestic-type machines and

appliances; certain agriculture machines or standard passenger elevators

2. Work on or about conveyors and related equipment. However, an employee who is at least 15 years of age may work as a cashier or bagger in or near a cash register conveyor belt in a supermarket or other retail establishment.

Hours of Work —Ages 14 & 15

Federal & State

Employment of 14 and 15 year olds shall be limited to times outside of school hours. When school is not in session, they shall not be permitted to work more than 40 hours in any one week nor more than 8 hours in one day. When school is in session, they shall not work more than 18 hours in any one week, nor more than 3 hours in any one day, including Fridays. A week is defined as seven consecutive 24-hour periods – the same period used to determine overtime due. New Jersey law also prohibits work in excess of 6 consecutive days.

Additionally, 14 and 15 year olds shall not work before 7:00 am or after 7:00 pm, except from around the end of school until Labor Day, the evening hour will be 9:00 pm, with written parental permission (which must be on file with the employer).

New Jersey law also requires a meal period after five hours of continuous work. Work is “continuous” unless it is interrupted by a non-work interval of at least 30 consecutive minutes.

Under 14 Years of Age

Employment is prohibited by state and federal law, with certain minor exceptions, such as in agricultural pursuits under specified conditions, and home delivery of newspapers.

Employment and Age Certificates: Working Papers

Employment certificates are required under State law for employees under 18 years of age, with these exceptions: none is required for any child 16 years of age or older for employment in "agricultural pursuits", nor required during the first 14 days of employment of any minor 15 years of age or over in retail, food service, restaurant or seasonal amusement occupations at such times as the schools of his district are not in session.

Minors may obtain a blank A300 employment certification form from the NJ Department of Education or the NJ Department of Labor & Workforce Development. The minor may also obtain the form from the Issuing Officer of the local school district where the minor resides or the district in which the employer is located if the minor is a non-resident of New Jersey.

After completing the personal information section of the employment certification, the minor takes the form to the employer to complete the employment information & promise of employment sections. The employer then returns the form to the minor for completion (i.e. physician's certification, proof of age, school record and Issuing Officer Certification). Once the form is complete and certified, it must be returned to the employer and the employer is required to retain the certificate until termination of the minor's employment. Upon termination the form should be returned to the Issuing Officer.

In order to protect himself against an unwitting violation of the laws respecting employment of minors, including protection against double liability under the Workers' Compensation Law, an employer may require any minor between ages 18 and 21, to produce an age certificate, obtainable in the same manner as an employment certificate. Such document states the minor's age and other identifying data, and under New Jersey and federal law constitutes conclusive evidence of the age of the minor.

Required Postings

Every employer shall conspicuously post in the establishment where any minor under 18 is employed, permitted, or suffered to work a printed child labor abstract and a list of the occupations prohibited to such minors, to be furnished by the Department of Labor.

Additionally, New Jersey requires a schedule of hours of labor which shall contain the name of each minor under 18 the maximum number of hours he shall be required or permitted to work during each day of the week, the total hours per week, the time of commencing and stopping work each day, and the time for the beginning and ending of the daily meal period. An employer may permit such minor to begin work after the time for beginning, and stop before the time for ending work stated in the schedule; but he shall not otherwise employ or permit him to work except as stated in the schedule. This schedule shall be on a form provided by the Department of Labor and shall remain the property of that department.

Penalties for Violation of the Child-Labor Laws

Under New Jersey law: a fine of $100 to $4,000 for each day that each minor is unlawfully employed, plus possible administrative penalty up to $2,500. If the violation is committed "knowingly", higher fines and imprisonment may be imposed.

Also, a person under 18 who is employed at a prohibited occupation or without a proper employment certificate is entitled to double compensation under the Workers' Compensation Act if he sustains an occupational disability, in which case the employer alone and not the insurance carrier shall be liable for the extra portion of the award. Employment in a prohibited occupation may also result in common law liability - i.e., the minor may elect to pursue a "tort" claim rather than a Workers' Compensation claim.

Under the federal Wage-Hour Law: in addition to a possible criminal penalty of up to $10,000, a civil penalty of $12,080 may be assessed by the Secretary of Labor with respect to each minor who is employed in violation of that Act.

Additionally, a civil penalty of up to $54,910 can be imposed for each child labor violation that causes the death or serious injury of any employee under the age of 18, subject to doubling if the violation is repeated or willful.

Privacy

There is no common definition of the term "privacy," although the US Supreme Court has repeatedly stated that it involves a "general right of the individual to be left alone." Notwithstanding the existence of this general right, there is no specific right to privacy in a private workplace, although public employers and employers closely associated with government activities are governed by constitutional principles.

Medical Records

Undoubtedly, federal law has created a public policy favoring a reasonable expectation to privacy regarding employee medical records. Regulations issued under the Health Insurance Portability and Accountability Act require a person's express written permission before medical information can be disclosed by health care providers, insurance companies and others, with two exceptions: disclosures made to an employer for the purpose of evaluating whether an employee sustained a work-related illness or injury and disclosures relating to the medical surveillance of the workplace. Further, the Americans with Disabilities Act requires that any medical documentation received by an employer be treated confidentially and stored outside the usual personnel file with access restricted solely to persons with a need-to-know.

The Equal Employment Opportunity Commission (EEOC) has released an informal discussion letter suggesting that employers may be obligated to do more than just maintain a separate file for employee medical records, especially when those records are in an electronic format. Both the Americans with Disabilities Act of 1990 (ADA), as amended, and the Genetic Information Non-Discrimination Act of 2008 (GINA) require employers to maintain a confidential medical record, which is separate from the employee's other personnel file(s), for information about the employee's medical conditions, medical history or "genetic information." The statutes do not, however, specify how such records are to be maintained or what level of security must be in place to protect the confidentiality of medical or genetic information.

In its letter, the EEOC makes a distinction between "personal" and "occupational" health information. According to the EEOC, personal health information is "information obtained in the course of diagnosis or treatment," while occupational health information "concern[s] an employee's ability to work."

The EEOC's letter raises two issues for employers in possession of both occupational and personal health information. First, the EEOC's letter suggests that employers need to distinguish between occupational or personal health information. Second, once the employer determines what information is occupational and what information is personal, the employer has to determine whether it has appropriate safeguards in place to prevent unauthorized access to or disclosure of either category of information. For paper files, this might mean maintaining separate folders in separate locations. For electronic medical records, an employer may need to erect an electronic "wall" so that the users of the system only have access to the relevant and appropriate information.

Drug Testing

The New Jersey Supreme Court has held that public policy favors a common law right to privacy in the workplace. Thus, mandatory random drug testing may in certain circumstances constitute an invasion of privacy. Generally, a court will weigh the invasion of the employee's privacy against the employer's need to know whether the employee is a drug user and the public interest.

Searches

Searches of employee work areas, desks, lockers and mail also implicate privacy concerns. If a search of any of these areas is not conducted in a discrete manner, or if it is done in a manner that reveals personal matters unrelated to the workplace, the search may constitute an invasion of privacy.

Generally, the employer's authority to conduct a search will be circumscribed by the employee's expectation of privacy. For example, if an employer provides an employee with a desk with a lock, the employee will have a high expectation of privacy in the contents of the desk. On the other hand, if the employer provides a locker and a lock, and the employee is on notice that the employer has retained a copy of the key, the employee has a lower expectation of privacy in the contents of the locker.

In most cases, employees' expectations of privacy are lowered with a written policy. Such policies put employees on notice of possible searches and, therefore, their continued employment constitutes consent to such of condition. Express or implied consent can also be given for monitoring telephone conversations and electronic communications. Additionally, such monitoring can occur without the consent of employees if it occurs within the regular course of business and the employer has a "legal interest" in the communication, such as to determine whether an employee is disclosing confidential trade secrets. However, such non-consensual monitoring must be limited in time and purpose. The scope of the exception does not include personal communications (see pages 102-103).

Surveillance

Surveillance cameras are permissible, again depending on the employee's expectation of privacy. There is a diminished expectation in open work areas. The expectation of privacy is greatest in bathrooms and dressing areas. Surveillance of employees engaged in union activities, however, is an unfair labor practice under the National Labor Relations Act.

Recording Devices

In New Jersey, the consent of at least one person to a conversation is required before that conversation can be tape-recorded. Usually, the person using the device is the one consenting to its use. In contrast, an employer may not tape record a conversation between employees without such consent.

Monitoring Telephone Conversations

Federal and New Jersey "wiretapping" laws* prohibit (with 2 exceptions) the intentional interception of a wire, oral or electronic communication, or the intentional disclosure of the contents of the communication. "Interception" means the "aural or other acquisition" of the contents of such a communication "through the use of any electronic, mechanical or other device." This definition includes monitoring and recording telephone conversations. Violations can result in substantial criminal and civil penalties.

One of the exceptions -- known as the "business extension" exception -- allows the monitoring of telephone conversations of employees if (a) the intercepting device is a "telephone instrument, equipment or component" which is either provided and installed by the telephone company in the ordinary course of its business, or obtained by the subscriber (i.e., the employer) for connection to the facilities of the telephone company, and (b) the use of the device in making the interception falls "within the ordinary course of business" of the employer -- i.e., there is a valid business justification for using the device.

Using a telephone extension to listen to a telephone conversation of an employee falls within the first part of this exception since the interception is accomplished by means of telephone equipment. Whether in a particular case it will be considered to be "within the ordinary course of business" of the employer will depend upon the content of the conversation which is overheard, and upon why the listening took place.

Listening to conversations of employees, such as with customers, for the purpose of training or for evaluating their performance would be deemed to be "in the ordinary course of business."

Listening to the conversation of a particular employee for the purpose of discovering whether he was engaged in some activity which was adverse or harmful to the employer -- such as divulging trade secrets, stealing, etc. -- is permissible if the employer has reason to suspect that the employee is engaging in such activity.

In no case, however, may the employer listen to employees' conversations which are of a personal nature.

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* The federal Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Electronic Communications Privacy Act of 1986, further amended by the USA Patriot Act (2001), and the New Jersey Wiretapping and Electronic Surveillance Act.

Recording Telephone Conversations

The federal courts are in disagreement as to whether the recording of telephone conversations falls within the "business extension" exception. However, a federal District Court in New Jersey has ruled that the use of a tape recorder violates both the federal and New Jersey statutes because the recorder is not a telephone instrument or equipment.

However, where an employee gives consent, an employer may both monitor and record a telephone conversation.

Consent can be express or implied. Express consent occurs when an employee specifically agrees as a condition of employment to allow the employer to listen to or record his conversations with others. Consent is implied when an employee is informed in advance that his conversations may be monitored.

Courts are not likely to interpret implied consent as allowing conversations of a personal nature to be listened to or recorded. Express consent should specify the kind of monitoring (listening or recording) which will take place, and whether it covers conversations of a personal nature.

Password Protection

New Jersey law prohibits employers from requesting or requiring a current or prospective employee to provide or disclose any user name or password, or in any way provide the employer access to, a personal account through an electronic communications device.

“Electronic Communications Device” means a computer, telephone, personal digital assistant, or other similar device, or any other device that uses electronic signals to create, transmit and receive information.

Generally, “personal account” is an account, service or profile on a social networking website that is used for personal communications unrelated to the business of the employer. A personal account does not mean an account, service or profile created, maintained, used by employees for business purposes or to engage in the employer’s business.

“Social Networking Website” means an Internet-based service that allows individuals to construct public or semi-public profiles within a bounded system that can be shared with others within the system.

Violations of the law are reported to the N.J. Department of Labor or Workforce Development. Employers that violate the law are subject to civil money penalties up to $1,000 for the first violation and up to $2,500 for each subsequent violation.

Agreements to waive or limit employee or prospective employee protections are not valid.

Employee or prospective employee refusals to disclose a user name or password are protected from retaliation or reprisal or from discrimination.

Investigations

Nothing in the law prevents an employer from implementing and enforcing a policy pertaining to the use of an employer issued electronic communications device or any accounts or service provided by the employer or that the employee uses for business purposes. Thus, an employer can retain passwords for all company-owned computers and devices and social networking sites that are used for business purposes.

Based upon the receipt of specific information about activity on a personal account of the employee, an employer can conduct investigations into workplace misconduct or into the unauthorized transfer of proprietary or confidential information. Presumably, based on specific information, an employer may request that a user name or password be disclosed to further an investigation, although the employee need not comply. A discharge for non-compliance may constitute a claim under the Conscientious Employee Protection Act (CEPA). See page 49.

An employer can view, access or use information about an employee or prospective employee that can be obtained in the public domain.

Monitoring and Accessing Electronic Communications

The Electronic Communications Privacy Act, as amended by the USA Patriot Act, and its state law equivalent, prohibits the interception of "electronic communications." An "electronic communication" means "any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photoptical system." An electronic communication is not an e-mail that resides in storage. Therefore, courts have held that accessing a stored e-mail is not an interception of an electronic communication.

However, civil liability remains for the intentional and unauthorized access to stored e-mails. There is an exception for service providers. Courts have held that employers that own, maintain and administer an electronic communications system or network are service providers. Accordingly, employers, as service providers, may access e-mails stored on its main file server.

Voice Mail

The US Patriot Act provides that a "wire communication" for the purpose of the federal wiretapping law does not include the electronic storage of the communication. Therefore, like stored e-mails, stored voice mail is not subject to interception. Similarly, the employer that owns and administers the voice mail system would be a service provider and able to retrieve employee voice mail messages.

Search Warrants

Under federal and state law, employers may be compelled to turn over electronic records under a search warrant, including name and addresses of employees. Additionally, upon the request of a law enforcement agency, a provider of wire or electronic services may be required to preserve records for a period of 90 days pending the issuance of a court order or other legal process.

Regulating and Prohibiting Speech

Public Employment

A public employee has a constitutional right to speak on matters of public concern without fear of retaliation. A public employee's speech involves a matter of public concern if it can be fairly considered as relating to any matter of political, social or other concern to the community. For example, the Third Circuit Court of Appeals has held that a firefighter who complained publicly about asbestos contamination at a fire station was engaging in speech relating to a matter of concern to the community.

However, a public employee's right to speech is not absolute. The public employer has an interest in promoting the efficiency of services it performs through its employees. Therefore, to deserve constitutional protection, the public employee's speech, as measured by the public interest, must outweigh the public employer's interest in effective and efficient operations.

Private Employment

There is no constitutional right to speech in a private workplace. On the other hand, an employer is liable for a wrongful discharge if the termination is "contrary to a clear mandate of public policy" (see page 49—NJ CEPA). It is unclear whether an employee can assert a constitutional wrongful termination claim against a private employer. However, in cases where courts have assumed such a claim can be made, they have balanced the interests between the employee and employer as above.

Proprietary and Confidential Information

An employer may take reasonable steps to prevent the dissemination of proprietary information and to prevent employees from disclosing confidential business information. However, under the National Labor Relations Act (NLRA), employees have the right to discuss employer-employee matters and to exchange information, among themselves and others, that might have an impact on wages, hours, and working conditions. Therefore, a

confidentiality rule must be reasonably tailored to protect the employer's legitimate confidentiality interest without conveying to employees that discussing wages, working conditions and other terms and conditions of employment is prohibited.

The right to discuss terms and conditions of employment (whether verbally, electronically or otherwise) is derived from the NLRA, which states that employers commit an unfair labor practice if they interfere with, restrain, or coerce employees in their right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." The National Labor Relations Board has prohibited employers from barring the discussion of salaries, the results of drug tests, employment test results, vacation policies, scheduling, health care benefits, managerial ineptitude, and from discussing the unfairness of accommodating a co-worker with a disability. Overly broad policies prohibiting employees from "gossiping and complaining" amongst themselves have been invalidated. Even harsh, arrogant and flippant speech about working conditions has been permitted. On the other hand, policies prohibiting complaints about working conditions in the presence of patients or customers have been upheld as a business necessity.

Not all speech about terms and conditions of employment, however, raises to the level of "concerted activity." Speech and actions are "concerted" only when tied to the beliefs or actions of fellow employees. Therefore, a single employee complaint is not "concerted", unless he is asserting a right under a collective bargaining agreement or a work-related statute, such as the Department Safety and Health Act, or unless the complaint is a "logical outgrowth of the concerns expressed by others." Only "employees" are guaranteed rights under the NLRA, although disciplining a supervisor's speech, if intended to interfere with the concerted activity of employees, is an unfair labor practice.

In contrast, speech even when in concert with others, that is unrelated to working conditions is not protected by the NLRA. For example, disparaging a company's product or tarnishing an employer's image constitutes disloyalty, well recognized as an elemental cause of discharge.

Employers may permissibly prohibit speech that is sexually or racially offensive. On the other hand, employers cannot interfere with complaints about sexual harassment or to retaliate against an employee that discloses any activity, policy or practice that he "reasonably believes" violates a law or regulation (see page 49—Conscientious Employee Protection Act).

Notwithstanding the above, there is no "freedom of speech" in a private workplace, although public employers and employers closely associated with government activities are governed by constitutional principles. An exception for private employers is where public policy concerns reflect the constitutional guarantee of free speech. For example, an employer may not condition employment on an employee making a political contribution or on a requirement that an employee engage in political or lobbying activities to support the employer. On the other hand, an employee may permissibly prohibit political activity in the workplace, as well as other forms of solicitation and distribution of literature.

Speech During Union Campaigns

The NLRA protects "[t]he expressing of views, argument, or opinion whether in written, printed, graphic, or visual form" in connection with union campaigns. Generally, protected employee speech is limited to terms and conditions of employment and to the benefits of union membership, although such speech is given wide latitude, so that harsh criticisms and denunciations of an employer, if not intended to harm its business, is protected speech.

Religious Speech

Praying, certain religious dress, beards required by faith for men and head coverings that reflect an employee's sincerely held religious beliefs are considered religious expression, and must be accommodated, unless to do so would cause an undue hardship (see pages 18, A-11, A-17—Religious Discrimination). However, an employee need not accommodate an employee's cultural or political beliefs. Other forms of non-religious expression, such as jewelry, tattoo, body piercing, hair length or style, or clothing need not be accommodated (see page 18—Dress Codes).

Displaying the American Flag

Under New Jersey law, it is unlawful for an employer to discharge or discriminate against an employee for displaying on a work station or wearing the American flag, provided that the display does not substantially and materially interfere with the employee's duties. Compensatory and punitive damages are recoverable, although in cases where the employee has filed a frivolous suit, the court may award costs and reasonable attorneys' fees to the employer.

Electronic Communications

According to the National Labor Relations Board, where computers are provided to employees as a tool to perform productive work, the computer is a "work area." As such, the employer's ability to restrict electronic communications is subject to the National Labor Relations Act (NLRA).

Under the NLRA, employees are permitted to engage in verbal solicitation while in work areas, during non-work time. In contrast, distribution of written materials may be restricted to non-work areas by employers (see pages 189). Electronic communications that are expected to occasion a spontaneous response or initiate reciprocal conversation is considered "solicitation." In contrast, one-sided communications where the purpose of the communication is achieved so long as it is received is considered "distribution."

In a memorandum issued by the Division of Advice, an employer may not prohibit e-mail messages that amounted to solicitation during non-working time, without demonstrating that special circumstances warranted a rule banning all non-business use of e-mail in order to maintain production or discipline.

Social Networking

Under Section 7 of the National Labor Relations Act (NLRA) it may be an unfair labor practice to discipline employees for social media activities.

Generally, employees (as defined by the NLRA) have the right under the law to be free from reprisal for discussing with their co-workers the terms and conditions of their employment. Accordingly, employers who discipline their employees for concertedly complaining about their wages, hours, and conditions of employment violate Section 8(a) (1) of the NLRA.

In a report issued by the General Counsel of the National Labor Relations Board in 2011, four Advice Memoranda addressing unfair labor practices that arose out of employees engaging social networking activity, the majority of which took place outside the workplace, were discussed.

In each of the following situations, employee conduct was deemed protected under the NLRA because the communications concerned the terms and conditions of employment; the communications addressed employees' shared concerns; or the communications were directed at coworkers and/or discussed with coworkers:

1. Employees complaining to each other via Facebook (with expletives) about their employer's tax withholding practices;

2. A commission-paid employee posting on Facebook pictures and sarcastic commentary criticizing the inexpensive manner in which his employer conducted a sales event;

3. An employee posting negative comments on Facebook about a supervisor (including the use of a demeaning epithet), who was investigating a customer complaint against the employee; and

4. Multiple employees posting comments (which included hostile words and sarcasm) on Facebook criticizing the work performance of their coworkers and staffing level problems.

New Jersey Identity Theft Protection Act

The New Jersey Identity Theft Protection Act requires NJ employers to minimize the risk of identity theft for their New Jersey employees, applicants, contractors and customers by:

- Restricting use of Social Security numbers (see below)
- Destroying (by shredding, erasing or otherwise making unreadable) paper and computerized records containing private personal information once those records are no longer required to be retained
- Disclosing any breach of security or unauthorized access of records containing private personal information to the Division of State Police. If they determine no ongoing investigation will be compromised, the Division will instruct the business how to give written/electronic notice to affected individuals. If the breach involves more than 1,000 persons, the three main consumer reporting agencies (Equifax, Experian, TransUnion) must also be notified.

Private personal information is a person's first name or initial and last name linked with their social security number, driver's license or other State ID number, or account or credit/debit card number and security code permitting access to the person's financial account.

Use of Social Security Numbers

No person, including any public or private entity, shall:

1) Publicly post or publicly display an individual's Social Security number, or any four or more consecutive numbers taken from the individual's Social Security number;

2) Print an individual's Social Security number on any materials that are mailed to the individual, unless state or federal law requires the Social Security number to be on the document to be mailed;

3) Print an individual's Social Security number on any card required for the individual to access products or services provided by the entity;

4) Intentionally communicate or otherwise make available to the general public an individual's Social Security number;

5) Require an individual to transmit his Social Security number over the Internet, unless the connection is secure or the Social Security number is encrypted; or

6) Require an individual to transmit his Social Security number to access an Internet website, unless a password or unique personal identification number or other authentication devise is also required to access the Internet website.

Permitted Uses

A Social Security number may be used for internal verification and administrative purposes, so long as the use does not require the release of the Social Security number to persons not designated by the employer to perform associated services allowed or authorized by law.

Nothing prevents the collection, use or release of a Social Security number, as required by federal or state law. Further, Social Security numbers may e included in applications and forms sent by mail, including documents sent as part of an application or enrollment process, or to establish, amend or terminate an account, contract or policy, or to confirm the accuracy of the Social Security number. A Social Security number that is permitted to be mailed may not be printed, in whole or in part, on a postcard or other miler not requiring an envelope, or visible on the envelope or without the envelope having been open.

Health Maintenance Organizations

Public Health Service Act

An employer who provides health insurance to its employees may offer (but is not required to offer) the option of membership in a health maintenance organization (HMO).

The statute provides that if it is offered by an employer (other than a church or association of churches), the employer shall contribute to the premium or charges of the HMO "in an amount which does not financially discriminate" against an employee who enrolls in the HMO. A contribution does not discriminate "if the employer's method of determining the contributions on behalf of all employees is reasonable and is designed to assure employees a fair choice among health benefit plans."

Pursuant to regulations an employer has several choices of methods to determine his contribution to an HMO.

1. The contribution can be either the same dollar amount or the same percentage amount, per employee, that is paid for the non-HMO coverage. The amount may vary among different classes of employees.

2. A contribution rate may be established that results in the same out-of-pocket cost to employees, whichever plan they choose.

3. If the HMO provides more comprehensive benefits than the other insurance plan, the contribution to the HMO may be higher than otherwise in order to compensate for the greater benefits.

4. The amount of the payment to the HMO can be established by mutual agreement; the agreement must be reasonable and fair to the employees.

5. Where the specific amount of the employer's contribution to his other insurance is stated in the terms of a collective bargaining contract or other employer-employee contract, the employer's obligation for contribution to the HMO on behalf of an employee covered by such a con-tract need not exceed that amount.

The data used to compute the amount of the employer's contribution to HMO shall be retained for at least 3 years.

An employer who "knowingly" violates the statute shall be subject to a civil penalty up to $10,000 for each 30-day period of non-compliance.

The foregoing provisions apply only if all of the following conditions are met. If they are not met, the employer is not required to contribute toward the cost of the HMO.

1. The employer had an average of 25 or more employees (full-time or part-time) in any calendar quarter of the previous year, and

2. The HMO is federally qualified, and

3. At least 25 of the employees to whom the HMO option is offered reside in the service area of the HMO.

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Immigration Reform & Control Act

In 1986, Congress reformed U.S. immigration laws and enacted the Immigration Reform and Control Act of 1986 (IRCA). This Act provided that all employers verify the identity and employment eligibility of each person hired, complete and retain a Form I-9 for each employee, and refrain from discriminating against individuals on the basis of national origin or citizenship.

General Provisions

IRCA prohibits employers from hiring and employing an individual for employment in the U.S. knowing that the individual is not authorized with respect to such employment. Employers also are prohibited from continuing to employ an individual knowing that he or she is unauthorized for employment. This law also prohibits employers from hiring any individual, including a U.S. citizen, for employment in the U.S. without verifying his or her identity and employment authorization on Form I-9.

An employer must complete the Form I-9 every time they hire any person to perform labor or services in the United States in return for wages or other remuneration. This requirement applies to everyone except for the following:

1. Employees hired before November 7, 1986, who have continued in their employment and have a reasonable expectation of employment at all times;
2. Employed for casual domestic work in a private home on a sporadic, irregular, or intermittent basis;
3. Independent contractors; or
4. Providing labor to you who are employed by a contractor providing contract services (e.g., employee leasing or temporary agencies).
5. Individuals who do not receive any form of remuneration (volunteers).

Completing the Form I-9

The Employer should provide a copy of the Form I-9 to all newly hired employees which would include all pages of the instructions and Lists of Acceptable Documents. Additional information and the Form I-9 can be downloaded from the U.S. Citizenship and Immigration Services (USCIS) Website: https://www.uscis.gov/i-9

An employer may not require an individual to complete the form prior to he or she accepting a job offer. The Employee and Employer must complete all relevant fields on the Form and enter N/A in fields that do not apply.

Section 1: Employee Information and Attestation

Section 1 of the Form I-9 is completed by the EMPLOYEE at the time of the hire (i.e. by the first day that his or her employment for pay begins) by filing in the correct information and signing and dating the form. The employer is responsible for reviewing and ensuring that the employee has fully and properly completed Section 1.

An employer can only require an employee to provide a social security number if they participate in the USCIS E-Verify Program.

Section 2: Employer or Authorized Representative Review and Verification

Within 3 business days of the hire the EMPLOYER must complete Section 2 of the Form I-9. For example, if an employee begins employment on Monday, you must review the employee's documentation and complete Section 2 on or before Thursday of that week. However, if you hire an individual for less than 3 business days, Section 2 must be completed no later than the end of the first day of employment.

The employee must present to the employer unexpired original document(s) that establish identity and employment eligibility. Some documents establish both identity and employment eligibility (List A). Other documents establish identity only (List B) or employment authorization only (List C). The employee must be allowed to choose from the List of Acceptable Document(s) he or she wish to present. The Employee may provide either a document from List A **OR** a document from List B **AND** List C. For further information regarding completing the Form I-9, see USCIS publication M-274 Handbook for Employers.

The employer representative must accept any document(s) from the Lists of Acceptable Document presented by the individual which reasonably appear on their face to be genuine and to relate to the person presenting them. If the employer participates in E-Verify, then they may only accept List B documents that have a photograph. The employer may copy any of these documents which are presented, and retain the copies if they are kept with the Form I-9.

The employer representative should fully complete Section 2 of the Form I-9 by recording the title of the document, the issuing authority, the document number, and expiration date (if any) of the document(s) in the appropriate sections; fill in the date of hire and correct information in the certification block; and sign and date the Form I-9.

Minors (Individuals under Age 18)

Minors (individuals under age 18) and certain employees with disabilities whose parent, legal guardian or representative completed Section 1 for the employee are only required to present an employment authorization document from List C. Refer to the Handbook for Employers: Guidance for Completing Form I-9 (M-274) for more guidance on minors and certain individuals with disabilities.

Verification Procedure

The employer or authorized representative who physically examines the employee's original document(s) and completes Section 2 attests that he or she has examined the documents presented and that they appear to be genuine and to authorize the individual to work in the United States by signing and dating the signature and date fields.

Section 3: Reverification and Rehires

When completing this section, an employer or authorized representative must also complete the Last Name, First Name and Middle Initial fields in the Employee Info from Section 1 area at the top of Section 2, leaving the Citizenship/Immigration Status field blank. When completing Section 3 in either a reverification or rehire situation, if the employee's name has changed, record the new name in Block A.

Reverification in Section 3 must be completed prior to the earlier of:

- The expiration date, if any, of the employment authorization stated in Section 1, or
- The expiration date, if any, of the List A or List C employment authorization document recorded in Section 2 (with some exceptions listed below).

Some employees may have entered "N/A" in the expiration date field in Section 1 if they are aliens whose employment authorization does not expire, e.g. asylees, refugees, certain citizens of the Federated States of Micronesia, the Republic of the Marshall Islands, or Palau.

An Employer should not reverify U.S. citizens and noncitizen nationals, or lawful permanent residents (including conditional residents) who presented a Permanent Resident Card (Form I-551). Reverification does not apply to List B documents.

For reverification, an employee must present an unexpired document(s) (or a receipt) from either List A or List C showing he or she is still authorized to work. An Employer CANNOT require the employee to present a particular document from List A or List C. The employee is also not required to show the same type of document that he or she presented previously.

Rehires

If an employer rehires an employee within three years from the date that the Form I-9 was previously executed, the employer may either rely on the employee's previously executed Form I-9 or complete a new Form I-9 provided the Form I-9 meets certain guidelines. For further information regarding completing the Form I-9, see USCIS publication M-274 Handbook for Employers.

Record Retention

Employers must retain each employee's completed Form I-9 for as long as the individual works for the employer and for a specified period after employment has ended. Employers are required to retain the pages of the form on which the employee and employer entered data. If copies of documentation presented by the employee are made, those copies must also be retained. Once the individual's employment ends, the employer must retain this form and attachments for either 3 years after the date of hire (i.e., first day of work for pay) or 1 year after the date employment ended, whichever is later.

Employers should ensure that information employees provide on Form I-9 is used only for Form I-9 purposes. Completed Forms I-9 and all accompanying documents should be stored in a safe, secure location.

Form I-9 may be generated, signed, and retained electronically, in compliance with Department of Homeland Security regulations at 8 CFR 274a.2.

Discrimination

The anti-discrimination provision of the Act, as amended, prohibits four types of unlawful conduct:

(1) Citizenship or immigration status discrimination;
(2) National origin discrimination;
(3) Unfair documentary practices during the Form I-9 process (document abuse); and
(4) Retaliation.

In practice, employers should treat employees equally when recruiting and hiring, and when verifying employment eligibility and completing the Form I-9. Employers should not:

1. Improperly requesting that employees produce more documents than are required by Form I-9 to establish the employee's identity and employment authorization.

2. Improperly requesting that employees present a particular document, such as a "green card," to establish identity and/or employment authorization.

3. Improperly rejecting documents that reasonably appear to be genuine and to relate to the employee presenting them.

4. Improperly treating groups of applicants differently when completing Form I-9, such as requiring certain groups of employees who look or sound "foreign" to present particular documents the employer does not require other employees to present.

5. Set different employment eligibility verification standards or require that different documents be presented by employees because of their national origin and citizenship status. For example, employers cannot demand that non-U.S. citizens present DHS-issued documents.

6. Request to see employment eligibility verification documents before hire and completion of the Form I-9 because someone looks or sounds "foreign," or because someone states that he or she is not a U.S. citizen.

7. Refuse to accept a document, or refuse to hire an individual, because a document has a future expiration date.

8. Request that, during reverification, an employee present a new unexpired employment authorization document (EAD) if he or she presented an EAD during initial verification. For reverification, each employee must be free to choose to present any document either from List A or from List C.

9. Limit jobs to U.S. citizens unless U.S. citizenship is required for the specific position by law; regulation; executive order; or federal, state, or local government contract.

The Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC), part of the United States Department of Justice Civil Rights Division, enforces the anti-discrimination provision of the INA. Title VII

also prohibits employment discrimination on the basis of national origin, as well as race, color, religion, and sex. Title VII covers employers that employ 15 or more employees for 20 or more weeks in the preceding or current calendar year, and prohibits discrimination in any aspect of employment, including.

Enforcement and Penalties

The Department of Homeland Security (DHS) may impose penalties if an investigation reveals that an employer has knowingly hired or knowingly continued to employ an unauthorized alien, or has failed to comply with the employment eligibility verification requirements, with respect to employees hired after November 6, 1986.

The following penalties may be imposed:

Employing Unauthorized Aliens:
- 1st offense: $539 to $4,313 per individual
- 2nd offense: $4,313 to $10,781 per individual
- Additional offenses: $6,469 to $21,563 per individual

Improperly Completed, Retained or Missing Forms I-9:
- $216 to $2,156 per individual

Requesting Specific Documentation:
- $178 to $1,782 per individual

Knowingly Hiring or Continuing to Employ Unauthorized Aliens:
- Up to $3,000 per unauthorized alien
- Imprisonment (if convicted)

Participating in Document Fraud:
- 1st offense: $376 to $3,005
- Additional offenses: $3,005 to $7,512

Discrimination:
- 1st offense: $445 to $3,563 per individual
- 2nd offense: $3,563 to $8,908 per individual
- Additional offenses: $5,345 to $17,816

In determining the amount of the penalty, DHS will consider:

1. The size of the business of the employer being charged;
2. The good faith of the employer;
3. The seriousness of the violation;
4. Whether or not the individual was an unauthorized alien; and
5. The history of previous violations of the employer.

E-Verify

E-Verify is an Internet based system operated by the Department of Homeland Security (DHS) in partnership with the Social Security Administration (SSA) that allows participating employers to electronically verify the employment eligibility of their newly hired employees. Participation in E-Verify is voluntary except for Employers who are federal contractors and who are required by contract to participate in the program. E-verify does not exempt the employer from the responsibility to complete, retain, and make available for inspection Forms I-9 that relate to its employees, or from other requirements of applicable regulations or laws.

E-Verify employers may accept any document or combination of documents on Form I-9, but if the employee chooses to present a List B and C combination, the List B (identity only) document must have a photograph. After completing a Form I-9 for the new employee, the authorized representative creates a case in E-Verify that includes information from Sections 1 and 2 of Form I-9. E-Verify will then provide notification regarding the employment authorization of the employee. In some cases, E-Verify will provide a response indicating a tentative non-confirmation of the employee's employment authorization. This does not mean that the employee is necessarily unauthorized to work in the United States, rather, it means that E-Verify is unable to immediately confirm the employee's authorization to work. In the case of a tentative non-confirmation, both the employer and the employee must take steps specified by E-Verify to resolve the status of the case within the prescribed time period.

You must also follow certain procedures when using E-Verify that were designed to protect employees from unfair employment actions. An Employer must use E-Verify for all new hires, both U S citizens and noncitizens, and may not use the system selectively. An Employer may not prescreen applicants for employment, check employees hired. For further information regarding E-Verify, go to the USCIS website.

Federal Contractors see also - Executive Order 12989 page 54.

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Workers' Compensation Act

The New Jersey Workers' Compensation Act provides benefits for "occupational" disabilities (injuries, diseases and death) generally - i.e., those "arising out of and in the course of employment" - and constitutes the exclusive remedy against an employer for such disabilities except when the employee involved is a minor who is employed in violation of law, or in cases of "intentional wrong."

Course of Employment

The statute provides that "employment" shall be deemed to commence when the employee arrives at his place of employment to report for work, and terminates when he leaves it. "Place of employment" excludes areas "not under the control of the employer," with these exceptions:

1. When an employee is required by his employer to be away from his place of employment, he is considered to be in the "course of employment" while engaged in the "direct performance" of the duties assigned by his employer - i.e., if he is on a "special mission." In such case the travel to and from the mission would be considered to be "in the course of employment."

2. "Employment" includes time spent traveling to and from a distant job site away from the employer's place of business if the employee is paid for such travel time - i.e., if he receives wages for the time spent, rather than reimbursement for travel expense.

3. "Employment" includes time spent traveling in an "employer authorized" vehicle on "authorized business." "Authorized" does not mean "owned;" it means that the use is authorized, and it must be authorized for use on the employer's business.

4. By judicial interpretation, an employee while in a parking lot which is not under his employer's control is "in employment" while traveling to or from a parking location to which his employer has assigned him.

Categories of Disability

1. Temporary disability: a disability which totally prevents the employee from performing the normal duties of his occupation and which continues until the employee is able to resume work or until he is as far restored in his ability to work as the character of the injury will permit.

2. Permanent, partial disability (i.e., permanent in quality and partial in character): a "permanent impairment" caused by accident or disease, established by "demonstrable, objective medical evidence, which restricts the function of the body or one of its members or organs." A factor to be taken into consideration is whether there has been "a lessening to a material degree of an employee' s working ability."

The following are declared to be outside the scope of this definition: injuries such as minor lacerations, minor contusions, minor sprains, scars which do not constitute "significant permanent disfigurement", and diseases of minor nature such as mild dermatitis and mild bronchitis.

3. Permanent, total disability (i.e., permanent in quality and total in character): a physical or neuropsychiatric "total permanent impairment" caused by accident or disease "where no fundamental or marked improvement in such condition can be reasonably expected." Factors other than physical or neuropsychiatric impairment may not be considered unless they constitute at least 75% of total disability.

Amount and Duration of Benefits

1. For temporary disability: 70% of the employee' s weekly wage with a minimum of 20% of the state-wide average weekly pay and a maximum of 3/4 of such average. Maximum duration of benefits is 400 weeks.

> No benefits are payable before serving a waiting period, which consists of 7 days of disability, consecutive or otherwise. If the total period of disability extends beyond 7 days, benefits will be paid retroactively to the first day of disability.

2. For permanent total disability, weekly benefit amounts are the same as for temporary disability. Payments shall be made for 450 weeks, at the end of which time payments shall cease unless the injured person shall have submitted to such physical or educational re-habilitation as has been ordered by the Rehabilitation Commission and can show that because of such disability it is impossible for him to earn wages equal to those earned at the time of the accident.

3. For permanent, partial disability: 70% of the employee' s weekly wage with a maximum ranging from 20% to 75% of the state-wide average weekly pay, depending on the duration of payments (not to exceed 600 weeks), and a minimum of $35 per week. The duration of payment for loss of certain parts of the body is specified in the statute; for other injuries the duration is determined by the ratio of the extent of disability to 600 weeks - thus, for 50% disability, payment would be made for 300 weeks. (Benefits for permanent disability may be awarded after and in addition to an award for temporary disability.)

4. For death

> If death results from occupational accident or disease, the amount of weekly compensation payable to the employee's surviving dependents is calculated at 50% to 70% of the employee's wage, regardless of the number of dependents, but not to exceed 3/4 of the state-wide average weekly pay.
>
> A surviving spouse shall receive his or her share of this compensation for life, except that upon remarriage the amount payable thereafter shall not exceed 100 times the weekly benefit. Other dependents shall be paid their share of such compensation for 450 weeks; at the end of this period payment to a dependent who is under 18 years of age shall be continued until he attains that age, or age 23 if he is a full-time student.

Maximum Benefits

Effective January 1, 2017, the maximum weekly benefits under the Workers' Compensation Law is $896.

Medical Expenses

The employer of an injured worker is obligated to make available appropriate medical treatment and hospital care (even though the injury does not result in lost time), but not in excess of $50 for physicians' services and $50 for hospital service unless the Workers' Compensation Division determines that a higher amount is warranted. The employer is not obligated to reimburse an employee for medical or hospital charges incurred by an employee who selects his own physician or hospital unless the employer has failed, after request, to supply such medical treatment or care.

The mere furnishing of medical treatment or the payment thereof by the employer shall not be an admission of liability.

Occupational Disease

An occupational disease is defined as one arising out of and in the course of employment which is "due in a material degree to causes and conditions which are or were characteristic of or peculiar to a particular trade, occupation, process or place of employment." Deterioration of a tissue, organ or part of the body in which the function of such tissue, organ or part is diminished due to the natural aging process is not compensable.

Heart Cases

In any claim for compensation for injury or death from cardiovascular or cerebral vascular causes, the claimant must prove that the cause was work effort or strain "involving a substantial condition, event or happening in excess of the wear and tear of the claimant' s daily living," and which "in reasonable medical probability caused in a material degree" the resulting injury and death.

Hearing Loss

1. Compensation is payable for noise-induced occupational loss of hearing, which is defined as "a permanent bilateral loss of hearing acuity of the sensorineural type due to prolonged, habitual exposure to hazardous noise in employment." A loss caused by a single, short noise exposure shall not be considered an occupational disease but an injury by accident.

a. "Sensorineural hearing loss" means a loss of hearing acuity due to damage to the inner ear, as distinguished from conductive hearing loss which results from disease or injury involving the middle or outer ear.

b. Prolonged exposure means exposure to hazardous noise for a period of at least 1 year.

c. Habitual exposure means exposure to noise exceeding the allowable daily exposure (see below) at least 3 days each week and for at least 40 days each year.

d. Hazardous noise means noise which exceeds the following daily exposures:

Noise Level (dBA)	Allowable Daily Exposure
90	8 hours
95	4 hours
100	2 hours
105	1 hour
110	30 minutes
115	15 minutes

If the hearing loss of the better ear is less than a dB level specified in the statute, the hearing loss shall not be compensable.

2. To determine the degree of hearing loss, the hearing threshold for each ear is calculated by measuring and averaging the hearing thresholds for 3 frequencies: 1000 Hz, 2000 Hz and 3000 Hz. The extent of binaural hearing loss is then determined by application of a formula specified in the Act.

3. An employer may request an employee to undergo an audiometric test (at the employer' s expense) at the time of termination of employment. The employer must make the request in writing and state the penalty for a refusal, which is forfeiture of the employee's right to compensation for hearing loss if he fails to comply with the request within 60 days after its receipt, unless such failure was due to a "legitimate reason" as determined by the Workers' Compensation Division. If so requested by the employee a copy of the test results shall be furnished to him within 2 weeks of the request.

Recreational and Social Activities

Injuries or death resulting from recreational or social activities are not compensable unless such activity is "a regular incident of employment" and produces a benefit to the employer "beyond improvement in employee health or morale."

A New Jersey court held that an injury sustained by an employee while playing softball on a team composed of co-workers was not compensable where the games were held off-premises, were not sponsored or organized by the employer and participation was voluntary, and where the employer's only

contribution was the furnishing of bats, balls and baseball caps. The "regular incident of employment" test was not met.

The same result was reached where an employee was injured while playing paddleball on the premises during his regular lunch period. The activity had been engaged in 12-15 times previously, had not been sponsored or supported by the employer, and participation was voluntary.

Pre-existing Disabilities

If an individual sustains an occupational injury or disease to a part of the body which results in an increase in a pre-existing loss of function of the same part of the body, the employer is relieved of responsibility for the pre-existing disability (including hearing loss) regardless of what caused it. The employer has the burden of proving the extent of the pre-existing disability.

A pre-existing disability is not limited to one which occurred prior to the current employment. It includes disability occurring prior to a compensable injury or disease, and so might apply where an employee sustained 2 injuries while with the same employer, the first one being non-compensable.

There is also the so-called "second-injury fund," created by contributions from insurance companies and self-insurers, which is available in cases where an individual who is permanently and partially disabled at the time of hire subsequently sustains further permanent injury, and where the combination of the 2 injuries results in permanent, total disability in the statutory sense.

Ridesharing

An employer shall not be liable under the Workers' Compensation law or otherwise for injuries sustained by an employee resulting from the operation of a motor vehicle while used in a "ridesharing arrangement" to transport employees between places of residence (or terminal near such place) and the place of employment where the transportation is incidental to the purpose of the driver unless (a) the vehicle is owned, leased or contracted for by the employer, or (b) the employee is required to participate in the ridesharing as a condition of employment or (c) the vehicle has a maximum capacity of more than 15 persons.

Defenses

It is a defense to a claim if:

1. The injury or death was self-inflicted, or

2. The proximate cause of injury or death was intoxication or the unlawful use of certain dangerous substances (narcotics, opiates, etc.) specified in the New Jersey Controlled Dangerous Substances Act,

or

3. The proximate cause was willful failure after repeated warnings to use "reasonable and proper" protective devices furnished by the employer if their use clearly has been made a condition of employment (except in emergencies which do not allow for such use).

Notification to Employer of Injury*

Unless an employer knows of the occurrence of an injury, notice thereof must be given to the employer by the injured employee or by someone on his behalf within 14 days of the occurrence of the injury to ensure recovery of full compensation; otherwise:

1. If the notice is given or the employer's knowledge is obtained 15 to 30 days from the occurrence of the injury, compensation will be barred or reduced to the extent the employer can show that he was prejudiced by the delay.

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*These provisions have limited effect because Workers' Compensation judges almost always find reason to impute knowledge to the employer of the occurrence of an injury.

2. If such notice or knowledge is received 31 to 90 days therefrom, the employee must show a reasonable excuse for the delay, and even then, compensation will be barred or reduced to the extent the employer can show that he was prejudiced by the delay.

3. If such knowledge or notice is received more than 90 days after the occurrence of the injury, no compensation shall be allowed.

As an exception to the foregoing, where there is a traumatic hernia, compensation will be allowed only if notice thereof is given by the employee to the employer within 48 hours after its occurrence (excluding a Saturday, Sunday or holiday from such period).

Notification to Employer of Disease

No compensation is payable for an occupational disease unless notice is given to the employer within two years after the employee knew the nature of the disability and its relation to the employment (or within 5 months after the last exposure to the environment), whichever is later --unless during that time period the employer had actual knowledge that the employee had contracted the disease.

Reporting By Employer

Upon the occurrence of an accident or an occupational disease, an employer shall promptly furnish the insurance carrier or third party administrator with information regarding the incident.

A self-insurer (not utilizing a third party administrator) shall within three weeks, file a "first notice of accident" report in electronic date interchange media with the Division of Workers' Compensation through the Compensation Rating and Inspection Bureau. Subsequent reports are also required.

Statute of Limitations

For injury: a claim must be filed with the Workers' Compensation Division within 2 years from the occurrence of the accident, or 2 years from the date of the last payment of compensation (which could include furnishing of medical treatment), whichever is later.

For disease (including hearing loss): a claim must be filed within 2 years from the date the employee first knew the nature of his disability and its relation to the employment, or within 2 years from the date of the last payment of compensation for the disease, whichever is later.

Penalties

Any employer who fails to provide coverage, misrepresents an employee as an independent contractor or provides false, misleading information regarding the number of employees, shall be guilty of a disorderly persons offense. Further, an employer shall be guilty of a crime of the fourth degree and subject to a stop-work order by the Director of the Division of Workers' Compensation if such failure is knowing.

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Unemployment Compensation

Definitions

1. Base Year: The base year is determined in one of several ways:

a. The first 4 of the last 5 completed calendar quarters immediately preceding the day of the filing of a valid claim. (A claim is "valid" if the claimant is unemployed and had sufficient base-year earnings to establish eligibility—see page 70. The "day" of filing is construed as Sunday of the week in which the claim is filed.)

b. If due to insufficient wages the claimant cannot establish eligibility for benefits in a base year which is determined as in (a), he may utilize as a base year the last 4 completed calendar quarters immediately preceding the filing of a valid claim.

c. If the claimant cannot establish eligibility in a base year which is determined as in either (a) or (b), he may utilize as a base year the last 3 calendar quarters plus the period between the last completed quarter and the filing of a valid claim.

d. In any of the foregoing cases if an individual's U.C. claim is filed after a period of disability, his base year may be determined differently. If the disability was of a kind which was compensable under the T.D.B. Law, and if the employment which the individual had immediately preceding the disability is no longer available, the terminal date of the calendar period used for measuring the base year will be the commencement of the period of disability rather than the date of filing a claim.

The same applies to a case where the disability was compensable under the Worker's Compensation Law, provided the period of disability did not exceed 2 years.

2. Weekly Benefit Rate: the lesser of 60% of the claimant's average, weekly wage during his base year or 56 2/3% of the state-wide average, weekly wage.

a. Increased benefits will be paid to a claimant who at the time of filing an "initial" claim has any of the following dependents: an unemployed spouse or civil union partner; an unemployed, unmarried child under age 19; an unemployed, unmarried child who is attending school, full-time, and who is under age 22. Provided, that if the claimant's spouse is employed during the week when claimant files an "initial" claim for benefits, the provisions of this paragraph shall not apply throughout the benefit year.

The individual's benefit rate will be increased by 7% for 1 dependent, 11% for 2 dependents and 15% for more than 2 dependents, but his total benefit amount may not exceed 56 2/3% of the state-wide average, weekly wage.

For a week of partial unemployment (see page 120) the amount of weekly benefit payable will be 120% of the weekly benefit rate otherwise payable minus any earnings received with respect to that week.

b. Special provisions apply to a claimant whose base-year employment includes military service.

c. A benefit amount otherwise payable may be offset by payments received by a claimant pursuant to a pension or retirement plan, including a 401(k), which was maintained or contributed to by any base-year employer or chargeable employer (unless the service performed for such employer during the base year did not affect either the amount of the private pension benefit or the eligibility thereof).

If the retirement plan was non-contributory, the entire amount of the retirement benefit is offset against U.C. payment; if the plan was contributory, except in the case of Social Security payments the U.C. payment is reduced by 50% of the amount of the retirement benefit. No reduction is made for Social Security payments.

If a lump-sum pension payment is received in lieu of periodic payments, the reduction of benefits is determined by prorating the lump-sum payment over the life expectancy of the individual.

A lump-sum pension paid to an individual who is separated involuntarily and permanently to the date at which the individual may retire (without penalty to pension rights) with full pension rights will offset only the week it was paid.

A lump-sum pension payment rolled over into another qualified retirement plan will not reduce unemployment benefits.

3. Average Weekly Wage: the amount arrived at by dividing the total of the claimant's earnings with all base-year employers by the number of base weeks he worked during his base year.

4. Base Week: a calendar week during the base year in which claimant earned at least 20 times the state minimum hourly wage.

5. Benefit Year: the period beginning with the day a valid claim for benefits is filed and continuing thereafter for 364 calendar days.

Exception: in cases of partial unemployment (see below) the benefit year commences with the onset of the unemployment, provided the claimant files a benefit claim in less than 28 days after his employer has furnished him with a statement of his earnings for the period of partial unemployment. A claim for benefits in each subsequent week of partial unemployment must be filed within a similar time period.

Eligibility for Benefits

(Note: There is no requirement to serve a "waiting week" before being eligible for benefits.)

1. For total unemployment: to be eligible for unemployment compensation a totally unemployed individual must:

a. Have had at least 20 base weeks of employment in his base year, or have earned a total of at least $8,400 in his base year from all "covered" employers for whom he worked during that year.

Further, an individual filing a claim for benefits in any successive benefit year must have earned six times his weekly benefits rate and worked for at least 4 weeks since his previous claim to re-qualify.

b. Demonstrate that he is able to work, available for work, and actively seeking work. This means able to perform some kind of work, not necessarily his customary work.

However, an individual who is unable to work because of a non-occupational accident or sickness which occurred more than 14 days after his last day of work and which results in total disability to perform any work for remuneration will be entitled to "unemployment disability benefits" if he otherwise would be entitled to U.C. benefits. These are a special form of unemployment compensation benefits which are not covered by the Temporary Disability Benefits Law and which are not charged against the employer's U.C. account.

For a temporary separation of 8 weeks or less, the claimant will not be required to actively seek work.

The Director of the U.C. Division has the authority to modify the requirement of actively seeking work when warranted by economic conditions.

2. For partial unemployment: an employee who meets the eligibility requirements of paragraphs (a) and (b), previous page, may receive benefits for partial unemployment for any 7-day period in which he does not work full time if his earnings for that week do not attain 120% of his weekly benefit rate.

Such an individual may be either one who normally works full time, but is unemployed during part of a week (as in the case, for example, of a 2-day layoff), or a person who customarily works on a part-time basis. ("Part-time" means fewer hours than those prevailing in the applicable industry or occupation.)

In the case of a person who restricts himself to part-time work, in order to be eligible for benefits, in addition to satisfying all the other requirements for eligibility he must demonstrate that (a) there is good cause for such

restriction, (b) he is available to work sufficient hours to earn wages equivalent to his weekly benefit rate, (c) there is a "market" for his skills in the geographical area in which he is willing to work, and (d) he has been performing part-time work for a substantial period of time - usually 20 weeks or more. "Good cause" does not include mere preference for part-time work.

3. **Shared Work Plans**: Shared-Work, also known as short-time compensation, is an option within the federal-state unemployment system that provides employers an alternative to layoffs during a business slowdown. Rather than laying off a percentage of the work force to cut costs, an employer may reduce the hours and wages of all or a particular group of employees. The employees whose hours and wages are reduced can receive partial unemployment insurance benefits to supplement their lost wages.

In general, this program can apply to employers employing 10 or more employees who must reduce the hours and wages of some or all of their employees by at least 10%.

The affected employees can receive a percentage of their weekly unemployment benefit equal to the percentage of hours reduced (e.g., a 20% reduction in hours/wages will result in a payment of 20% of the individual's weekly unemployment amount). This benefit may be paid for up to 26 weeks.

Employers must file a written application with the state to participate in this program. Additionally, the employer must agree to maintain group health insurance, pensions and other employment benefits during this time; agree not to hire any other workers; and, if applicable, reach written agreement with the union, among other things.

Benefits paid under Shared Work plans are charged back against the employers' account for use in computing experience rates.

Duration of Benefits

The number of benefit payments in any benefit year is one week of U.C. benefits for each base week of employment, up to a maximum of 26 times the individual's weekly benefit rate.

In periods of high unemployment the 26-times limit may be increased by as much as 80%, depending on the unemployment rate in the state. Not more than half of these additional payments will be charged to the employer's U.C. account and affect his experience rating; in some cases none of them will be charged.

Maximum Benefits

Effective January 1, 2017, the maximum weekly benefits under the Unemployment Compensation law is $677 per week.

Disqualification from Benefits

Even if an individual meets all of the eligibility requirements, he will be disqualified from receiving unemployment benefits for any of the following reasons:

1. Voluntary Quit

An individual shall be disqualified from benefits for the week in which he has left work voluntarily without good cause attributable to such work and for each week thereafter until he has been employed for 8 weeks and earned in employment at least 10 times his weekly benefit rate. Good cause attributable to such work means a reason related directly to the individual's employment, which is so compelling as to give the individual no choice but to leave the employment. In contrast, a voluntary quit may be separation due to lack of transportation, childcare issues, voluntary relocation, incarceration or, in some cases, the loss of a prerequisite license needed to perform job duties.

An individual who is absent from work, or who fails to return from a leave of absence, for 5 or more consecutive days and fails without good cause to notify the employer of the reason is considered to have abandoned his job and is subject to a quit disqualification.

An employee who does not return on a specified recall date from a temporary lay-off (up to 10 weeks) would also be disqualified.

Benefits will not be denied, however, when an individual leaves work due to 1) a work-related disability, provided there is no suitable work available; 2) a physical or mental condition or state of health that is not work-related, but is aggravated by working conditions, provided that there is no suitable work available; 3) unsafe, unhealthy or dangerous working conditions; 4) imminent layoff or discharge within 60 days; 5) circumstances directly resulting from the individual being a victim of domestic violence; and 6) when an employee leaves to accompany a spouse or civil union partner who is an active member of the United States Armed Forces to a new place of residence

outside the state, and the individual moves not more than nine months after the spouse is transferred, and upon arrival to the new residence, the employee is available for suitable work.

2. Discharge or Suspension for Misconduct

a. If discharged for "**gross misconduct**" connected with the work, which is the commission of an act punishable as a crime of the fourth degree or higher (i.e., other than a disorderly person offense), the disqualification can be removed only in the same manner as in the case of a quit, as previously described. Furthermore, no benefit rights shall accrue to the claimant based upon wages paid to him by the employer who discharged him.

Examples of gross misconduct are theft of a value of $200 or more, aggravated assault, embezzlement, arson or sabotage connected with the work.

b. If discharged or suspended for "**severe misconduct**", a person is disqualified for the week in which he was discharged or suspended and for each week thereafter until he becomes reemployed and works at least 4 weeks and earns at least 6 times his weekly benefit rate.

Examples of severe misconduct: repeated violations of an employer's rule or policy, repeated lateness or absences after a written warning by an employer, falsification of records, physical assault or threats that do not constitute a crime, misuse of benefits, sick time or leave, theft of company property, excessive use of intoxicants or drugs on work premises, theft of time, or where the behavior is malicious and deliberate but is not considered gross misconduct.

c. If discharged or suspended for "**simple misconduct**", a person is disqualified for the week in which the discharge or suspension occurred and for the 7 ensuing weeks.

For an act to be considered ordinary misconduct it must be improper, intentional and connected with the work of the individual. "Connected with the work" includes off-premises or after-hours conduct which adversely impacts the employer or impairs the individual's ability to perform his job duties.

Some examples of possible misconduct: deliberate violation of the employer's rules, or a disregard of standards of behavior which the employer has a right to expect of an employee, insubordination, deliberate performance below work standards, excessive absence or lateness without good cause or without notification to the employer, testing positive or refusing to take a drug test under a written policy.

Incompetency, inefficiency, or physical or mental inability to do a job is not misconduct.

3. Failure to Apply For or Accept Suitable Work

A person is disqualified if he "failed without good cause, either to apply for available, suitable work when so directed" by the local U.C. office "or to accept suitable work when offered him". The disqualification will continue for the week in which such failure occurred and for the 3 ensuing weeks. Such a disqualification will occur whether the individual refuses the work outright, or accepts suitable work for a brief period and then voluntarily quits.

a. An actual or attempted substantial change in the duties, terms or conditions of employment constitutes, in effect, an offer of new work, and if it is rejected by the employee, the rejection will not be treated as a quit but rather as a failure to accept work. Whether there will be a resulting disqualification will depend on whether the work offered was "suitable" and the employee had good cause for rejecting it. This determination will depend upon such factors as the individual's experience, prior earnings, ability to perform the work, commuting distance and means of commuting, and other conditions of the proposed employment.

b. However, if there is a lack of work in an employee's occupation and a union contract or promulgated policy allows him to bid or apply for another job, the other job is not regarded as new work: it is considered to be work which is within the scope of the existing employment agreement and a refusal would be treated as a voluntary quit.

c. A recall or offer of reemployment following a layoff constitutes an offer of new work, even though the job duties will be the same as previously, if the layoff was of indefinite duration or was of relatively long duration (more than 10 weeks).

4. Receipt of Payment in Lieu of Notice

An individual will be disqualified from benefits for any week with respect to which he is receiving or has received remuneration "in lieu of notice".

Remuneration is "in lieu of notice" only if the notice of termination is required by agreement or by custom and the payment is a substitute for the notice. Severance pay is not remuneration in lieu of notice and its receipt does not disqualify a claimant.

5. Involvement in Labor Dispute

A claimant will be disqualified from receiving unemployment benefits if his unemployment is due to a stoppage of work, such as a strike, which exists because of a labor dispute at the establishment at which he is or was last employed, unless (a) "he is not participating in or financing or directly interested in the labor dispute which caused the stoppage of work, and (b) he does not belong to a grade or class of workers, any of whom are participating in or financing or directly interested in the dispute."

A "stoppage of work" need not be complete; if there is a substantial curtailment of operations, the disqualification will arise. Ordinarily, a curtailment will be considered to be "substantial" if production of goods or services is reduced to 80% or less of normal production.

A claimant will not be disqualified during a "lockout." A lockout is when an employer prevents an individual from working, even though 1) the union has directed employers to work under the preexisting contract and 2) a strike did not precede the lockout.

6. Illegal Receipt of Benefits

A claimant will be disqualified for a period of 1 year from the date of discovery by the Division of the illegal receipt or attempted receipt of benefits as a result of any false or fraudulent representation, and is subject to a fine of $20 for each offense or 25% of the amount fraudulently obtained, whichever is greater.

7. Attending School

An individual who is a full-time student at, or on vacation from, an educational institution will be disqualified unless he earned sufficient base-year wages while attending school to establish a claim for benefits, and is otherwise entitled to benefits.

Voluntary Contributions

A reduction in the U.C. tax rate sometimes may be achieved by making a voluntary contribution. The effect of such contribution is to increase an employer's reserve ratio and thereby lower his tax rate.

The amount of voluntary contribution required to do this is computed by means of the following formula:

Average Annual Payroll x Reserve Ratio* Desired (at a higher whole %) minus present Reserve Balance = Amount of Voluntary Contribution.

Note that the resulting lower tax rate would be applied to the taxable payroll for the ensuing fiscal year, and if the payroll for that year declined, the voluntary contribution might not achieve any saving.

Voluntary payments can be made once a year, utilizing Form UC-45, within 30 days after the "Notice of Employer Contribution Rate" has been mailed.

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*An employer's reserve ratio for each fiscal year (July 1 to June 30) is computed in the following manner: The amount of all U.C. benefits charged to the employer for all past years is subtracted from the amount of all taxes paid by him for all past years. The result (called the "reserve balance") when divided by the employer's average annual taxable payroll (for the last 3 or 5 years, whichever produces the higher amount), yields the reserve ratio for that employer. This figure is then applied against the trust fund reserve ratio, (which reflects the financial condition of the U.C. trust fund) as shown in a tax table, to determine the employer's tax rate. For fiscal year 2011, the tax schedule will be “C” regardless of the Trust Fund deficit.

Interstate Employees

When an employee performs services both within and outside of New Jersey, coverage is determined by application of the following tests:

1. If the employee's services are "localized" in one state, he will be covered by the U.C. law of that state. (Service is "localized" in the state where the principal service is performed, and the services performed elsewhere are temporary or transitory.)

2. If the services are not localized in any state, the employee will be covered by the state where his base of operations is located, provided he performs some services there.

3. If neither of the foregoing applies, the individual will be covered by the state from which the employer exercises direction and control, provided the employee performs some services there.

4. If none of the foregoing applies, the employee will be covered by the state in which he resides if he performs some services there.

Records

The following records (in addition to those required by other laws) shall be maintained for the current calendar year and the 4 preceding calendar years:

1. For each employee for each pay period, the amount of total remuneration, showing commissions, bonuses, and gratuities separately.

2. Total remuneration for each pay period, and for each calendar week ending at midnight Saturday.

3. Each employee's date of return to work after temporary layoff, and date and reason for termination, and number of base weeks of employment.

4. Social Security number.

Claims Procedure

An explanation of the claims and appeals procedures is in the Appendix, page A-19.

Tax Rates

The Unemployment Compensation Division maintains an account for each employer in the state. All U.C. benefits paid to employees and former employees and charged to an employer's account must be replaced by that employer with a like amount in taxes. The employer's tax rate is also affected by the financial condition of the entire U.C. trust fund.

Benefit Payments Chargeable to Employer's Account

Only base-year employers are charged with benefits paid. The general rule is that benefits paid to an unemployed individual are charged pro rata to each base-year employer in the same proportion that wages paid by that employer during the base year bear to the wages paid by all base-year employers during the base year.

Not all benefits paid are charged against a base-year employer's account. If a claimant was or would have been disqualified for benefits with respect to a particular employer for any reason other than the claimant's involvement in a labor dispute or his receipt of remuneration in lieu of notice, that employer's account shall not be charged with any benefits which are paid after the disqualification period ends. Additionally, an employer's account will not be charged for payments to an individual who leaves work because they were a victim of domestic violence.

Example 1

An individual employed by Company A (who is his only base-year employer) is discharged for misconduct. He files a claim for U.C. benefits but is disqualified for a 7-week period, after which he is paid benefits for 10 weeks.

These benefit payments are not chargeable to Company A.

The individual is then immediately hired by Company B, but after working for 3 months is laid off for lack of work. He files for and receives U.C. benefits, (I.e., he reopens his existing U.C. claim.)

These benefits will not be charged to Company A. (Nor will they be charged to B, since B is not a base-year employer.)

Example 2

An individual employed by Company A, which has paid him a total of $20,000 in wages in his base year, resigns without "good cause" to accept employment with B. No U.C. claim is filed. After a few months' employment and receipt of wages totaling $10,000 from B he is laid off for lack of work; he files for and receives U.C. benefits for 10 weeks.

Thereafter, he is hired by Company C, but is discharged for misconduct. After a disqualification period of 7 weeks the individual receives U.C. benefits for 6 weeks.

None of the benefit payments are chargeable to Company A. Company B will be charged with 1/3 of the amount of all of the benefits paid (16 weeks) since B paid 1/3 of the total amount of wages paid by all base-year employers (A and B). Company C is not charged because it is not a base-year employer.

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Temporary Disability Benefits Law

This state law provides for the payment of "temporary disability benefits" (TDB) to an employee who sustains a non-occupational sickness or accident (including mental disability, alcohol-related disability and pregnancy-related disability) which results in the individual's inability to perform the duties of his regular job.

Benefits are payable by the state, pursuant to what is known as the "state plan", unless an employer elects to provide for such benefits via a so-called "Private Plan". A Private Plan may be either an insured or a self-insured plan; in either case it must provide benefits in amounts and on terms no less favorable than those of the state plan, and must receive advance approval by the appropriate state agency.

Definitions

1. Base year: the 52 consecutive weeks preceding the calendar week in which each period of disability commences.

2. Period of disability: the entire period when an individual is continuously and totally disabled from performing his regular job, except that 2 occurrences of disability due to the same or related cause and separated by not more than 14 days shall be considered as a single period of disability, provided the individual has earned wages during such 14-day period with the last employer for whom he worked immediately preceding the first disability.

3. Base week: a week in which claimant earned at least 20 times the state minimum hourly wage.

4. Weekly benefit rate: the lesser of 2/3 of claimant's average weekly wage or 53% of the average weekly wage in the state.

> The amount of TDB otherwise payable by the state will be reduced by the amount of pension benefits received under a pension plan maintained by claimant's most recent employer. Similarly, Social Security disability payments will reduce TDB but primary Social Security benefits received will not reduce TDB.

5. Average weekly wage: total wages from claimant's most recent employer during the base weeks in the 8 calendar weeks preceding the period of disability, divided by the number of such base weeks. If claimant had more than one employer during such period and if this computation yields less than the average earned among all of them, then the average weekly wage shall be computed on the basis of earnings from all such employers.

Eligibility for Benefits and Coverage

No individual shall be eligible for benefits unless during his base year, among all base-year employers, he had at least 20 base weeks of employment or earned a total of at least $8,400. Base weeks would include a week (maximum of 13 weeks) that an employee is laid-off because the employer curtailed operations due to a state of emergency (e.g. Hurricane Sandy).

Only a disability which commences during employment or within 14 days after an individual's last day of employment is compensable under this statute. (But note the provision for "unemployment disability" benefits in the Unemployment Compensation Law.) Ordinarily, the last day of "employment" is the last day of actual work. However, for purposes of the TDB law, employment is deemed to continue while an individual is on a paid vacation or paid leave of absence, or during the period for which he received pay in lieu of notice. Receipt of severance pay does not extend the period of employment.

Maximum Benefits

The maximum amount of benefits payable for <u>each</u> period of disability is the lesser of 26 times the claimant's weekly benefit rate or 1/3 of total wages received from all employers in his base year.

Effective January 1, 2017, the maximum weekly benefit rate for state plan benefits under the Temporary Disability Benefits Law is $633 per week.

All benefits are payable by or chargeable to the most recent base-year employer even if the claimant worked only a single day for that employer.

Two or More Employers

Occupational

If a covered individual with more than one employer receives workers' compensation benefits for an injury or illness incurred at one place of employment and that individual files a claim for New Jersey temporary disability benefits as a result of the same injury or illness on the basis of employment with other employer(s), those benefits are payable under the New Jersey State plan or an approved private plan provided that:

1. the claimant is otherwise eligible for disability benefits,

2. wages from all covered employers are used to calculate the weekly benefit rate,

3. the temporary disability weekly benefit rate is reduced by the workers' compensation weekly benefit rate,

4. the claimant receives disability insurance at the adjusted rate, and

5. the reduction of the disability weekly benefit rate reduces the maximum total benefits during the period of disability.

In such cases, the most recent covered employer who is not a party to the workers' compensation claim, shall be considered as the last employer under the temporary disability benefits law. If the last employer is covered under the state plan, benefits shall be paid under the state plan and are charged to the account of that employer. Such would be the case under an approved private plan.

Non-occupational

If an employee is in concurrent employment, meaning he is working for two employers on the day before his disability, then the benefits are paid by both employers in the same proportion as the wages paid. However, if one of the employers has a private plan, then that employer is responsible for the entire benefit payment, based on all wages.

Limitations of Benefits

No benefits are payable under the state plan to any person:

1. For the first 7 consecutive calendar days of each period of disability, except that this waiting period will be retroactively compensable after 3 consecutive weeks of benefit eligibility, i.e., if a disability lasts for 22 days, the waiting period will be paid for.

2. For any period during which he is not under the care of a licensed physician, dentist, optometrist, podiatrist, chiropractor, advance practice nurse or practicing psychologist.

3. For any period of disability due to willfully and intentionally self-inflicted injury, or to injury sustained in the perpetration by the claimant of a crime of the fourth degree or higher, or for any period during which he would be disqualified for unemployment compensation benefits for “gross misconduct.”

4. For any period during which he performs any work for remuneration or profit.

5. In an amount which together with any remuneration he continues to receive from his employer would exceed his regular weekly wages immediately prior to disability.

   a. "Remuneration" includes such items as vacation pay, sick pay, salary continuation, remuneration in lieu of notice of termination, but not severance pay (see page 122).

   b. Disability benefits "shall be reduced by the amount paid under any governmental or private retirement, pension, or permanent disability benefit or allowance program" to which claimant's most recent employer contributed.

6. For any period during which he would be disqualified for unemployment compensation because of the labor-dispute provision of the Unemployment Compensation Act unless the disability commenced before such disqualification would have arisen.

The foregoing limitations may be applied to employees covered by a Private Plan of TDB only if the limitations are expressly included in the terms of the plan.

Notice Requirements

In addition to posting notice of employee's rights under TDB (see page 133), it is the employer's responsibility to notify an employee of his/her rights upon the occurrence of a disability and employers who use the state Plan must provide a claim form to the individual by the ninth day of disability.

Disability Caused by Pregnancy

Pregnancy per se is not a disability under TDB the law, and there is no conclusive presumption of disability during any particular period of pregnancy. An actual disability which is caused or contributed to by pregnancy or childbirth is treated under the law as any other disability. However, for administrative convenience the state will not usually challenge a physician's certification that a claimant was disabled for a period of 4 weeks before childbirth and 4 to 6 weeks after childbirth (6 to 8 weeks in Caesarian cases).

Benefits for Partial Disability

Because TDB is payable only in cases of total disability an employee is ineligible for TDB although disabled during a particular week if he is able to perform some or all of his regular job duties with reduced hours.

However, if an employee who has sustained a non-occupational injury or illness which rendered him totally disabled recovers from the disability and returns to work during part of a week, he will be entitled (if otherwise eligible] to TDB for each day of the week that preceded his return. The amount of the benefit payment for each such day will be 1/7 of the employee's weekly benefit rate.

Physical Examinations

A State Plan claimant may be required by the state to submit to a physical examination by an impartial physician, either at the initiative of the State or at the request of the employer. The examination is paid for by the State.

An employee covered under a private plan has the right to choose his or her physician, although a private-plan employer or its insurance carrier may also require submission to a physical examination, without charge to the claimant, not more often than once a week.

Denial of Benefits

Whether under a State plan or private plan, a claimant can be denied benefits or disqualified from receiving additional benefits under the following circumstances:

1. The employer and treating physician reach a mutual agreement as to the period of disability.

2. The employer-designated physician determines that the claimant is no longer disabled.

3. The claimant refuses to submit to an examination.

4. Credible factual evidence exists showing that the claimant is performing activities that demonstrate that he or she is able to perform the regular duties of his or her regular employment.

Tax and Contribution Rates

The tax rate for State-plan employers ranges from 0.1% to 0.75% of taxable payroll, depending on their claims experience and the financial condition of the TDB fund. Private-plan employers pay no tax but are subject to a general assessment (not to exceed 1/20 of 1% of taxable wages) to defray expenses of the State for overseeing private plans.

Employees covered by the State Plan are taxed 0.2% of taxable wages, a rate which is determined each calendar year based on the condition of the State Disability Fund (in addition to their Unemployment Compensation tax). A private plan may require a contribution by employees of an amount not in excess of the amount of this TDB tax, provided a majority of the covered employees have accepted the plan by written election.

Family Leave Insurance

The Family Leave Insurance law (FLI) enables eligible employees to collect up to six-weeks of state paid monetary benefits when out of work to care for a newborn, newly adopted child, or an ill family member. This insurance law is an extension of the State Temporary Disability Benefits Program and will be administered through the State of NJ. However, employers have the option of establishing either an insured or a self-insured private plan with benefits and terms at least as favorable as the state plan. Private plans must receive advance approval by the state.

Definitions

As an extension of the Temporary Disability Benefits (TDB) law, eligibility and benefits calculations are the same; please see page 127 for relevant definitions. Additional definitions specific to FLI include:

1. Bond or Bonding – means to develop a psychological and emotional attachment between a child and his/her primary caregiver(s). The development of this attachment requires being in one another's presence.

2. Family member – means child, spouse, domestic partner, civil union partner or parent of a covered individual.

   A child means a biological, adopted, or foster child, stepchild or legal ward of a covered individual, or child of a domestic or civil union partner. Further, a child is defined as being less than 19 years of age or 19 years of age or older but incapable of self-care because of mental or physical impairment.

   A parent means a means a biological parent, foster parent, adoptive parent, a legal guardian of the eligible individual when he/she was a child, or a step parent which includes the person to whom the eligible individual's biological parent is either currently married or with who the eligible individual's biological parent is currently sharing a civil union.

3. Incapable of self care – solely for the purpose of defining the term "child," means that the individual requires active assistance or supervision to provide daily self-care in three or more "activities of daily living" or "instrumental activities of daily living. 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.

4. Physical or mental impairment – solely for the purpose of defining the term "child" means a) any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitor-urinary, hemic and lymphatic, skin and endocrine; or b) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

5. Care – means, but is not limited to, physical care, emotional support, visitation, assistance in treatment, transportation, arranging for a change in care, assistance with essential daily living matters and personal attendant services.

6. Serious Health Condition – in general, defined as in the Family Medical Leave Act (see page 58).

Reasons for Leave

An eligible individual can collect FLI benefits to bond with a newborn, newly adopted child or to care for an ill family member. Bonding with a child must occur within the first 12 months of the child's birth or placement for adoption. Caring for a family member with a serious health condition must be supported by a certification provided by a health care provider of the ill family member.

Eligibility

No individual shall be eligible for benefits unless during his or her base year, among all base-year employers, he or she had at least 20 base weeks of employment or earned a total of at least $8,400. Base weeks would include a week (maximum of 13 weeks) that an employee is laid-off because the employer curtailed operations due to a state of emergency (e.g. Hurricane Sandy).

Limitations of Benefits (the Waiting Week)

Similar to the TDB law, no FLI benefits are payable under the State Plan to any person for the first 7 consecutive calendar days of each benefits period, except that this waiting period will be retroactively compensable after 3 consecutive weeks of benefit eligibility.

However, there is no waiting period between a period of the individual's own disability and the period of family leave when the waiting period under the State TDB has already been met. This scenario will likely arise during periods of pregnancy disability and the bonding time that may follow after the disability ends.

In the case of intermittent family leave, if benefits become payable on any day after the first three weeks in which leave is taken, then benefits shall also be payable with respect to any leave taken during the first one-week period in which leave is taken. A likely scenario is when one day per week is taken to care for an ill family member. As always, the waiting period is the first week, which in this scenario would be one day. If the interment leave continues after 3 consecutive weeks, the waiting week (which was one day) is retroactively compensable.

Maximum Benefits

The maximum total benefits payable to any eligible individual for any period of family leave commencing on or after July 1, 2009, shall be six times the individual's weekly benefit amount or 1/3 of his total wages in his base year, which ever is less. In no cases shall more than six weeks of benefits be paid in any 12 month period, beginning with the filing of the initial claim.

Effective January 1, 2017, the maximum weekly benefit rate for state plan Family Leave Insurance benefits is $633 per week.

Use of Paid Time Off

An employer may require the claimant, during a period of family leave, to use up to two weeks of paid sick leave, paid vacation time or other leave at full pay. In such instances, the employer may request of the Division that the claimant's maximum FLI benefit entitlement during the 12-month period be reduced by the number of days of leave at full pay the employer is requiring the employee to use, up to two weeks. If the employer does not make such a request to the Division, the employee will retain the right to utilize the full 6-weeks of benefits in a 12-month period.

An employer may permit the claimant to use in excess of two weeks of such paid time off. When the employer permits the use of such time at full pay, the claimant's maximum FLI benefits within the 12 month period shall not be reduced by the number of full days pay permitted by the employer. However, the claimant will not be eligible to collect FLI benefits while receiving full pay from the employer (non-duplication of benefits).

Notice Required from the Employer

Employers shall post at each worksite, in a place or places accessible to all employees of the worksite, a printed notification of covered individuals' rights relative to receipt of FLI benefits. Additionally, employers shall provide each employee with a written copy of such notification in each of the following circumstances 1) At the time of the employee's hiring, 2) Whenever the employee provides notice to the employer of the potential need for a leave and 3) at any time, upon the first request of the employee. Such notice may be distributed in electronic form.

Employers will also be required to respond to correspondence from the Division regarding employee's claims for benefits.

Notice Required from the Claimant to the Employer

With regard to a claim for FLI to bond with a child, a claimant shall provide the employer with no less than 30 days notice. Failure to provide the employer with 30 days notice shall result in a reduction of the claimant's maximum FLI benefits entitlement by two weeks in a 12 month period, unless the timing of the leave is unforeseeable.

With regard to a claim to care in a continuous manner for a family member with a serious health condition, the claimant shall provide to the employer prior notice of the family leave in a reasonable and practicable manner, unless an emergency or other unforeseen circumstance precludes prior notice. When a claimant seeks to take intermittent leave, they must provide the employer with 15 days notice, unless an emergency or other unforeseen circumstance precludes such notice.

Intermittent Leave

Claims may be filed for six consecutive weeks, for intermittent weeks or for 42 intermittent days during a 12 month period, beginning with the first date of the claim.

Intermittent leave is not available for the purposes of bonding with a child unless the employer agrees to permit the use of leave in such a manner. In such circumstances the claimant will be permitted to utilize FLI benefits in non-consecutive periods of seven days or more.

A claimant will be eligible for intermittent leave to care for a family member with a serious health condition provided 1) it is medically necessary to take leave in such a manner, 2) the total period within which the intermittent family leave is to be taken does not exceed 12 months, 3) the claimant makes a reasonable effort to schedule the leave so as to not unduly disrupt the employer's operations and 4) when possible, prior to the commencement of the leave, the claimant provides the employer with a regular schedule of the day or days of the week on which the intermittent family leave will be taken.

Medical Examinations

An employer may request an independent medical examination of a claimant's family member to verity the need for FLI benefits in the same manner as under New Jersey Temporary Disability Benefits law, although the decision as to whether to direct an independent medical examination lies with the state or private plan.

Appeals

An employer may file an appeal of a determination to pay FLI benefits within seven (7) calendar days after the delivery of a determination, or within ten (10) calendar days after such determination was mailed.

Tax Rates

This program is financed by employee contributions. Each worker shall contribute an amount determined each calendar year and based upon the condition of the general state "Family Temporary Disability Leave Account." *

* 2012 rate = .08% of taxable payroll

Record Retention

The following is a summary of the specific record-keeping and record-retention requirements of state and federal statutes. For a more complete description of a particular record, the designated statutory or regulatory source should be consulted at the page number indicated.

In addition to the records that are specifically mandated, employers should maintain whatever data may be needed to demonstrate compliance with substantive legal obligations imposed by statute or otherwise, or which may be needed or helpful in defending against various charges or law-suits. All retention periods are based on the time the document was created, except where specifically stated.

Subject Matter	Retention Period	Source
Personnel Records		
All records, including job application, advertisements, tests, results of physical exams; records of personnel actions (terminations, promotions, demotions, layoff, etc.)*	1 Year	Title VII, ADA and ADEA, pages 21, 25, 39
	1 year or 3 years	Executive Order 11246, page 51 Rehabilitation Act, page 54
Applicant flow data	Period of adverse impact plus 3 years	Title VII, page 23 E.O. 11246, page 52, A-5
Payroll Records		
Daily and weekly hours of work; total earnings in each pay period; regular rate in overtime weeks	3 years	Federal Wage-Hour law, page 12
	6 years	NJ Wage-Hour law, page 12
Pay period, date of payment and beginning of workweek; overtime premiums; exclusions from regular rate	3 years	Federal Wage-Hour law, page 12
Basic time cards and earning cards	2 years	Federal Wage-Hour law, page 12
FICA and FUTA taxes	4 years after the date the taxes to which they relate become due, or the date the taxes are paid, whichever is later	Internal Revenue Code
W-4's	As long as they are in effect and for 4 years thereafter	Internal Revenue Code
Total remuneration of employees each pay period and each week; reasons for termination	5 years	Unemployment Compensation law, page 119

*The statues do not require that these records be compiled; they require only that they be retained if the employer makes or uses them.

Subject Matter	Retention Period	Source
Employment Eligibility		
Attestation Form I-9; documentations from state agency	Duration of employment. 3 years from the date of hire or 1 year after termination—whichever is longer	Immigration law, page 110
Employment certificate (for minors)	Duration of employment	NJ Child Labor law, page 99
Welfare and Pension Plans		
Records necessary to compile reports of benefits	6 years after filing dates	ERISA, page 153
Occupational Disabilities		
OSHA Forms 101, 200 and Forms 300, 300A, 301	5 years after end of reporting period	OSHA, page 136
Medical and Exposure Records		
Records of employees exposed to harmful substances	Varies; 30 years for most	OSHA, page 138, 139
Noise exposure	2 years	OSHA, page 139
Payments to HMOs		
Date used to compute amount of contribution	3 years	Public Health Service Act, page 107
Miscellaneous		
Records pertaining to leaves of absence	3 years	Family and Medical Leave Act, page 55
Meal period time (for employees under 19)	1 year	NJ Wage-Hour law, page 14, 96
Hours of motor vehicle operators	6 months	DOT, page 95
Driver's qualification file	3 years after termination	DOT, page 96
Date of birth	3 years	Wage-Hour, page 12 ADEA, page 43
Drug and alcohol-testing of motor vehicle drivers	1 year and 5 years	DOT, page 169
Unclaimed wages	10 years	Unclaimed Property Act, page 231

Posting of Notices (Required Postings)

The following must be posted by all employers:

1. An abstract of the New Jersey Wage Payment Law and the New Jersey Wage and Hour Law. (Obtainable from Division of Workplace Standards, N.J. Department of Labor.)

2. Employment Poster regarding Discrimination in Employment (Issued by N.J. Division on Civil Rights.)*

3. Notice of coverage under the Unemployment Compensation and Temporary Disability Benefits Laws. (Obtainable from the New Jersey Division of Unemployment and Disability Insurance.)

4. Notice of coverage under New Jersey Family Leave Insurance (Obtainable from the NJ Division of Temporary Disability Insurance.)

5. Notice of coverage under the Workers' Compensation Act. (Furnished by the insurance carrier, in format approved by the Commissioner of Insurance. Self-insurers prepare their own notices, in an approved format.)

6. Notification of employees' rights and obligations under the New Jersey Conscientious Employee Protection Act. (Issued by the NJ Department of Labor)

7. Consolidated EEO Poster with Supplement for Federal Contractors. This covers all of the laws which are enforced by the EEOC and the OFCCP (Issued by EEOC)*

8. "Federal Minimum Wage Poster". (Obtainable from Wage and Hour Division, U.S. Department of Labor.)

9. Job Safety and Health Protection Poster, informing employees of their protections and obligations under OSHA. (Furnished by the Occupational Safety and Health Administration, U.S. Department of Labor.)*

10. Notice of Employee Polygraph Protection Act. (Supplied by Wage and Hour Division, U.S. Department of Labor.)*

11. Notice of Employee Protections under the Uniform Services Employment and Reemployment Rights Act (USERRA) (Supplied by Veterans' Employment & Training Services, U.S. DOL)

12. Employee Rights Under the National Labor Relations Act (Supplied by National Labor Relations Board) *POSTING OF THIS NOTICE HAS BEEN PUT ON HOLD UNTIL FURTHER NOTICE.*

13. Employer Obligation to Maintain & Report Records (Issued by NJ Department of Labor and Workforce Development)

The following must be posted by certain employers:

1. A copy of the summary portion of OSHA Form 300A must be posted annually by most employers of 11 or more employees. (Furnished by the U.S. Department of Labor, Occupational Safety and Health Administration.)

2. Every employer of a person under 18 years of age shall post an abstract of the New Jersey law relating to employment of such minors, a list of the occupations prohibited to them, and each such employee's name, beginning and ending of his workday and meal period, and his maximum daily and weekly hours of work. (NJ Department of Labor.)

3. Contractors with the Federal government, State, counties and municipalities, and their subcontractors, must post certain notices.

4. Notice of employees' rights and obligations under the New Jersey Family Leave Act must be posted by employers subject to that law. (NJ Division on Civil Rights.)*

5. Notice of the provisions of the federal Family and Medical Leave Act must be posted by employers who are subject to that law. (Furnished by Wage and Hour Division, U.S. Department of Labor.)*

6. Certain industry specific abstracts under the NJ Wage and Hour law (i.e. health care facilities, seasonal amusement, hotel & motel, mercantile, beauty, food service, laundry, dry cleaning and dying occupations. (Furnished by NJ Department of Labor.)

7. Poster stating that it is a "place of public accommodation." (Issued by N.J. Division on Civil Rights.)*

8. Notice of Equal Pay Rights (Right to be Free of Gender Inequity) must be posted by employers with 50 or more employees. (NJ Department of Labor)

9. Notice of employee rights under NJ SAFE Act. (Issued by NJ Department of Labor)

The addresses of these government agencies are shown in the Appendix, page A-23 or can be linked to from the Member's Only section of www.eanj.org

* Must be visible to applicants as well as employees

Reporting and Notification

Requirements (other than posting) of reporting to or notifying employees, governmental agencies, and others appear in statutes and regulations on the following subjects.

Notifications to Employees

*Annual Notice Requirement

Notifications and Reports to Government Agencies and Others

Employee Access to Records

There is no state or federal law which requires an employer to allow an employee access to his personnel file or, except as stated below, to any other personnel document in the employer's possession. Neither the Freedom of Information Act nor the Privacy Act has any application in this context to private employers: these are statutes which apply to government agencies.

However, employees and others must be given access to certain other materials.

1. Employees, former employees or their representatives may inspect the records of injuries and illnesses which employers may be required to maintain under the Occupational Safety and Health Act, page 137 and 139.

2. Participants and beneficiaries may inspect certain documents which must be maintained pursuant to the Employee Retirement Income Security Act, page 150.

3. Employees and their representatives may inspect certain documents which their employer has prepared pursuant to the requirements of the OSHA Hazard Communication Standard, page 144.

4. Access by employees to medical and exposure records of employees exposed to toxic substances and harmful physical agents is required by OSHA, page 139.

5. Audiometric test results must be made available to employees, on request, Appendix page A-22.

6. An affirmative action program covering veterans or handicapped employees must be made available for inspection to certain employees and applicants, page 51.

7. Drivers of commercial motor vehicles may obtain copies of records of their use of drugs and alcohol, and records of test results, page 164.

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Occupational Safety and Health Act (OSHA)

General

This statute, which is enforced by the U.S. Secretary of Labor through the Occupational Safety and Health Administration, imposes on every employer (1) the general duty of furnishing a place of employment free from "recognized hazards that are causing or are likely to cause death or serious physical harm to his employees" and (2) the obligation to comply with safety and health "standards".

Standards are issued to provide for controlling and minimizing the risk of exposure to specific hazards. Major subjects on which they have been issued are listed on Appendix, page A-21.

Enforcement

To determine whether there is compliance with applicable standards, an inspection of an employer's premises may be conducted by OSHA either on the basis of a complaint or pursuant to a systematic and general administrative plan for the selection of inspection targets. In such cases, according to the statute, the OSHA agent can "inspect, and investigate during regular working hours and at other reasonable times, and within limits and in a reasonable manner" all machines, equipment, materials, etc., and "question privately" any employer or employee. By regulation, an inspector has the authority to take photographs, take environmental samples and employ "other reasonable investigative techniques", including the attachment of "personal sampling equipment" to employees for the purpose of measuring their exposure to air or noise contaminants.

The Act also provides that during an inspection a union representative shall be given an opportunity to accompany the inspector "for the purpose of aiding such inspection". When there is no such representative, the inspector "shall consult with a reasonable number of employees concerning matters of health and safety in the workplace". There is no statutory requirement to pay employees who participate in such "walkaround" activity. A representative of the employer may also accompany the inspector.

NOTE: the foregoing describes the authority of an OSHA agent who is allowed entry into the premises without a search warrant. If, as is his right, an employer refuses access to the premises without a warrant, if one is then obtained and served on the employer, the scope of the inspection must be limited strictly to the specific terms of the warrant. The inspector has no right to go anywhere or do anything which is not expressly authorized by the warrant. Furthermore, a warrant cannot legally grant an OSHA inspector access to records of the employer except, possibly, those records which are specifically required to be maintained.

A citation may be issued for a condition deemed to be a violation. To be effective, it must be issued within 6 months of the occurrence of the alleged violation. If the employer fails to correct the violation within the period of time specified in the citation (unless it has been appealed), the Secretary shall notify the employer by certified mail of such failure and the penalty therefor.

Upon receipt of a citation, the employer has 15 working days to notify the Secretary that he wishes to contest the citation or the proposed penalty, or both. Also, upon receipt of a notification of failure to correct a violation, the employer has 15 working days to notify the Secretary that he wishes to contest the notification or the proposed penalty, or both. After the filing of a notice of contest the Occupational Safety and Health Review Commission shall conduct a hearing.

Reporting of Injuries and Illnesses

Employers with 11 or more employees (at any one time in the previous calendar year) must prepare and maintain OSHA Forms 300, 300A, and 301 unless they are engaged in certain low hazard industries, which are identified by any of the following North American Industry Classifications (NAICS).*

Form 300, the Log of Work-Related Injuries and Illnesses, identifies employees who sustained occupational injuries or disabilities and describes each case. Form 300A, Summary, shows the totals for each type of recordable case that occurred during the year. A recordable case would be one involving an injury or illness that results in death, loss of consciousness, days way from work, restricted work, transfer to another job or medical treatment beyond first aid. Absent these results, an employer must also record a case if it involves a significant injury or illness diagnosed by a licensed health care professional. (eg. a punctured eardrum may not require lost time or medical treatment, but is considered a "significant injury")

All work-related needlestick injuries or cuts from sharp objects that are contaminated with another person's blood or potentially infectious material must be reported, as well as certain tuberculosis cases and any case requiring medical removal under requirements of an OSHA health standard.

In making entries on Form 300, distinctions should be made between a new injury or illness (recordable) and the recurrence of symptoms of a previous one (not recordable); between a previous injury's significant aggravation caused by a new traumatic and work-connected event (recordable) and aggravation of a previous occupational disability caused by a non-work connected event (not recordable).

Whether a disability should be categorized as an illness or as an injury is determined by the nature of the original event or exposure which caused the disability, not by the resulting condition of the affected employee. Hearing losses and cumulative trauma disorders (CTDs) should be recorded as injuries if they result from instantaneous events; otherwise, they are to be recorded as illnesses. Work-related shifts in hearing of 10 dB in hearing acuity that have resulted in a total 25 dB level of hearing above audiometric zero or more at 2,000, 3,000 and 4,000 hertz (Hz) in either ear must be recorded on the OSHA 300 log.

Upper extremity CTD's, which include back cases, must be recorded as occupational illnesses. The criteria for these cases include at least one physical finding of an objective symptom and a subjective symptom coupled with either medical treatment or lost workdays, including restricted activity.

Generally, company parking lots and sidewalks are part of the employer's establishment and injuries occurring there are recordable. However, injuries caused by motor vehicle accidents in company parking lots while employees are commuting to and from work are not considered work-related, and not recordable.

All employers, regardless of size or NAICS code, must contact OSHA within 8 hours after the death of any employee, or within 24 hours following an occurrence of any in-patient hospitalization, amputation, or loss of an eye. Only fatalities occurring within 30 days of the work-related incident must be reported to OSHA. Further, for an inpatient hospitalization, amputation or loss of an eye, incidents must be reported to OSHA only if they occur within 24 hours of the work-related incident. For reporting compliance, employers have three options when contacting OSHA: 1) call the nearest area office; 2) call OSHA's 24-hour hotline 1-800-321-OSHA(6742); or 3) report online.

If an employee is injured while operating a mechanical power press, within 30 days a report must be sent to OSHA or the New Jersey Department of Labor containing full details (injury sustained, functioning of equipment, cause of accident, etc.).

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* Industries classified with the following NAICS codes are exempt from OSHA recordkeeping requirements: 4412, 31, 61, 71, 81, 82, 83; 4511, 12, 31, 32; 4812, 61, 62, 69, 79, 85; 5111, 12, 21, 22, 51, 72, 73, 79, 81, 82, 91; 5211, 21, 22, 23, 31, 32, 39, 41, 42, 51, 59; 5312, 31; 5411, 12, 13, 14, 15, 16, 17, 18; 5511; 5611, 14, 15, 16; 6111, 12, 13, 14, 15, 16, 17; 6211, 12, 13, 14, 15, 44; 7114, 15; 7213, 21, 22, 24; 8112, 14, 21, 22, 31, 32, 33, 34, 39

Some employers in these categories or with fewer than 11 employees may be selected by OSHA to participate in a mandatory statistical survey of occupational disabilities which may require the keeping of records and submission of data.

Form 301, Injury and Illness Incident Report, is a supplementary record of every injury or illness which appears on Form 300. It provides additional information concerning the cause and nature of each disability, and such data must be recorded within 7 work days after the employer has received information that the occupational injury or illness has occurred. In lieu of using this form, workers' compensation, insurance or other reports may be used if they contain all of the items in Form 301.

All records must be prepared on a calendar-year basis for every physical location where operations are performed and, generally, kept at the work location to which they pertain.

Electronic Submission of Injury and Illness Records

Establishments with 250 or more employees that are required to keep injury and illness records will be required to electronically submit to OSHA their 300, 300A and 301 forms. Employers in certain high-risk industries* whose establishments have between 20 and 249 employees will be required to electronically submit their 300A annual summary form.

Employers must submit their OSHA 300A annual summaries by July 1, 2017. The requirements for the submission of 300 logs and 301 reports do not take effect until 2018, with those forms being due on or before July1, 2018. Beginning in 2019, the forms will be due by March 2 every year. Additionally, employers may be required to electronically submit records upon notification of OSHA.

Employers will omit personal employee identification data from the forms, (e.g. employee name, address, name of physician) prior to submission.

Records are to be submitted electronically through a secure website maintained by OSHA. OSHA intends to make such records available to the public through a website.

Privacy

An employer may not enter an employee's name on Form 300 under the following circumstances: 1) an injury or illness to an intimate body part or to the reproduction system, 2) an injury or illness resulting from a sexual assault, 3) a mental illness, 4) a case of HIV infection, hepatitis, or tuberculosis, 5) a needlestick injury, and 6) other injuries or illnesses if an employee requests that his or her name not be entered on the Form 300. In these cases, "Privacy Case" shall be noted on the Form in place of the employee's name.

Annual Summary

At the end of each calendar year the employer must prepare an Annual Summary of the injuries or illnesses recorded on the Form 300. This is done by transferring the totals from the Log to the Summary Form 300A. A company executive (i.e.: owner or officer), must certify that he or she has examined the Form 300 and that he or she reasonably believes, based on knowledge of the process by which the information was recorded, that the Annual Summary is correct and complete. The Annual Summary is posted no later that February 1 of the year following the year covered, and remain posted until the following May 1 (three months).

*Establishments with between 20 and 249 employees with the following NAICS codes must electronically submit their forms: 11, 22, 23, 31-33, 42, 4413, 4421, 4422, 4441, 4442, 4451, 4452, 4521, 4529, 4533, 4542, 4543, 4811, 4841, 4842, 4851, 4852, 4853, 4854, 4855, 4859, 4871, 4881, 4882, 4883, 4884, 4889, 4911, 4921, 4922, 493, 5152, 5311, 5321, 5322, 5323, 5617, 5621, 5622, 5629, 6219, 6221, 6222, 6223, 6231, 6232,6233, 6239, 6242, 6243, 7111, 7112, 7121, 7131, 7132, 7211, 7212, 7213, 7223, 8113, 8123

Employee Involvement and Access to Records

Employees and their representatives must be involved in the recordkeeping in several ways. First, a system must be established for employees to report injuries and illnesses promptly and employees must be informed on how to use it. Second, employees or their representatives must be given access to OSHA Forms 300 and 301. (Union representatives access to the Form 301 is limited). Employee names must be left on the Form 300 subject to the privacy rule. Copies of the documents must be given to employees or their representatives upon request without charge. However, access to records are limited to the establishment in which the employee works.

Both forms must be retained for 5 calendar years following the end of the year to which they relate. Although each Form 300 covers a calendar-year period, it must be retroactively corrected or amended to reflect changes which occur after the end of a given calendar year - e.g., a change in the extent or outcome or nature of a disability which affects an entry previously made or requires a new entry.

Medical and Exposure Records (General)

OSHA has issued a regulation which provides that employers must retain medical records, exposure records, and analyses thereof, of employees exposed to toxic substances or harmful physical agents. Except as mandated by certain OSHA Standards, as hereafter described, employers are not required to make any new records of these kinds, but only to retain those which are voluntarily made.

Definitions

1. Toxic substance or harmful physical agent; any chemical substance, biological agent (bacteria, virus, fungus, etc.) or physical stress (noise, heat, cold, vibration, repetitive motion, radiation, hypo or hyperbaric pressure, etc.) which:

    a. Is listed in the NIOSH Registry of Toxic Effects of Chemical Substances, or

    b. Is the subject of a material safety data sheet known to the employer indicating that the material may pose a health hazard, or

    c. Has yielded positive evidence of an acute or chronic health hazard in human, animal or biological testing conducted by or known to the employer.

2. Employee medical record: a record concerning the health status of an employee which is made or maintained by a physician, nurse or other health-care personnel, or technician, including results of medical exams, laboratory tests, X-rays, and biological monitoring; medical opinions, histories, diagnoses, and recommendations; description of treatments and prescriptions; employee medical complaints; first-aid records.

An employee medical record does not include physical specimens (e.g., blood or urine samples) which are routinely discarded as a part of normal medical practice; records concerning health insurance claims and employee assistance programs if maintained separate from the employer's medical program.

3. Employee exposure record: a record containing any of the following kinds of information concerning employee workplace exposure to toxic substances or harmful physical agents:

    a. Environmental (workforce) monitoring or measuring of a toxic substance or harmful physical agent

    b. Biological monitoring results which assess the absorption of a substance by body systems

    c. Material safety data sheets

    d. In the absence of the above, any other record which reveals the identity of a toxic substance or harmful physical agent, and where and when it was used.

"Exposure" does not refer to cases where the harmful substance or agent in the workplace is not used, handled, stored, generated or present in any manner different from typical, non-occupational situations.

4. Analysis using exposure or medical records: any compilation of data or any statistical study based in whole or part on information collected from individual employee-exposure or medical records or from health insurance claims records.

Retention of Records

If any of the foregoing records are made, then unless a specific OSHA Standard requires a different retention period (see next page), employee exposure records and analyses using exposure or medical records must be retained for 30 years, and employee medical records shall be retained for 30 years after the termination of employment.

There are these exceptions:

1. Health insurance claim forms which are kept separate from the employer's medical program. These need not be preserved for any particular period of time.

2. First-aid records of one-time treatment of minor scratches, cuts, burns, splinters, etc., which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job, if made on-site by a non-physician, and kept separate from the medical program. Such records need not be preserved for any particular period of time.

3. Medical records of employees who work less than 1 year. Unless a specific Standard provides otherwise, these need not be retained beyond the period of employment if they are provided to the employee upon termination of employment.

4. Background data to environmental (workplace) monitoring or measuring, such as laboratory reports and worksheets. Such data need only be retained for 1 year so long as the sampling results, the collection methodology (sampling plan), a description of the analytical and mathematical methods used, and a summary of other background data relevant to interpretation of the results obtained, are retained for at least 30 years.

5. Material safety data sheets and records concerning the identity of a substance or agent. These need not be retained for any specified period as long as some record of the identity (chemical name if known) of the substance or agent, where it was used, and when it was used are retained for at least 30 years.

Medical and Exposure Records Required by Specific OSHA Standards

The Standard on Hazardous Waste Operations requires preparation of a record of medical examinations and retention for the duration of employment plus 30 years.

The Noise Exposure Standard (see Appendix, page A-22) requires that employee exposure measurements be made and retained for 2 years, and audiometric test records be made and retained for the duration of the individual's employment.

The Toxic and Hazardous Substances Standard requires that a report of the results of medical examinations (which are mandatory for employees exposed to any of the substances covered by the Standard) shall be prepared and retained. The period of retention is the duration of the individual's employment, except in the cases of employees exposed to any of the following substances. Also, records of exposure to any of the following substances must be prepared and maintained.

Records of exposure to any of the following substances must also be prepared and maintained.

	Duration of retention of:	
Substance	**Exposure Records**	**Records of Medical Exams**
Vinyl chloride	30 years	30 years, or duration of employment plus 20 years, whichever is longer
Asbestos, tremolite, anthophyllite, actinolite and formaldehyde	30 years	Duration of employment plus 30 years
Cotton dust	20 years	20 years
Ethylene oxide	Duration of employment plus 30 years (for both records).	
Inorganic, arsenic, lead, DBCP, acrylonitrile, coke oven emissions	40 years, or duration of employment plus 20 years, which ever is longer (for both records).	

Access to Records

Upon the request of an employee, former employee, or his designated representative, an employer shall provide opportunity to examine and copy, or to obtain copies, of an employee's medical records (including those voluntary maintained), records (including monitoring records) indicating the extent of exposure to toxic substances and harmful physical agents, and of each analysis using exposure or medical records which concerns the particular employee's working conditions.

If a copy is requested, an initial copy shall be supplied without cost, or copying facilities shall be made available without charge, except that in the case of an original X-ray access may be restricted to on-site examination. A reasonable charge may be made for additional copies.

If an exposure record is requested by a union on behalf of an employee, the request must be in writing, and shall specify "with reasonable particularity" the records requested and the occupational need for access to them. If a medical record is requested by any representative on behalf of an employee, the employee must execute a specific written consent to the release of the data, which describes generally the particular information to be released and the purpose for releasing it.

A representative of OSHA is entitled to access to any medical records, exposure records and analyses. However, in order to examine a medical record he must produce a written "access order" which contains, among other matters, an explanation of the need for making the examination, or obtain the written consent of the employee to make the examination. The order and the accompanying cover letter shall be posted for at least 15 days.

Deletions From Records

A physician, nurse, or other health-care personnel may delete from requested medical records the identity of a family member, friend or coworker who has provided confidential information.

If an employee medical record contains information concerning terminal illness or psychiatric condition which, in the option of the company physician, would be detrimental to the employee's health if disclosed to the employee, the employer may allow disclosure only to the employee's designated representative who has specific written authorization from the employee or former employee.

When the request is for a copy of the analysis using exposure or medical records, the employer shall first remove any material which would identify specific employees.

Before disclosing any records to a health professional, employee or designated representative the employer may delete therefrom trade-secret data which discloses manufacturing processes, the percentage of a chemical substance in a mixture, or specific chemical identity, provided the employer reports the deletion.

1. If such deletion substantially impairs evaluation of the place where or the time when exposure to a toxic substance or harmful physical agent occurred, the employer shall provide alternative information which is sufficient to permit the employee to identify where and when exposure occurred.

2. Notwithstanding the foregoing, the specific chemical identity must be disclosed to a health professional, employee, former employee or representative if a request is submitted in writing which describes the occupational health need for the information and if a confidentiality agreement is made.

3. Where a treating physician or nurse determines that a medical emergency exists and the specific chemical identity of a toxic substance is needed for emergency or first-aid treatment, the employer shall immediately disclose that information to the physician or nurse.

Notification to Employees

Employees must be informed they have the right to report, and the procedures for reporting, work-related injuries & illnesses and employers are prohibited from discharging or in any way discriminating against employees for reporting or filing a safety & health complaint, asks to view records, or in any way exercises any right afforded by OSH Act.

Upon hire, and annually thereafter, an employee who will be or has been exposed to toxic substances or harmful physical agents shall be informed of his right of access to the records described herein. Also, where the monitoring of exposure to certain toxic or hazardous substances is required by a particular OSHA standard, the results of the monitoring must be made known to the employee.

When an employer ceases to do business, records shall be transferred to the successor employer or, if there is none, employees shall be notified of their rights of access at least 3 months prior to the cessation of business.

Employees shall be informed in writing within 21 days of the determination of a “standard threshold shift” in hearing (see page A-22).

Payment for Personal Protective Equipment

Effective, February 12, 2008, any item of Personal Protective Equipment (PPE) used to comply with a specific OSHA standard must be provided and paid for by the employer, including its replacement. Unlike OSHA's position taken with respect to employee time and travel expenses for employer-directed medical services, this rule is not intended to cover time and travel expenses an employee might incur while shopping for PPE during non-working hours.

This provision applies to all employees, including temporary and other contingent workers. In the case of employees obtained from an agency, OHSA will use a common law standard in determining which "employer" is responsible.

An employer is not responsible for paying for:

- Non-specialty safety-toe protective footwear (including steel-toe shoes or boots) and non-specialty prescription safety eyewear provided that the employer permits such items to be worn off the job site.
- Footwear with built-in metatarsal protection requested to be worn by the employee instead of metatarsal guards provided by the employer.
- Everyday clothing, or ordinary clothing used solely for protection from weather, such as winter coats, gloves, raincoats, sunglasses, sunscreen, and logging boots.
- Protective equipment owned by the employee and allowed to be used at the employee's request.

Access to Restrooms – Transgender Workers

Under OSHA's Sanitation standard (1910.141), employers are required to provide their employees with toilet facilities. This standard is intended to protect employees from the health effects created when toilets are not available. A person who identifies as a man should be permitted to use men's restrooms, and a person who identifies as a woman should be permitted to use women's restrooms. The employee should determine the most appropriate and safest option for him- or herself.

Generally, employees are not asked to provide any medical or legal documentation of their gender identity in order to have access to gender-appropriate facilities. In addition, no employee should be required to use a segregated facility apart from other employees because of their gender identity or transgender status. Under OSHA standards, employees generally may not be limited to using facilities that are an unreasonable distance or travel time from the employee's worksite.

Penalties

Beginning in August 2016, OSHA penalties will be upwardly adjusted annually based on the Consumer Price Index (CPI). Penalties for OSHA violations will range from approximately $9,000 to $125,000 and 6 months' imprisonment, depending on the frequency, severity and consequences of the violation, and whether it is willful or repeated. Failure to timely correct a violation for which a citation has been issued and which is not appealed can result in a fines of approximately $12,500 per day, and failure to post required forms may also result in an approximate $12,500 penalty.

OSHA Hazard Communications Standard

This "standard", issued by the Occupational Safety and Health Administration (OSHA), generally requires that employees be apprised of hazardous chemicals to which they may be exposed, through a hazard communication program. The following is a summary of its principal provisions.

Definitions

1. Chemical manufacturer: an employer with a workplace where chemicals are produced for use or distribution. "Produced" means manufactured, processed, formulated, or repackaged. "Use" means to package, handle, react, or transfer.

2. Importer: the first business enterprise within the U.S. Customs Territory which receives hazardous chemicals produced in other countries for the purpose of supplying them to others in the U.S.

3. Distributor: a business, other than a chemical manufacturer or importer, which supplies hazardous chemicals to other employers, including other distributors.

4. Chemical: any substance, or mixture of substances

5. Hazardous chemical: any chemical which is classified as a physical hazard or health hazard, a simple asphyxiant, combustible dust, pyrophoric gas, or hazard otherwise not otherwise classified.

6. Safety data sheet (SDS): written or printed information concerning a hazardous chemical which, among other things, identifies the hazardous chemical or its components and describes its physical and chemical characteristics, its hazards, precautions for its handling, exposure limits and identity of the manufacturer.

7. Employee: a worker who may be exposed to hazardous chemicals under normal operating conditions or in foreseeable emergencies. Workers, such as those in offices, who encounter hazardous chemicals only in non-routine, isolated instances are not covered by the Standard.

Classification of Hazards

Chemical manufacturers and importers shall evaluate the chemicals produced in their work-places or imported by them to classify the chemicals as to their hazard class (nature of the hazard) and, if appropriate, category (severity). Employers are not required to classify chemicals unless they choose not to rely on the classification performed by the chemical manufacturer or importer.

Labeling

Except as noted, all employers "shall ensure" that each container of a hazardous chemical which is present in the workplace is labeled, tagged or marked so as to identify the chemical and warn about its hazard.

A container is anything that holds chemicals, except pipes and piping systems.
Chemical manufacturers, importers and distributors shall ensure that each container of hazardous chemicals leaving the workplace is labeled to show the product, identifier, signal word, hazard statement, pictogram, precautionary statement, and name, address an phone number of its manufacturer or importer. The manner of labeling shall not conflict with other requirements of OSHA or of the federal Hazardous Materials Transportation Act.

If the item shipped is solid metal, solid wood or plastic items the required label need be transmitted to the customer only at the time of the initial shipment, and need not be sent with subsequent shipments of the item to the same customer.

Labeling is not required:

1. On portable containers used for transferring chemicals from labeled containers and which are intended for the immediate use of the employee who performs the transfer.

2. On individual, stationary, process containers if signs, placards, process sheets, batch tickets, operating procedures or other data are posted or made available, and which identify the chemical and warn about the hazard.

3. For chemicals which are subject to the labeling requirements or regulations of these federal laws: the Insecticide, Fungicide and Rodenticide Act; the Food, Drug and Cosmetic Act; the Alcohol Administration Act; and the Consumer Product Safety Act.

Safety Data Sheets (SDS)

Chemical manufacturers and importers shall obtain or develop an SDS for each hazardous chemical which they produce or import. Other employers shall obtain, maintain and have accessible an SDS for each hazardous chemical which they use.

The chemical manufacturer or importer preparing the safety data sheet shall ensure that it is in English and includes at least the following sections and headings and associated information under each heading:

Identification; Hazard identification; Composition/information on ingredients; First-aid measures; Fire-fighting measures; Accidental release measures; Handling and storage; Exposure controls/personal protection; Physical and chemical properties; Stability and reactivity; Toxicological information; Ecological information; Disposal considerations; Transport information; Regulatory information; and Other information, including date of preparation or last revision.

If hazardous chemicals are shipped by chemical manufacturers, importers or distributors, they shall, except as noted, provide the receiving employers and other distributors with a SDS with their initial shipment, with the first shipment made after a SDS is updated, and upon request. If an SDS is not provided, the distributor or employer shall obtain one from the chemical manufacturer as soon as possible. However, they need not supply one to a retail distributor who states that he does not sell the chemical to commercial customers nor open a sealed container of the chemicals.

Hazard-Communication Program

All employers shall develop and implement a written, hazard-communication program which at a minimum will contain:

1. A description of how the requirements concerning labeling, SDS, and employee training will be met.

2. A list of the hazardous chemicals known to be present using a product identifier that is referenced on the SDS.

3. The methods to be used to inform employees of the hazards of non-routine tasks, and the hazards associated with chemicals contained in unlabelled pipes in their work areas.

Where individuals who are exposed to hazardous chemicals which are present at the workplace are the employees of another employer (such as employees of a construction contractor working on-site), the hazard-communication program shall also include reference to the methods the employer will use to inform the other employer about precautionary measures to be taken to protect the latter's workers, the labeling system used, and the availability of MSDS.

Employee Training

All employers shall provide employees with effective information and training on hazardous chemicals at the time of their initial assignment and whenever a new chemical hazard the employees have not been previously trained on is introduced in their work area. This shall include:

1. Identification of operations in their work area where hazardous chemicals are present.

2. The location and availability of the written hazard communication program, the list of hazardous chemicals and SDS.

3. Methods of detecting the presence or release of hazardous chemicals; identification of the physical, health, simple asphyxiation, combustible dust, pyrophoric gas hazards, as well as hazards not otherwise classified; and protective measures which can be taken.

4. The details of the hazard-communication program, including an explanation of the labels received on shipping containers and the workplace labeling system used by their employer; the SDS and how employees can obtain and use the appropriate hazard information.

Protection of Trade Secrets

The Standard exempts disclosure of trade secrets, within limits.

A trade secret is defined as any confidential formula, pattern, process, device, information or compilation of information that is used in the operation of an employer's business, and that gives the employer an opportunity to obtain an advantage over competitors who do not know or use it. An employer has the burden of demonstrating that his trade secret claim is bona fide.

Some of the criteria to be considered in determining whether an item is a trade secret are the extent to which it is known outside of the employer's own business, the extent to which it is known by his employees and by others involved in his business, the extent of measures taken to guard its secrecy, the value of the information to the employer and his competitors, the amount of money and effort expended to develop the item, and the ease or difficulty required to acquire or duplicate it by others.

The specific chemical identity of a chemical, including the chemical name and other specific identification, may be withheld from an SDS where that information is a trade secret, and provided that information concerning the properties and effects of the hazardous chemical is disclosed, as required, in the SDS, and the SDS reports that the identity and/or percentage of composition is being withheld as a trade secret. However, the specific chemical identity and percentage composition of a trade secret must be disclosed:

1. To a treating physician or nurse who determines that a medical emergency exists, where the information is necessary for emergency or first-aid treatment.

2. In non-emergency situations, upon request, to a health professional (physician, industrial hygienist, toxicologist, epidemiologist or occupational health nurse) providing medical services to exposed employees, and to employees or their designated representatives, including collective bargaining agents and employees of "downstream" employers.

The request must (a) be in writing, (b) specify the health need for the information, and explain in detail why disclosure of the specific chemical identity is essential and why certain specified alternate information will not suffice, and (c) describe the procedures which will be used to maintain confidentiality. Confidentiality agreements must be executed by the requestor and by the "downstream" employer of an employee making the request.

Access to Information

The following must be made available for inspection, on request, to employees, their designated representatives, the Assistant Secretary of Labor for OSHA and the Director of the National Institute for Occupational Safety and Health (NIOSH):

1. Description of the procedures used to evaluate chemicals

2. Safety data sheets (SDS)*

3. The written hazard-communication program

Exclusions and Limitations

In work operations where the only hazardous chemicals are in sealed containers which are not opened under normal conditions of use, the Standard requires only that labels and SDS accompanying incoming containers be maintained (or that a missing SDS be obtained if requested by an employee), and that the employees be informed of the hazards which might result from spillage or leakage of the chemical.

The application of the Standard to laboratories is limited to requiring that labels and safety data sheets accompanying incoming containers of hazardous chemicals be maintained, and that employees be informed of the hazards of the chemicals in their workplace.

The entire Standard is inapplicable to:

1. Articles which are manufactured to a specific shape or design, which have an end-use function dependent in whole or part upon the shape or design during end use, and which do not release or otherwise result in exposure to a hazardous chemical under normal conditions of use.

2. Tobacco and tobacco products; wood and wood products; food, drugs, cosmetics or alcoholic beverages in a retail establishment which are packaged for sale to customers; and food, drugs or cosmetics intended for personal consumption by employees.

3. Any consumer product or hazardous substance as defined by the federal Consumer Product Safety Act or the Hazardous Substance Act, where it is used in the workplace in the same manner as normal consumer use and with no greater exposure than is experienced by consumers.

4. Any hazardous waste as such term is defined by the federal Solid Waste Disposal Act, when subject to regulations issued thereunder by the EPA.

5. Any drug, as that term is defined in the federal Food, Drug and Cosmetic Act, when it is in solid, final form (i.e., tablets or pills) for administration to a patient.

*Another federal statute, the Superfund Amendments and Reauthorization Act (SARA), requires, with some exceptions, that a copy of each MSD be submitted to the New Jersey Department of Environmental Protection, the local fire department, and the local Planning Commission.

Self-Funded Health Plans: Notification to Employees

A New Jersey statute (the Health Care Quality Act) requires employers who provide health plans which are self-insured to notify their employees who are enrolled in the plan that it is self-insured. Such notification must explain that the plan is not subject to state consumer-protection regulations, including the right to appeal denials or limitations of payment for medical treatment, and must identify the particular benefits which the state has mandated for health plans other than self-insured plans and which are not covered by the employer's plan.

The following form of notification, supplied by the state, will satisfy these requirements:

> You are currently enrolled in a self-funded health plan which is administered by (Name of entity providing health benefits) for (name of company offering benefits.) This plan is known as an ERISA plan that is authorized under the Federal Employee Retirement Income Security Act (ERISA) which provides limited rules and regulations regarding the conduct of plans. Please note that the (name company) plan is exempt from complying with New Jersey State laws governing health insurance, including laws mandating coverage for specific health insurance benefits and laws granting individuals the right to appeal to an independent entity final decisions by a managed care organization to reduce or deny treatment for a covered health care service. Therefore, even though the name (Name of ASO/TPA or HMO) may appear on your health insurance card or in correspondence about your coverage, you may not have the same legal rights as persons covered by state regulated health plans.
>
> "The following is a list of state mandated health insurance benefits which are not covered by your plan: (List mandated insurance benefits)." Or, in the alternative, if a self-funded plan voluntarily agrees to cover these benefits, the notice should say: "Although we are not required by law, the (name of company) health plan voluntarily covers all mandated benefits that are approved by the New Jersey Legislature and signed into law by the Governor."

A listing of current state mandates can be found at:

http://www.state.nj.us/dobi/division_insurance/mhbac/mandatedhbac.htm

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New Hire Reporting

All employers with business operations in New Jersey must report certain information about employees and contractors who are hired to work in New Jersey. The information is used principally to help locate parents who have failed to make child-support payments.

The report is required for each person who is newly hired. A newly hired employee is defined as a person who has not previously been employed by the employer, or who was previously employed by the employer but has separated from such prior employment for at least 60 days. This includes individuals reinstated to active employment after a layoff, furlough, unpaid leave of absence, or termination of employment.

The report should show:

1. The individual's name, address, date of birth, social security number, and date of hire and

2. The employer's name, address and federal tax identification number.

Reports must be submitted within 20 days after the employee is hired, re-hired or returns to work (or twice a month if reporting electronically).

Reports shall be sent to:

New Hire Operations Center	www.nj-newhire.com
PO Box 4654	Phone: 877-654-4734
Trenton, NJ 08650-4654	Fax: 800-304-4901

Multi-state employers who submit such reports electronically or magnetically may designate a single State (either New Jersey or elsewhere) to which it will transmit the new-hire reports for all of its facilities. In that case the U.S. Secretary of Health & Human Services shall be notified of the designation.

For failure to comply with the foregoing reporting requirements a civil monetary penalty may be assessed.

Payment of Wages and Benefits

Deductions From or Withholding of Wages

The New Jersey Wage Payment Law forbids withholding or diverting any portion of an employee's wages,* despite any agreement to the contrary, except for the following:

1. Sums which an employer is "required or empowered" to withhold or divert under state or federal law (such as taxes, union dues and initiation fees, garnishments).

2. Contributions authorized either in writing by employees or under a collective bargaining agreement to the following: employee welfare plans; insurance plans; retirement and profit-sharing plans; plans establishing individual or group retirement annuities, as defined by the Internal Revenue Code, section 26 U.S.C. 408 (b); individual retirement accounts at any state or federally chartered bank, savings bank, or savings and loan association, as defined by 26 U.S.C. 408(a).

3. Payments authorized by employees for employer-sponsored programs for the purchase of insurance or annuities on a group or individual basis.

4. Contributions authorized either in writing by employees or under a collective bargaining agreement for payment into company-operated thrift plans or into security-option or security-purchase plans to buy securities of any corporation at or below market price, provided such securities are listed on a stock exchange or are marketable over the counter.

5. Payments authorized by employees into personal savings accounts, such as to savings fund societies, savings and loan associations, credit unions; payments to banks for Christmas and vacation funds; payments for the purchase of U.S. Government bonds - provided all such deductions are approved by the employer.

6. Contributions authorized by employees for organized and generally recognized charities, if the deductions are approved by the employer.

7. Deductions to rectify payroll errors.

8. Repayment of employer loans to employees, and payment for company products, made in accordance with a periodic payment schedule contained in the loan or purchase agreement. Recoupment of pay advances and advances of expense money.

9. Payments authorized by employees or their collective bargaining agent for the rental, laundering or dry-cleaning of work clothing or uniforms; payment for safety equipment - provided all such deductions are approved by the employer.

10. Payment authorized by employees or their collective bargaining agent for health club membership fees or for child care services, provided such deductions are approved by the employer.

11. Payments for mass transportation commuter tickets, if authorized by the employee in writing or in a collective bargaining agreement.

12. Contributions (to a maximum of $5 per week) to certain political action committees organized to aid or oppose candidates for state or local office, or public questions, if authorized by the employee in a writing which includes the statement that his contribution is voluntary and in compliance with state law. Deductions may be made for only one committee at a time.

13. Installment payments to satisfy financial obligations of an employee to the state of New Jersey in amounts expressly authorized by the employee, and pursuant to a system instituted by the employer.

14. Employees with access to sterile or secure areas of airports may have the related fees for the replacement of an employee ID badge deducted from pay, provided it is in accordance with a fee schedule approved by the federal Transportation Security Administration and such deduction is approved by the employer.

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* The term "wages" is defined in the statute as direct monetary compensation, including commissions, but excluding any form of supplementary incentives and bonuses "which are calculated independently of regular wages and paid in addition thereto".

Frequency and Method of Payment of Wages

State law requires that the full amount of wages and salaries be paid to all employees at least twice during each calendar month, except that "executive, supervisory and other special classifications of employees"* need be paid only once each calendar month.

> The interpretation of the New Jersey Department of Labor is that the requirement of semi-monthly payment is not satisfied by monthly payment which includes prepayment for the balance of the month (e.g., payment on the 15th of a month of full salary for the entire month).

Payment must be made on regularly occurring days designated in advance, which may be no later than 10 working days from the end of the pay period in which the money was earned. If the regular pay day falls on a non-work day, payment must be made on the immediately preceding work day.

When an individual's employment is terminated for any reason, or is suspended because of layoff or labor dispute, payment must be made no later than on regular payday, except that if a labor dispute involves employees who prepare payrolls, the employer may have an additional 10 days in which to make payment. In the case of employees compensated in full or part on an incentive basis, payment at the time indicated of "reasonable approximation" of all wages due will suffice until the exact amounts can be computed. The payment may be made available in the customary manner or, if the employee so requests, by mail.

Payment may be made by checks if "suitable arrangements" have been made for cashing them "without difficulty" and for the full amount for which they are drawn. Alternatively, payment can be directly deposited into a bank account in the employee's name or deposited into a payroll debit card account. The use of direct deposit or a payroll debit card must be agreed to in writing by the employee, without intimidation, coercion or fear of discharge or reprisal for not agreeing to such a method of payment. Payment in such a manner can not be a condition of hire or continued employment. The employee must have the option of opting out of either of these methods of payment at any time, upon timely notice to the employer.

If payment is made into a payroll debit account, on at least one occasion per pay period, the employee shall be permitted, using the payroll debit card, to withdraw his or her wages in full, without any fee to the employee and without difficulty. The employer shall disclose this to the employee in writing, prior to obtaining consent from the employee for payment by a payroll debit card, along with the features of the payroll debit card (e.g. ATM or point-of-sale use) and any fees which may be charged to the employee for use of such features.

If the employee is required to pay a fee for the cashing of a check, the employer shall bear the burden of the fee. The employer is also responsible for payment of all check-deposit-return fees and shall reimburse the employee for the full amount of the fee as soon as possible, but not later than the next regularly scheduled payday.

There is no specific statutory requirement that employees be allowed time off from work for the purpose of cashing paychecks. However, if the only place where a paycheck can be cashed is available only during an employee's working hours and it is not conveniently located, the Department of Labor might require that time off be granted (but without pay).

Notification to Employees

Employers must notify employees at the time of hiring of the rate of pay and of the regular payday designated by the employer. Additionally, employers must notify employees of any changes in pay rates or pay days prior to the time of such changes.

Employers must furnish each employee with a statement of deductions made from wages for each pay period such deductions are made.

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* The Department of Labor interprets this phrase generally as applying to executive/supervisory type employees and others of equivalent rank who are more than likely "exempt" from overtime pay requirements. However, it concedes that because these terms are not defined in the statute itself, employers are free to determine the "special classifications."

Wages of Deceased Employees

Upon the death of an employee, in the absence of actual notice of the pendency of probate proceedings and after presentation of proof of relationship and "proper demand", an employer may make payment of all wages due to the deceased, in the following order of preference: spouse/civil union partner, children (or to the guardian of those under age 18), parents, brothers and sisters, or if there are none of the foregoing, to the person who pays the funeral expenses. As an alternative, payment may be made to the administrator of the estate of the deceased. Otherwise, payment shall be made to the executor.

Penalties for Wage Payment Violations

An employer who “knowingly and willingly” violates any of the foregoing provisions is subject to a fine of $100 to $1,000. Each day of violation is a separate offense.

In addition, violators are subject to “administrative penalties” and “administrative fees”, assessed by the New Jersey Commissioner of Labor: from $250 to $500, and from 10% to 25% of amounts due but not paid to employees. Further, where the Commissioner makes an award of back pay, he or she may also award interest under circumstances.

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Employee Retirement Income Security Act (ERISA)

This statute and the Internal Revenue Code require the filing of reports and the maintaining and disclosing of information regarding employee welfare plans, retirement plans, and certain fringe-benefit plans.

Identification of Plans

A "welfare plan" is defined as any plan or program which provides medical, surgical or hospital benefits; death benefits; unemployment benefits; apprenticeship or similar training; prepaid, group legal service plans and day-care centers. A pension plan is defined as a plan which provides retirement benefits or deferred compensation.

The following are not considered to be welfare plans and so are excluded entirely from the application of the law and its reporting and disclosure requirements.

Overtime and premium pay

Pay* for unworked holidays and vacations and for absences due to such reasons as jury service, testifying in "official" proceedings, training, education, and active military duty

"Remembrance" gifts

On-premises recreation, dining, first-aid, and other facilities

Payments* for scholarship programs, including tuition and educational expense refunds

Payments made under a "sick-pay" plan which is maintained solely for the purpose of complying with the Workers' Compensation or T.D.B. Law; any other sick-leave plan which pays* normal compensation to employees while absent on account of disability or medical reasons.

The following are not considered to be either welfare plans or pension plans if they meet the stated conditions, but if they do not meet them, they are considered to be pension plans and subject to the reporting and disclosure requirements.

Bonuses for work performed, provided payment is not systematically deferred until termination of employment or so as to provide retirement benefits.

Individual retirement accounts, annuities or bonds described in Sections 408(a), 408(b) or 409 of the Internal Revenue Code, provided no contributions or endorsements are made by the employer, and employee participation therein is voluntary.

A payroll-deduction IRA if it is voluntary, is not endorsed or sponsored by the employer or any affiliate, and if materials distributed by the employer clearly state these facts and also state (a) that IRA' s are available from other sources (b) that an IRA may not be appropriate for all individuals and (c) that the tax consequences are the same whether payroll deduction is used or not.

Supplements to pension payments, provided that the payment is made for the purpose of supplementing the pension benefits of a retiree or his beneficiary, payment is made out of general assets of the employer or from a separate trust fund established and maintained solely for that purpose (i.e., not out of a general welfare trust), payment is not made before the last day of the month with respect to which it is computed, and the amount paid with respect to any month does not exceed the "supplemental payment factor" for that month. This factor is calculated by multiplying the amount of the retiree's pension benefit by the percentage increase in the cost-of-living index since the commencement of his pension benefit.

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*Only if such payments are made out of general assets; if otherwise payable, they are considered as welfare plans.

A severance pay plan is either a welfare plan or a pension plan. If it meets all of the following requirements, it is a welfare plan, otherwise it is a pension plan.

1. Payments are not contingent, directly or indirectly, upon the employee's retiring, and

2. The total amount of payment does not exceed the equivalent of twice the employee's annual compensation during the year preceding termination (including benefits of monetary value), and

3. All payments are completed within 24 months after termination of the employee's service, except that in the case of an employee who is terminated in connection with a "limited program of terminations", the payments are completed within 24 months after termination of service or 24 months after normal retirement age, whichever occurs last.

A "limited program of terminations" is defined as one which is scheduled to be completed upon a date certain or upon the occurrence of one or more specified events; and which states in advance the number, percentage or categories of employees to be terminated; and which is described in writing.

(The U.S. Supreme Court held that lump-sum severance payments, calculated strictly according to years of service and made to all employees at the same time when a plant was closed, did not constitute a "plan" of severance pay because no administrative scheme or procedures were required to implement the payments.)

Notification To Employees and Beneficiaries

Employees must be given an ERISA Rights Statement if they are covered by or eligible for a welfare plan or pension plan which is subject to ERISA. This statement usually is included in or attached to a Summary Plan Description.

When pension benefits become payable, the employee's spouse must be notified that payments will be made in the form of a joint and survivor annuity unless the spouse consents in writing to some other form of payment. Such notification must explain what payment options are available.

The Summary Plan Description

A Summary Plan Description (SPD) is a written summary of an employee benefit plan which provides participants and beneficiaries with details about how the plan operates, what benefits are included and how benefits may be obtained or lost. It must be clearly written and may need to be written in more than one language. It must not mislead, misinform or fail to inform about plan terms which might cause a participant to fail to qualify or lose benefits (for example, the requirement of written notification when adding dependents.)

Both Pension and Welfare Benefits SPDs must include the following information:

- Name of the plan;
- Name and address of employer, or employer organization or group that maintains the plan;
- Employer identification number (EIN) and plan number;
- Type of plan (defined benefit, profit sharing, hospitalization, dental, etc.)
- Type of administration of the plan;
- Name, business address and business telephone number of the plan administrator;
- Name and address of the person designated as legal agent for service of process (including a statement that plan trustee or administrator may be served with process)
- Name, title, and address of the principal place of business of each plan trustee, if the plan has trustees;
- Description of any relevant provision of any collective bargaining agreements and a statement that copies of such agreements are available for examination, upon written request;
- Plan's eligibility for participation (age, years of service, employment status) and for benefits;
- Circumstances which may result in the disqualification, ineligibility, denial or loss of benefits; information on provisions for plan termination or amendment;
- Sources of contributions to the plan and the method by which the amount of contributions is calculated;
- Identity of any institution or organization used for the accumulation of assets;

- Date on which the plan's fiscal year ends;
- Procedures to be followed in presenting claims and requests for review of denied claims; and
- ERISA rights statement.

For Pension Plans the SPD must also include the definition of the plan's normal retirement age; any conditions which must be met for a participant to be eligible to receive benefits; the benefits provided by the plan; information regarding procedures governing qualified domestic relations order determinations (QDRO); any joint and survivor benefits provided under the plan, including any requirement that an election must be made to accept or reject the joint and survivor annuity; if the plan is insured, a summary of the pension benefit guaranty provisions; statement if plan benefits are not insured, and the reason for lack of insurance; and the plan provisions for determining years of service for eligibility to participate, vesting and breaks in service, and years of participation for benefit accrual.

Welfare Benefits Plan SPDs must include the following: description or summary of benefits; eligibility conditions to receive benefits and whether the health insurance issuer is responsible for financing and/or administering the plan; description of any cost-sharing provisions for which the participant is responsible, and caps or plan limits; coverage of preventive services, existing or new drugs, tests, devises or procedures; use of network providers, listing of such providers, out-of-network services, selection of primary care providers, emergency care limitations; requirements for preauthorization or utilization reviews. Procedures governing qualified medical child support order (QMCSO) determinations; and for group health plans, information regarding length of hospital stay for childbirth; a description of the rights and obligations to continuation coverage (COBRA).

Amending or Terminating a Plan

A plan which is an employee welfare plan, or a pension plan, under ERISA may be amended or terminated if the plan documents (the plan itself and the Summary Plan Description) reserve the right to amend or terminate and provide generally for a procedure to be followed.

Crediting of Employees' Service

The calculation of an employee's years of service for determining his eligibility for participation in, and the extent of his vesting in, a pension plan, profit-sharing plan, or a deferred compensation (401k) plan to which employer contributions are made, and for determining his benefit accrual in a defined-benefit pension plan, shall be made in either of two ways.

1. He shall be given credit for a year in which he performs 1,000 or more "hours of service" .

    a. The general rule is that an "hour of service" includes not only time worked but also time which is not worked but for which an employee is paid due to vacation, holiday, disability (including disability resulting from pregnancy), jury duty, leave of absence, military service or layoff; provided, however, that not more than 501 hours need be counted with respect to any single, continuous period during which no duties are performed. Also, it is unnecessary to count payments made pursuant to a plan maintained solely to comply with the Unemployment Compensation, Workers' Compensation or T.D.B. Laws, or payments which reimburse an employee solely for medical or "medically related" expenses.

    b. Several alternative methods may be used to calculate "hours of service", such as using actual hours worked, non-overtime hours worked, etc. Any alternative method used must be set forth in the document under which the plan is maintained.

2. Years of service may be determined on the basis of "elapsed time", i.e., the total period of employment - regardless of the actual hours worked.

The regulations describe the treatment of breaks in service and other periods which can be excluded from the calculation of service.

A plan may use different methods of crediting service for different categories of employees, provided the categories are reasonable. Whatever method or methods are used must be stated in the " document under which the plan is maintained".

Records

Records required to compile the information which must be reported shall be preserved for 6 years after the due date for filing the documents to which they relate.

Discrimination

It is unlawful for an employer to discharge, discipline, or discriminate against, a "participant" or "beneficiary" for exercising any right to which he or she is entitled under the provisions of an employee benefit plan or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan. This prohibition applies to both pension and welfare benefits plans. While an employer has the flexibility to amend or eliminate its welfare benefits plan because such plans are exempt from the stringent vesting requirements for pension plans, such flexibility does not include the power to discharge or otherwise discriminate against the participants or beneficiaries for the purpose of interfering with their rights under the plan.

Federal courts have held that for an employee to make out a claim under ERISA, he or she must introduce evidence that suggests interference with ERISA rights was a motivating factor in the employer's decision. Generally, measures designed to reduce costs in general that also result in an incidental reduction in benefit expenses do not suggest discriminatory intent. Instead, the participant or beneficiary must introduce evidence suggesting that the employer's decision was specifically directed at ERISA rights.

Duty of Disclosure

ERISA requires a plan to identify a "named fiduciary," a person responsible for ensuring that the plan is operated and administered properly and who holds legal responsibility for the plan. The plan sponsor, typically an employer, or employees of the plan sponsor are often named fiduciaries. Fiduciaries must make prudent decisions "solely in the interest of plan participants". While an employer's decision to amend or terminate a plan is not usually governed by ERISA's fiduciary provisions, an employer acts as a fiduciary when it communicates important information about the benefit plans it sponsors.

Several Third Circuit Court of Appeals decisions are illustrative: An employer violated ERISA when it went from paying for the entire health insurance premium for retirees and their spouses to paying none of the premium. While employers may terminate coverage under the terms of the plan, a fiduciary is obliged to communicate to beneficiaries important facts which the fiduciary knows the beneficiaries do not know, but which the beneficiaries need to know for their own protection. In this case, the personnel manager told retirees that under the plan their medical benefits were guaranteed to them for life. Executives recognized that retirees might be under the mistaken impression that their health benefits could not be terminated but failed to clarify this mistaken impression. The failure to clear up this mistaken impression violated ERISA.

Similarly, when asked, an employer has a duty to disclose information about a plan amendment when it is under serious consideration by senior management with the authority to adopt the amendment. In this case, an employee, months before his retirement, tried to confirm rumors about a special retirement incentive but was told by management that no such plan was under consideration. In fact, the plan was being given serious consideration by senior management with authority to implement the amendment. The employee relied on the statement and retired. The employer's failure to disclose that the retirement incentive was under serious consideration by senior managers violated ERISA. However, an employer has no duty to volunteer information to employees who do not make any inquiries about plan changes before their adoption.

Moreover, plan fiduciaries must disclose important information that will help participants make prudent benefits decisions. For example, the failure to inform a participant that a benefit election is irrevocable may violate ERISA even if the employee never asks whether the election is irrevocable.

Duty of Prudence

A plan sponsor has a fiduciary responsibility to use care, skill, prudence and diligence when selecting and monitoring defined benefit plans and participant-directed defined contribution plans, which includes monitoring investment results, reassessing choices for the upcoming year, and diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so. Further, the selection of a vendor for an employee benefits plan is a fiduciary act. As such, the lowest bidder need not always be selected.

If the plan is participant-directed, a fiduciary will not be liable for the losses resulting from the participant's investment decisions if the fiduciary has provided information sufficient for the average participant to understand and assess the following: 1) the control the plan permits the participant to exercise and the financial consequences he/she assumes by exercising control, 2) the rights that ERISA provides to participants and the obligations that ERISA imposes on fiduciaries, 3) the plan's terms and operating procedures, 4) alternative funds offered, 5) investments in which assets in each fund are placed, 6) the financial condition and the performance of the investment, and 7) developments materially affecting the investment's financial status.

Permissible Investment Education

Providing investment advice is a fiduciary act. However, an Interpretative Bulletin issued by the US Department of Labor draws the line between investment advice and education. An employer may offer investment education by providing:

1. **plan information** that informs participants about the benefits of plan participation, increasing contributions, impact of pre-retirement withdrawals on retirement income, alternative plan investments, e.g., descriptions of investment objectives, risk and return characteristics, prospectuses, etc.;

2. **general investment and financial information**, such as risk and return, diversification, dollar cost averaging, compounded return, tax-deferred investments, historic differences between asset classes, effects of inflation, estimating future retirement needs and determining investment time horizons.

3. **asset allocation models** for hypothetical individuals with different retirement and/or risk horizons and profiles, as long as investment assumptions are disclosed and participants are told that they should consider their other assets, and,

4. **interactive investment materials** which provide a participant or beneficiary with the means to assess future retirement needs and the impact of different asset allocations.

However, if the employer uses actual stocks or mutual funds offered by the plan in its illustrations, the illustration should include a disclaimer saying that the employer is not endorsing a particular stock, mutual fund or security.

Penalties

A civil action may be brought by a plan participant or beneficiary or by the Secretary of Labor to enforce statutory requirements, including the reporting and disclosure requirements. Depending on the particular offense, fines can be as much as $70,000 and imprisonment up to one year. In some cases the plan administrator may be personally liable.

ERISA Reporting and Disclosure Requirements (Summary)

REPORT	WHEN DUE	APPLICATION
Provide to Participants and Beneficiaries		
Summary Plan Description	Within 120 days of plan establishment. To new employees and beneficiaries: 90 days after becoming employees or beneficiaries	For all welfare, pension and profit-sharing plans.
Updated Summary Plan Description	Every 10 years, or at end of each 5 year period in which plan modifications were made. Also, latest description to be furnished within 30 days of written request.	Ditto
Summary of Material Modifications	Within 210 days after end of plan year in which modifications occur. 60 days from modification for "material reduction in covered services or benefits."	Ditto Welfare Plan
Statement of plan's assets, liabilities, income, expenses, etc.	Within 210 days from end of plan year	For pension, profit sharing, welfare plans, any of which has 100 or more participants, and all welfare plans which pay benefits out of a fund.
Summary Annual Report	Within 9 months after end of plan year	Ditto*
Copy of latest annual report	Within 30 days after written request**	Ditto
Copy of plan description	Ditto**	Ditto
Copies of plan documents (trust agreement, contracts, etc.)	Ditto**	Ditto
Statement of accrued and vested benefits	Within 30 days of written request (but not more than once every 12 months). Also, on termination of employment or following a break in service of 1 year or more	For all pension and profit-sharing plans
Notice of application for plan amendment or termination	Mailed 10 to 24 days before filing for IRS approval, or posted 7 to 21 days prior to such filing	Ditto
Notice of plan termination	Within 30 days of written request	Ditto

*For participants in pension, profit-sharing and welfare plans, any of which covers fewer than 100 participants , copy of Form-C/R may be substituted.

** Must also be made available for examination on 10 days' notice. Also, a participant may be entitled, on request, to additional information to assist him to determine his eligibility, rights and monetary interest in

REPORT	WHEN DUE	APPLICATION
Filed with Internal Revenue Service		
Form 5500	Within 7 months following end of plan year, then annually	Plans of the following kinds covering 100 or more participants: pension plans; profit-sharing plans; and welfare plans.
Schedule A	(Attached to Form 5500 or 5500-C/R)	If any such benefits are provided via insurance
C portion of Form 5500-C/R	Within 7 months following end of plan year, then every 3 years	Plans of the following kinds covering fewer than 100 participants: pension plans; profit-sharing plans; and welfare plans if benefits are paid out of a fund.
R portion of Form 5500-C/R	In years when 5500-C portion is not filed	Ditto
Schedule B	(Attached to Form 5500 or 5500-C/R)	Defined-benefit pension plans
Schedule SSA	Ditto	Plans providing deferred, vested benefits
Filed with Pension Benefit Guaranty Corporation (For defined-benefit pension plans only)		
Notice of “reportable event”	Within 30 days after knowledge of occurrence of event	Required for plan merger, closing of facility, benefit curtailment, 20% decrease in employment, etc.
Notice of plan termination	10 days or more before termination	

Military Service

Reemployment and related rights of employees who are returning from military service are governed by the Uniformed Services Employment and Reemployment Rights Act of 1994.

This federal statute provides that any person who has been "absent from a position of employment by reason of" military service (referred to herein as a "serviceman") is entitled to restoration to employment and employment benefits, provided that other conditions of entitlement are met.

Definitions

1. Position of employment: any employment, other than one for a brief, non-recurrent period where there is "no reasonable expectation that it will continue indefinitely for a significant period."

2. Military Service: performance of any of the following kinds of duty in the armed forces (which includes the commissioned corps of the Public Health Service and service under the National Disaster Medical System) on a voluntary or involuntary basis: active duty, active duty for training, inactive duty training, and full-time National Guard duty.

3. Qualified: having the ability to perform the essential tasks for a position.

4. Reasonable efforts: actions, including training, required of an employer that do not create an undue hardship - i.e., "significant difficulty or expense" for the employer.

Leaving Employment to Enter Military Service

In order for a serviceman to be eligible for reemployment he must have left his position of employment for the purpose of performing military duty, and he must maintain this purpose from the time he leaves his employment until the time of commencement of such duty. A hiatus between the time of leaving employment and entering upon military service or becoming committed to enter service will not necessarily indicate lack of such a purpose but if the interval is lengthy, the individual may have to produce evidence to support his asserted reason for leaving.

If an individual enters military service at a time when he is in layoff status but with recall rights, he is considered as being "absent from a position by reason of military service."

Notification to Employer

In order to be entitled to reemployment advance notification, either written or oral, of an obligation or intention to perform military service must be given to the employer by the employee or by "an appropriate officer" of the military unit (unless the giving of notice is "precluded by military necessity" or is impossible or unreasonable).

Duration of Military Service and Conditions of Discharge

A serviceman will have no reemployment rights if:

1. The periods of all of his absences for military service exceed 5 years in the aggregate* (a longer period is allowed in some cases), or

2. He was separated from military service with a dishonorable or bad conduct discharge, or under other than honorable conditions.

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* This time limit applies only to military service performed during the employment to which he claims restoration rights. Service performed before that employment relationship began does not count.

Application for Reemployment

Except as hereafter noted, a serviceman must apply for reinstatement in accordance with the following:

1. If his period of military service was for less than 31 days, he must report back to the employer by the beginning of the first regularly scheduled workday which occurs 8 hours after the employee returns home, or as soon as possible if delayed through no fault of his own.

2. If his period of military service was for more than 30 days but less than 181 days, he must submit an application for reemployment within 14 days* after completion of service; and if the period of military service was for more than 180 days, he must submit such application within 90 days.

These periods for returning to and applying for reemployment are extended (normally for up to 2 years*) for servicemen who are hospitalized or convalescing from service-related disabilities. Furthermore, a person who fails to timely report or apply for reemployment shall not automatically forfeit reemployment rights but "shall be subject to the conduct rules, established policy, and general practices of the employer pertaining to explanations and discipline with respect to absences from scheduled work."

The employer may require a returning serviceman whose period of military service was for more than 30 days to supply documentation establishing his entitlement to reinstatement.

Reemployment Positions

A returning serviceman who is eligible for reemployment shall be reemployed in accordance with the following:

1. If the period of his military service was for less than 91 days:

   a. He shall be placed in the position he would have attained but for his absence in military service. However, if he is not qualified for that position, after reasonable efforts by the employer to qualify him, then

   b. He shall be restored to the position he left.

2. If the period of his military service was for more than 90 days:

   a. He shall be placed in the position he would have attained but for his absence in military service, or (at the option of the employer) in a position of like seniority, status and pay the duties of which he is qualified to perform. However, if he is not qualified for any such positions, after reasonable efforts by the employer to qualify him, then

   b. He shall be restored to the position he left or (at the option of the employer) to one of like seniority, status and pay.

3. If for any reason other than a service-connected disability** the serviceman is not qualified for the positions described in 1 (b) or 2 (b), above, and cannot become qualified with reasonable efforts by the employer, he shall be reemployed, if qualified, in any other position which is the nearest approximation to the position described in 1a, above, or if there is no such position, to the nearest approximation to the position he left.

An employer is not required to reemploy a serviceman if the employer's circumstances have so changed as to make the reemployment impossible or unreasonable, or in the case of a person otherwise entitled to reemployment pursuant to (3), above, if reemploying him would impose an undue hardship on the employer -- i.e., require "significant difficulty or expense."

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*Or thereafter as soon as possible if reporting within this time period is impossible or unreasonable through no fault of the serviceman.

** Special provisions apply where his lack of qualifications is due to a disability incurred in or aggravated by the military service.

Special Reinstatement Rights for Those Who Serve During War or Emergency

Under New Jersey statute, if the circumstances of an employer have so changed because of reason of economy of efficiency or related reason as to make it impossible or unreasonable to restore a person who left to enter active military service in the Armed Forces in time of war or emergency, such employer shall restore such person to any available position, if requested by such person, for which the person is able or qualified to perform the duties.

Other Rights and Benefits

While performing military service a serviceman shall be considered to be on a leave of absence, and shall be entitled to whatever benefits are generally provided to employees "having similar seniority status and pay" when they are on non-military leave of absence, pursuant to the employer's policy, practice or contract.

Also, a health plan shall provide that an employee covered by health insurance who leaves to perform military service may elect to continue the insurance for himself and his covered dependents, regardless of the number of employees of his employer. The maximum period of continuation is 24 months, but not beyond the point where the employee fails to make timely application for a return to reemployment.

The employee may be required to pay up to 102% of the applicable premium in order to continue the coverage unless his military service was for less than 31 days, in which case he may not be required to pay more than his share, if any, of the premium.

Employers may develop reasonable requirements addressing how continuing coverage may be elected. Where health plans are also covered under COBRA (see page 205) employers may adopt COBRA-like rules regarding election of continuing coverage and cancellation rules.

Upon restoration to employment pursuant to the statute the servicemen will be entitled to certain benefits and credits as if he had been continuously employed.

1. In general, health coverage that was discontinued on account of military leave must be immediately reinstated without any exclusion or waiting periods. (This does not apply to the coverage of any illness or injury which the Secretary of Veteran Affairs determines to have been incurred or aggravated during military service.)

2. The returned serviceman shall be credited with the amount of seniority he would have attained if he had remained continuously employed.

3. He will be entitled to those rights and benefits that are determined by seniority - i.e., those that are related to the mere passage of time or duration of employment. The period of military service shall not constitute a break in service under a pension plan, and must be credited in calculating pension vesting and benefits. (The Act contains other, detailed provisions on the subject of contributions which employees must make to pension plans, 401K plans, profit-sharing plans, money purchase plans, and employee stock-ownership plans.

4. Make-up contributions may be made by the employer or employee to an individual account plan or a defined benefit plan without incurring disqualification of the plan for violating contribution limits that are otherwise applicable.

5. With respect to vacations, in calculating a returned employee's total length of employment or seniority as a measure of the duration of his vacation - i.e., in determining whether he would get a vacation of 1 week or 2 weeks, etc. - the period of his military service must be counted. This is so even where by the terms of a vacation plan a year (or other period) of employment is counted only if a prescribed minimum amount of actual working time has been performed in that period, or prescribed remuneration has been received in that period. The employee is entitled to be credited with the working time or earnings he would have had but for his absence in the military.

On the other hand, in determining a serviceman's eligibility for vacation or vacation pay in a particular year, a bona fide requirement of performance of actual work must be satisfied. The amount of work required must be reasonably substantial to be bona fide.

For example, if a vacation plan requires the performance of a specified number of hours or days of work in one calendar year in order to receive any vacation in the following year, an employee who in a given calendar year was unable to fulfill this requirement because of his absence in military service would not be eligible for vacation or vacation pay in the following year.

To be contrasted with this kind of requirement is a provision that in order to be eligible for a vacation to which his length of service otherwise entitles him, an employee must be actively employed on a specified date. Most courts say that an employee may not be denied vacation pay merely because he is unable to satisfy such a requirement because of his absence in military service. Where the vacation plan contains no requirement of performance of actual work as a condition to receiving vacation, so that eligibility for a vacation in a particular year is attained merely by being employed for some part of that year, then for the year in which he left employment to enter military service he is entitled to the vacation pay he would have received had he not left. In the year in which he returns to employment (or makes application for reemployment) he is similarly entitled, provided that if vacations must be taken within a specified time period, an employee who returns after that period is not entitled to a vacation.

Nothing in the foregoing entitles an employee to vacation with respect to a vacation year during all of which he was absent because of military service.

Protection Against Discharge

USERRA prohibits discrimination with respect to the terms, conditions or privileges of employment.

An employee who has been restored to employment pursuant to the statutory requirements is protected against discharge, except "for cause," for a period of one year if the duration of his military service was more than 180 days, and for a period of 180 days if the duration of his military service was more than 30 days but less than 181 days.

Drug and Alcohol Testing and Control Programs

Testing of Employees Generally

Although courts generally regard mandatory urine testing for the presence of drugs or alcohol as an intrusion into privacy, they also recognize the interest and right of employers to maintain a substance-free workplace and of the public to be free from potential hazards resulting from substance abuse. Courts attempt to balance these rights, and so whether testing will be regarded as an impermissible intrusion will depend upon the circumstances in which it is done and how it is done.

Regardless of circumstances, an employer is at risk if he tests or seeks to test an employee for the presence of drugs or alcohol without having first promulgated a policy on the subject. In the absence of a promulgated policy employees who are subjected to testing have a strong basis for a claim of invasion of privacy, whereas employees who have been informed in advance concerning the testing policy and program have a lesser expectation of privacy.

However, even a pre-announced testing program must observe certain limitations. The leading case on the subject in New Jersey is Hennessey v. Coastal Eagle Point Oil Co., in which the New Jersey Supreme Court upheld an employer's program of drug testing on a "random" basis - i.e., employees were subjected to testing where there was no individualized evidence or suspicion that they were drug users. However, the basis for the court's decision was that the particular employee involved in the lawsuit was in a "safety-sensitive" job, where there was a potential for serious injury to coworkers, the public or the workplace as a result of drug use. Another element in the case (although it is not clear how much weight was given to it by the court) was that the work locations of the employees made it impractical to use less intrusive means of detecting drug use.

It is plain from the court's opinion that it would not uphold random testing of employees generally. On the other hand, it is highly probable that employers can legally require an employee to submit to testing for the presence of drugs and alcohol when there is a reasonable belief or suspicion of their use. Post-accident testing and testing as part of or as a follow-up on a rehabilitation program were not discussed by the court; presumably, testing in such circumstances would require "reasonable suspicion".

However, as previously observed, no testing should be performed without first promulgating a policy or program which, at a minimum, identifies the categories of employees subject to testing, explains the circumstances in which testing will occur, and describes the consequences of testing "positive" or of refusing to submit to testing. In addition, in the Hennessey case the Supreme Court advised that the program "warn employees of the lingering effect of certain drugs in the system" and explain how the sample will be analyzed. The test procedure should allow as much privacy and dignity as possible, and the tests should be restricted to those which are necessary to determine the presence of drugs or alcohol. The chain of custody of the sample must be safeguarded, and the tests must be accurate.

Criminal Sanctions

Any person who knowingly defrauds the administration of a drug test that is administered as a condition of employment or continued employment as a law enforcement officer, corrections officer, school bus driver, operator of a motorbus, employee of a rail passenger service, firefighter, provider of emergency first-aid or medical services, or any other occupation that requires the administration of a drug test by law, rule or regulation of the state or local agency, public authority, or the federal government is guilty of a crime of the third degree.

Any person who knowingly defrauds the administration of a drug test which is administered as a condition of any employment or continued employment not specified above is guilty of a crime of the fourth degree.

Testing of Bargaining Unit Employees

Before subjecting union-represented employees to testing, the employer is obligated to bargain with their union regarding the particulars of the testing program unless the union has waived the right to bargain on the subject. There is no bargaining obligation with respect to applicants for bargaining unit jobs.

The duty to bargain requires only that the employer, upon request, bargain to impasse.

In the absence of a specific contractual provision on the subject, the right of an employer to establish a substance-abuse program, and the reasonableness of the program and of its application in a particular instance may be subject to challenge via arbitration, depending on whether and the extent to which the subject is covered by the terms of the collective bargaining agreement.

Job Applicants

Applicants should be informed in advance that any job offer is conditioned upon consent to testing, the testing procedures must provide as much privacy as possible, the tests must be accurate, and samples should be tested only for the presence of drugs or alcohol.

Note also the provisions of the Americans With Disabilities Act on the subject.

Inspections and Searches

Where a drug or alcohol control program includes inspection and searches of employees' desks, lockers, automobiles in company parking lots, personal effects, etc., it is important to promulgate a policy on the subject, in advance, as a defense to invasion-of-privacy claims. The searches must be conducted in a reasonable manner and with reasonable justification.

Release of Information

The written or oral communication of information concerning an individual's use, or alleged use, of alcohol or drugs is subject to the law of defamation (see page 191). Both internal and external communications concerning test results, etc., should be limited to those who have a legitimate need for the information.

Even where the information is truthful, and so not defamatory, its publication may constitute an invasion of privacy where the manner and circumstances of publication are unreasonable.

Post-Accident Testing and Non-Retaliation

The Occupational Safety and Health Act prohibits retaliation against employees for reporting violations of the Act. The Occupational Safety and Health Administration states that automatically terminating the employment of employees who test positive for drugs may dissuade them from reporting accidents and injuries. Thus, drug testing polices should limit post-accident testing to situations in which employee drug use is likely to have contributed to the incident, and for which a drug test can accurately indentify impairment caused by drug use. While the Act does not require employers to specifically suspect drug use before testing, the Administration states that there should be a reasonable possibility that drug use by the reporting employee was a contributing factor to the reported injury or illness in order for an employer to require drug testing.

Drug-free Workplace Act of 1988

This federal statute provides that in order to be eligible to obtain a procurement contract of $25,000 or more to supply property or services to any agency of the federal government (including the Department of the Defense), or to obtain a federal grant of any amount, the employer must certify to the contracting agency or granting agency that it will provide a drug-free workplace at the site where work will be performed on the contract or grant, by fulfilling the following requirements:

1. Publish a statement notifying employees* that the unlawful manufacture, distribution, dispensation, possession or use of a "controlled substance" (i.e., a substance listed in schedules I through V of the federal Controlled Substances Act) is prohibited in the workplace, and specifying the actions that will be taken against violators. Employees shall be given a copy of the statement.

2. Include in the statement a notification that as a condition of employment employees must comply with the terms of the statement, and that if convicted of a criminal drug offense occurring in the workplace, they will notify the employer within 5 days after such conviction.

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*The requirements of the Act do not apply to all employees of the contractor or grantee, but only to those "directly engaged" in the performance of work on the contract or grant. All references herein to "employees" are limited accordingly.

3. Notify the contracting or granting agency within 10 days after learning of such a conviction. Within 30 days after learning of a conviction either impose sanctions on the convicted employee or require him to satisfactorily complete a drug rehabilitation or assistance program.

4. Establish a "drug-free awareness program" to inform employees about the dangers of drug abuse in the workplace, and about any available counseling, rehabilitation and assistance programs.

5. Make a good-faith effort to maintain a drug-free workplace by implementing the foregoing.

The government may suspend payments, terminate the contract or grant or debar an employer who makes a false certification, fails to fulfill the foregoing requirements, or has such a number of employees convicted of criminal drug statute violations occurring in the workplace as to indicate that the contractor has failed to make the required good-faith effort.

The statute neither requires nor prohibits testing for drug use.

The statute has no application to a subcontractor. It has no application to a financial institution unless it furnishes some specific article to an agency of the federal government.

With respect to federal grants, the statute is applicable only to the entity receiving the grant directly from the federal government; if a state agency receives a grant and passes the money on to a third-party employer, the Act applies only to the state agency.

A grantee may determine what is the relevant site for the performance of work and specify that site in his certification.

A "grant" is defined as an award of financial assistance, including a cooperative agreement. It also includes block grants and block entitlement programs, but excludes loans, loan guarantees, interest subsidies, insurance and "direct appropriations".

Drug-free Workforce Rules (Department of Defense)

Contracts with the Department of Defense (for other than "commercial or commercial-type products") shall include a "drug-free workforce clause" if employees who will work on the contract will have access to classified information or if the contracting officer determines that such a clause is necessary.

Pursuant to the clause, contractors must agree to institute and maintain a "program for achieving the objective of a drug-free workforce", which will include the following, "or appropriate alternatives":

1. Establishment of employee assistance and treatment programs.

2. Training supervisors to identify drug users.

3. Random testing of employees in sensitive positions.

   A "sensitive position" is defined as one which involves access to classified information or which the contractor determines to involve national security, health or safety or to require a high degree of trust and confidence.

4. Adoption of appropriate personnel procedures to deal with drug users.

   An employee in a "sensitive position" who is discovered to be using illegal drugs must be removed from that position until he is drug-free.

In addition, contractors may test an employee when there is reasonable suspicion of drug use, or when an employee has been involved in an accident or unsafe practice, or as part of or as a follow-up to rehabilitation or counseling, or as part of a voluntary testing program. (However, the drug-testing provisions of the Rules are inapplicable to the extent that they are inconsistent with state law or a collective bargaining contract. Drug testing is restricted under New Jersey law—see page 161).

These workforce rules do not apply to subcontractors nor to employees who do not work on the contract.

Testing of Motor Vehicle Operators

Companies which employ one or more drivers of commercial vehicles must comply with the following regulations issued by the Federal Highway Administration, Department of Transportation (DOT), for the testing of such drivers for drug and alcohol use. The State of New Jersey has adopted these regulations.

Application

Drivers must be tested for both drug and alcohol use if they drive any of the following motor vehicles:

1. A vehicle which has a gross vehicle weight rating of more than 26,000 pounds,

2. A vehicle which has a gross combination weight rating of more than 26,000 pounds, inclusive of a towed vehicle with a gross vehicle weight rating of more than 10,000 pounds,

3. A vehicle which is designed to transport 16 or more persons, including the driver,

4. A vehicle of any size which is used to transport hazardous materials and which requires placarding,

5. A vehicle which is designed to transport from 8 to 15 persons, including the driver, and is used to transport persons "for hire on a daily basis" to and from places of employment. (New Jersey only)

Drivers in categories 1 to 4, above, are subject to testing if they drive either interstate or intrastate. Drivers in category 5 are not subject to testing (or to any other provisions of these regulations) if they drive interstate only.

"Drivers" include leased drivers and independent, owner-operator contractors who are either directly employed by or under lease to an employer, or who operate at the direction of or with the consent of an employer.

The drugs and drug groups for which testing is required are marijuana, cocaine, opiates, amphetamines, and phencyclidine (PCP).

Prohibited Conduct

The DOT regulations provide that engaging in any of the following is "prohibited conduct".

1. No driver shall report for or remain on duty requiring the performance of a safety-sensitive function while having an alcohol concentration in his system of 0.04 or greater, or when he uses any drug, except when the drug use is pursuant to the instructions of a physician who has advised the employee that use of the drug will not affect his ability to operate a motor vehicle safely. An employer may require a driver to disclose any therapeutic drug use.

a. A driver is "on-duty" from the time he begins to work or is required to be in readiness to work until the time he is relieved from work and all responsibility for performing work.

b. Performing a "safety-sensitive function" is any of the following:

Driving or riding in the motor vehicle -- i.e., at the controls or as a passenger (except while resting in a sleeper berth which meets DOT specifications as to size, etc.)

Loading or unloading a vehicle; supervising, assisting in or attending loading or unloading; giving or receiving receipts for shipments loaded or unloaded.

Inspecting certain parts and emergency equipment of the vehicle.

Rendering assistance (as specified in regulations) after being involved in a highway accident.

Repairing, obtaining assistance for, or remaining in attendance upon a disabled vehicle.

2. No driver shall drive or be on duty while possessing wine containing 1/2% or higher of alcohol by volume, beer or distilled spirits unless the alcohol is manifested and is part of a shipment.

3. No driver shall use alcohol (including medication or other mixture containing alcohol) while performing a safety-sensitive function or within 4 hours before performing one.

4. No driver who is subject to testing for involvement in a highway accident shall use alcohol (including medication or other mixture containing alcohol) for 8 hours following the accident, or before he undergoes a post-accident alcohol test, whichever first occurs.

5. No driver shall refuse to submit to any test for alcohol or drugs (other than a pre-employment test) which is required by these regulations, nor leave the scene of an accident in order to avoid taking a required test. A "refusal" includes a failure to provide an adequate breath or urine sample for testing, without a valid medical reason.

Circumstances and Conditions of Testing

Before performing any test which is required by the regulations the individual to be tested shall be informed that the test is required by the regulations.

Testing must be done in accordance with procedures specified by the DOT. They cover such items as specimen collection, laboratory analysis, and quality assurance. All testing for alcohol shall be conducted by using breath-testing devices approved by the National Highway Traffic Safety Administration. The costs of testing are assumed by the employer, although reimbursement may be sought from the employee for all or part of the costs associated with testing split samples.

DOT tests must be completely separate from non-DOT tests in all respects. DOT tests must take priority and must be completed before a non-DOT test is begun. For example, an excess urine specimen left over from a DOT test must be discarded and a separate specimen must be taken for a non-DOT test. Further, no other tests for additional drugs can be done on a DOT urine specimen. An exception is when a DOT drug test specimen is collected as part of a physical examination required by DOT regulations.

Testing shall be performed in the following circumstances:

1. If an employer has a "**reasonable suspicion**" that a driver has engaged in any of the foregoing prohibited conduct which involves the use of drugs or alcohol, he shall require him to submit to a test. The reasonable suspicion must be based upon "specific, contemporaneous, articulable observations" concerning the employee's appearance, behavior, speech or body odors, and be made by a supervisor or company official who has received training concerning the symptoms of drug and/or alcohol use, as described hereafter. A written record of the observations leading to a drug test shall be made within 24 hours of the observed behavior or before the test results are released, whichever is earlier.

Alcohol testing based on "reasonable suspicion" may be conducted only during, immediately before, or immediately after the driver's performance of a safety-sensitive-function.

2. Drivers are also subject to **random testing** for the presence of drug and alcohol in the system. These tests shall be unannounced and the dates for administering them must be spread reasonably throughout the year. The random test for alcohol may be conducted only during, immediately before or immediately after the period when the driver performs a safety-sensitive function.

Each year the number of random tests for drugs must equal at least 50% of the number of drivers, and for alcohol it must equal at least 10% of such number. (These rates are subject to adjustment by the DOT.) The selection of the particular drivers for testing shall be made by "a scientifically valid method, such as a random number table or a computer-based random-number generator that is matched with drivers' Social Security numbers, payroll identification numbers, or other comparable identifying numbers."

3. **Following a highway accident** the driver of the vehicle shall be tested for the presence of alcohol and drugs if (a) the accident involved a fatality, or (b) if the driver received a citation for a moving

violation and the accident either caused bodily injury to any person resulting in his immediate receipt of medical treatment away from the scene of the accident or caused disabling damage to one or more motor vehicles which required towing away.

An alcohol test may not be given more than 8 hours after the accident, and if it is not given within 2 hours, the employer shall prepare and maintain a written explanation of the reason such test was not administered promptly. A post-accident drug test may not be administered more than 32 hours after the accident; if not given within that time limit, an explanation must be prepared and maintained.

Tests conducted on-site by State or local law enforcement agents or public safety officials are acceptable in lieu of employer-conducted tests.

An employee who is subject to post-accident testing shall remain readily available for testing (except that he may leave the accident site to obtain necessary medical attention for injured persons or to take care of other emergencies.)

4. A **pre-employment test** must be given for drugs, except as noted. (A pre-employment test for alcohol is not required.) The test may be administered either pre-hire, or after hire but before the first time a driver performs a safety-sensitive function. This requirement also applies when a current employee is transferred to a driver position.

The test is not required if the applicant has met certain specified requirements regarding previous participation in a drug-testing program. In such case the employer must obtain details concerning the program and the applicant's participation.

Collection, Monitoring and Observation

Specimen collectors must be trained, meet minimum qualifications and demonstrate necessary knowledge, skill and ability. Generally, when a specimen is collected at the work site an employee's immediate supervisor may not act as a collector, unless no other collector is available. The collection may be monitored by someone of the same gender as the employee, although the monitor cannot make a direct observation of the employee urinating. If there is a reasonable belief of specimen tampering, the collection must be made under direct observation. If the collection is made under direct observation it must be explained to the employee. The observer (which may be the specimen collector) must be of the same gender as the employee and must watch the employee urinate into the collection container and specifically observe the urine go from the employee's body into the container. If an employee declines to permit observation, it is to be considered a refusal to test.

If a specimen is collected at the worksite, the employer must take detailed steps to ensure privacy and to protect the security and integrity of the urine collection.

An employer must direct an immediate collection under direct observation with no advance notice to the employee if 1) the testing laboratory reported to the physician [Medical Review Officer (MRO)] that a specimen was invalid and the MRO reports to the employer that there is no medical explanation for the result or 2) the MRO reports that the original test result was cancelled because the test on the split sample could not be performed.

Review and Reporting

All drug test results shall be reviewed and interpreted by the MRO before they are reported to the employer. The regulations describe in detail the required content of the MRO's report, and specify that the MRO must submit a signed, written notification of the test result.

If the laboratory reports a positive result to the MRO, he will communicate with the driver (in person or by telephone) and conduct an interview to determine if there is an alternative medical explanation for the drugs found in the driver's system. The employee may request a test on a split sample within 72 hours, or if the driver provides appropriate documentation and the MRO determines that there has been a legitimate medical use of the prohibited drug, the drug test result will be reported as negative to the employer.

Consequences of Misuse of Drugs and Alcohol

The particular consequences of misusing drugs or alcohol depend upon test results and driver conduct.

1. If any test for alcohol discloses a concentration of 0.04 or over, or if any test for drugs produces a positive result, or if a driver has engaged in any prohibited conduct, the driver shall be removed from and shall not be allowed to return to the performance of safety-sensitive functions until a test or retest for drugs is negative or for alcohol shows a concentration less than 0.02. However, the employer is not required to return an employee to a safety-sensitive position because an employee has met the conditions. A discharge or other decision may be made at the employer's discretion.

> In addition, before an employee returns an employer may require that he the employee shall be evaluated by a substance-abuse professional (SAP), who is a physician, psychologist, social worker, employee-assistance professional, or a certified addiction counselor, although the employer is not required to provide a SAP evaluation. The SAP will determine what assistance, if any, the employee needs in resolving his drug and/or alcohol problems.
>
> Neither the employer nor employee may seek a second SAP's evaluation if the employee has already been evaluated by a qualified SAP. If the employee obtains a second evaluation the employer must disregard it.
>
> If the SAP determines that such assistance is needed, he will prescribe a rehabilitation program, and monitor the employee's adherence to the program. The recommendation may not be changed by the employer. Also, the driver must undergo follow-up testing for drugs or alcohol, or both, upon his return to duty. The number and frequency of such tests will be as directed by the SAP but there must be at least 6 tests in the first 12 months. They must be unannounced and conducted only just before, during or just after the performance of a safety-sensitive function.

2. If any test for alcohol discloses a concentration of from 0.02 to less than 0.04, the driver shall be removed from the performance of all safety-sensitive functions for at least 24 hours.

3. He must be similarly removed where his behavior and appearance indicate that he is under the influence of alcohol but it is infeasible or impossible to conduct a "reasonable suspicion" test in a timely manner.

4. Also, the Commercial Motor Vehicle Safety Act (page 198) provides that drivers who operate while under the influence of drugs or alcohol are subject to disqualification for one year or longer.

Standing Down

Employers are prohibited from "standing down" employees. "Stand down" refers to an employer practice of temporarily removing an employee from performance of safety-sensitive duties upon learning that the individual had a confirmed laboratory positive drug test, but before the MRO has completed the verification process. MROs are not permitted to inform employers about the existence of a confirmed laboratory positive test pending verification and employers are not allowed to take any action concerning an employee until they receive the MRO's notification of a positive test. An employer may seek a waiver of the stand-down prohibition from the US Department of Transportation.

Investigation of Applicants

When hiring a driver, or transferring an employee into a driver position, the employer must make a "good-faith effort" to obtain the following information about the individual from his previous employers during the preceding 3 years:

1. Whether the driver had violated DOT drug and alcohol rules,

2. For a driver reported to have violated DOT drug and alcohol rules, whether the driver failed to undertake or complete rehabilitation. (If the previous employer does not know this information, such information may be obtained directly from the driver), and

3. For a driver reported to have violated DOT drug and alcohol rules, successfully completed rehabilitation, and remained in the employ of the referring employer, information on whether the driver had the following testing violations:

    a. Results of tests for alcohol which showed a concentration of 0.04 or greater

    b. Drug tests that produced positive results

    c. Refusals to be tested

Each such previous employer must be furnished with the driver-applicant's written authorization to release the requested information. Upon receipt of such authorization, the previous employer shall supply the requested information, if any.

The hiring employer must keep separate files pertaining to the above investigation and such information must be used for making hiring decisions only. Disclosure of information should be on a need-to-know basis only.

If any such information is reported, the applicant shall not be allowed to perform any safety-sensitive function unless the prospective employer also obtains information on subsequent compliance with the referral and rehabilitation requirements previously described herein.

The applicant may not be allowed to perform safety-sensitive functions unless a good-faith effort has been made to obtain the information. When obtained, if feasible it must be reviewed before the driver starts work. If this is not feasible, it must be reviewed promptly but no later than 14 days after he commenced work unless the employer had been unable to obtain the information; in that case the employer shall record the efforts made to obtain it.

Training of Supervisors

All supervisors of drivers must receive at least 60 minutes of training in alcohol misuse, and at least an additional 60 minutes of training on drug use, which covers the physical, behavioral, speech and performance indicators of alcohol misuse and drug use.

Information to Applicants and Employees

Before a job application is submitted, the employer must inform the applicant that the information that he has provided may be used, and the applicant’s previous employers will be contacted, for the purpose of investigating the applicant’s safety performance history. Additionally, the prospective employer must notify the driver in writing, either on the job application or in a separate document, of the following:

1) The right to review information provided by previous employers,
2) The right to have errors in the information corrected by the previous employer and for corrected information to be sent to the prospective employer, and
3) The right to have a rebuttal statement attached to the alleged erroneous information, if the previous employer and driver cannot agree on he accuracy of the information.

An applicant must be informed of the result of a pre-employment drug test if he requests it within 60 days after having been notified of the disposition of his application for employment. A driver must be informed if the result of a random, reasonable suspicion or post-accident drug test was "positive", and be told what drug was identified. A driver is entitled, upon written request, to obtain copies of any records pertaining to his use of drugs or alcohol, including test results.

Each employer shall distribute to drivers a detailed statement concerning the drug/alcohol-control program, which shall explain the categories of drivers who are subject to the regulations; the conduct which is prohibited; the circumstances of and the requirements for testing; the consequences of engaging in prohibited conduct and of failing or refusing to submit to a required test; testing procedures; the effects of the use of drugs and alcohol on health, work and personal life; symptoms of drug and alcohol problems; available methods of intervening when a problem is suspected; and the identity of the person who is available to answer drivers' questions about the program. (A sample of such a statement is available from EANJ.) Each driver shall sign an acknowledgment that he has received this information.

Privacy

An employer is prohibited from releasing individual test results or medical information to third parties without the employee's specific written consent releasing a particular piece of information to an explicitly identified person at a particular time. Releases must be individually tailored to the employee and general, standard forms cannot be used.

Release of Information

Notwithstanding the requirement of written consent above, an employer may release information pertaining to an employee's drug or alcohol test without the employee's consent in a legal proceeding commenced by the employee, i.e.: wrongful discharge. In such a proceeding, the information must be released solely to the decision-maker in the proceeding with the stipulation that the decision maker to whom it is released will make it available only to parties to the proceeding.

Records

The regulations contain record-keeping provisions that are extremely detailed and extensive. (Copies will be furnished on request.) Record retention is from 1 year to 5 years.

Except as required by law, no information concerning a driver's use of drugs or alcohol, or any other information contained in such records, may be released to another employer except upon written authorization from the driver.

Violations

An employer who knowingly permits a driver who has engaged in prohibited conduct to perform or continue to perform a safety-sensitive function, or an employer who fails to comply with the testing or other requirements of the regulations, is subject to civil and criminal penalties.

Preemption of State Law

These regulations preempt State law. However, the testing and other procedures which are authorized and required by them is limited to the specified drug categories and to the specified situations. If an employer wishes to test for other drugs, test in some other circumstances or manner, or discipline or discharge drivers for misusing drugs or alcohol, etc., he is not precluded by the regulations from doing so. However, any such additional requirements or actions must be clearly identified as being based on the employer's independent authority and not on the regulations.

Workplace Violence

Violence Against Women

The Violence Against Women Act permits recovery of compensatory and punitive damages for crimes of violence motivated by gender. The term "crime of violence" means any act that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another, whether or not those acts have actually resulted in criminal charges, prosecution or conviction. While the Violence Against Women Act reaches co-workers and third-parties, it cannot, however, reach an employer unless the employer is the victimizer. **[NOTE: The United States Supreme Court has held that Congress exceeded its power to regulate interstate commerce when it enacted the Violence Against Women Act.]**

Occupational Safety and Health Act

Employers have a statutory duty to provide a safe and healthy working environment. The Occupational Safety and Health Act requires employers to provide workers with a place of employment that is "free from recognized hazards that are causing or are likely to cause death or serious physical harm to employees." Although the Occupational Safety and Health Administration has not issued formal standards governing workplace violence, it has issued guidelines relating to the healthcare and retail industries. Likewise, New Jersey law requires every employer within the state to "furnish a place of employment [that] shall be reasonably safe and healthful for employees."

Workers' Compensation Law

Additionally, employers should consider the common law duty of care owed to both employees and to third parties to prevent foreseeable acts of workplace violence. Assaults occurring during the course of employment and associated with the employment are usually compensable under the New Jersey Workers' Compensation Law, which will provide the exclusive remedy for the injured employee. However, an assault occasioned by a risk not incidental to the employment is not compensable, even where the assault occurs on the employers' premises. For example, in one New Jersey case, a female employee who was shot at work by her former boyfriend was not permitted to recover workers' compensation benefits. On the other hand, an employer could be liable under a negligence theory of recovery if it knew, or should have known, that the woman would be harmed at work and the employee took no preventive measures. As it follows, if an employer has reason to believe that an employee is violence-prone and does nothing or is careless about providing a safe workplace, the employer could be liable for the harm caused to employees or others on the employer's premises.

Criminal Background Checks

With written permission, employers may obtain a record of a criminal history on an applicant or current employee. In New Jersey, such a record will include all state-wide records of criminal proceedings in state courts, including convictions, arrests and other charges, regardless of their age (unless expunged). Out-of-state records or records of federal court proceedings are not available. Since a date of birth is necessary to obtain the records, the record must be obtained after making an offer of employment. If the record disqualifies an applicant from employment or results in the discharge of a current employee, the person must be given the opportunity to challenge the record' s accuracy and be given a reasonable amount of time to correct it. To obtain such a record, a form must be obtained from the Bureau of Identification of the New Jersey State Police (Form SBI 212). Both the employer and the applicant/employee must sign the form. A filing fee is required.

Community agencies under contract with the NJ Department of Human Services must conduct criminal background checks on employees that work under contract with persons with developmental disabilities and providers of institutional and home health care services, including all employees working or residing at an agency who may come in contact with clients.

The criminal background check must be conducted at least once every two years for both the person responsible for the overall operation of the program under contract and employees. Disqualification for employment is based on the conviction of crimes:

1. involving danger to persons, including certain disorderly persons offenses;
2. against family, children or incompetents; or
3. involving the manufacture, transportation, sale, possession or habitual use of a controlled dangerous substance
4. involving theft (institutional and home health care providers)

Similar provisions apply to certain child care center staff, however the list of convictions that will disqualify an applicant or employee is more extensive.

If any applicant refuses to consent to, or cooperate in, securing a criminal background check, the person cannot be hired. Likewise, if a current employee refuses, discharge must be immediate.

Provisional employment for up to 6 months can be offered upon a sworn statement that the person has not been convicted of any crime referenced above. However, such provisional employee must be supervised during their provisional employment.

Notwithstanding the provisions above, no individual shall be disqualified for employment on the basis of any disclosed conviction if the individual "affirmatively demonstrates clear and convincing evidence of rehabilitation." In this regard, the agency shall consider the following factors:

1. the nature and responsibility of the position which the person would hold, or currently holds;
2. the nature and seriousness of the offense;
3. the date of the offense;
4. the age of the individual when the offense was committed;
5. whether the offense was an isolated or repeated incident;
6. the circumstances under which the offense occurred;
7. any social conditions which may have contributed to the offense; and
8. any evidence of rehabilitation, including good conduct in prison, counseling or treatment received, vocational schooling, successful completion in work-release program, or recommendations from previous supervisors.

Restrictions on the Use of Criminal Records

An employer may conduct a criminal background check on a job applicant. However, state law - the Opportunity to Compete Act – governs how and when such records can be used, including by third-party vendors on behalf of an employer.

Unless authorized by law, rule or regulation, employers with 15 or more employees, regardless of where located, over 20 calendar weeks are prohibited from inquiring, either orally or in writing, about a job applicant's criminal record and from requiring a job applicant to complete an application that makes such inquiries during the initial employment application process.

"Initial employment application process" is defined as the period beginning when an applicant for employment first makes an inquiry to an employer about a prospective employment position or job vacancy, or when an employer first makes any inquiry to an applicant for employment about a prospective employment position or job vacancy.

An "inquiry" includes a search on a website.

The initial employment application process ends when an employer has conducted a first interview of the applicant, whether in person or by other means.

However, an employer is authorized under the bill to make inquiries during the initial employment application process about a job applicant's criminal record if the applicant, either orally or in writing, voluntarily discloses such information.

An employer is also authorized to make oral or written inquiries concerning an applicant's criminal record or require the applicant to complete an employment application making such inquiries **after** the initial employment application process has concluded. This would typically be after the first "live" interview, which could be over the phone or via video conference.

Employers are not precluded from refusing to hire an applicant for employment based upon the applicant's criminal record as long as the refusal is consistent with other applicable laws, rules and regulations. (See EEOC Guidance on Criminal Background Checks on page A-12).

An employer is authorized to make inquiries during the initial employment application process about an applicant's criminal record if:

(1) the position is in law enforcement, corrections, the judiciary, homeland security or emergency management;
(2) a criminal history record background check is required for the position by law;
(3) the position, by law, precludes employment of a person with an arrest for or a conviction of a crime or offense;
(4) the employer is restricted from specified business activities based on the criminal record of its employees; or
(5) the employment sought or being considered is for a position designated by the employer to be part of a program or systematic effort designed predominantly or exclusively to encourage the employment of persons who have been arrested for or convicted of crimes or offenses.

Advertisements

The law also prohibits an employer from knowingly or purposefully publishing an advertisement soliciting applicants for employment which states that the employer will not consider an applicant who has been arrested for or convicted of a crime or offense. But the same exceptions as above apply.

An advertisement can include other provisions setting forth any other qualifications for employment, as permitted by law, including, but not limited to, the holding of a current and valid professional or occupational license, certificate, registration, permit or other credential, or a minimum level of education, training or professional, occupational, or field experience.

Except where a criminal history record background check is required by any law, rule or regulation, an employer who knowingly or purposefully publishes an advertisement that solicits applicants for employment where the advertisement explicitly provides that the applicant will be required to submit to a criminal history record background check, the advertisement must state:

"New Jersey law prohibits employers from considering the criminal records of applicants for employment under certain circumstances."

Penalties

Any employer who violates this act shall be liable for a civil penalty in an amount not to exceed $1,000 for the first violation, $5,000 for the second violation, and $10,000 for each subsequent violation collectible by the Commissioner of Labor and Workforce Development in a summary proceeding.

The Opportunity to Compete Act does not provide for a private lawsuit by an aggrieved person for violations of the law.

Health Care Professional Responsibility and Reporting Enhancement Act (The Cullen Law)

Under state law, health care entities are required to report to the Division for Consumer Affairs of a healthcare professional's impairment, incompetence or professional misconduct where it relates adversely to patient care or safety. The law also requires certain disclosures during reference checking and provides protection of whistleblowers.

Definitions

"Health care entity" means a facility or institution, whether public or private, engaged principally in providing services for health maintenance organizations, diagnosis or treatment of human disease, pain, injury, deformity or physical condition, including but not limited to, a general hospital, special hospital, mental hospital, public health center, diagnostic center, treatment center, rehabilitation center, extended care facility, skilled nursing home, nursing home, intermediate care facility, outpatient clinic, home health care facility, residential health care facility and a bioanalytical laboratory controlled, directly or indirectly, by a health care entity; a health maintenance organization; a carrier which offers a managed care program; a state developmental center; a staffing registry or a home care services agency.

"Health care professional" means a person licensed or otherwise authorized by law to practice a health care profession that is regulated by the Division of Consumer Affairs or by a professional board, including certified nurses' aides and personal care assistants.

The law requires health care entities to report to the Division of Consumer Affairs (DCA) within 7 days when any health care professional:

1. Has full or partial privileges summarily or temporarily revoked or suspended, or permanently reduced, suspended or revoked;

2. Has been discharged from staff;

3. Has been terminated or had a contract rescinded;

4. Has been removed from a list of eligible employees of a health service firm or staffing registry;

5. Has conditions or limitations imposed on clinical privileges;

6. Voluntarily relinquishes any partial privilege/authorization to perform a specific procedure if under review by the healthcare entity or if the entity has expressed an intention to do so;

7. Voluntarily resigns because the healthcare entity is reviewing his/her patient care because it believes that the conduct is unprofessional or demonstrates impairment or incompetence or if the entity has indicated an intention to conduct such a review;

8. Has been granted a leave of absence due to a physical, mental or emotional condition or drug or alcohol use that impaired his/her ability to practice, unless the professional sought assistance from a professional assistance or intervention program and is following the required treatment program;

9. Has malpractice lawsuits resolved by settlement, judgment or arbitration in which both the professional and healthcare entity are parties.

Exchange of Information between Healthcare Entities

1. Upon inquiry, a healthcare entity must inform other healthcare entities if they have submitted any notices to DCA, medical practitioner review panel, or professional or occupational licensing board within the prior seven years preceding the inquiry about a healthcare professional.

2. Upon inquiry, healthcare entities must provide information about a current or former health care professional's

job performance as it relates to patient care and the reasons for the former employee's separation. The job performance information shared shall relate to the suitability of the employee for re-employment at a healthcare entity, and the employee's skills and abilities as they relate to suitability for future employment at a healthcare entity. The job performance information is based on the employee's performance evaluation and provided to another healthcare entity under the following conditions:

a. The evaluation has been signed by the evaluator and shared with the employee;

b. The employee has had the opportunity to respond; and

c. The employee's response has been taken into consideration when providing information to another healthcare entity.

Maintenance of Records

All records of all disciplinary proceedings or actions involving affiliated or employed healthcare professionals and also retain all documented complaints of patient care-related incidents must be kept for 7 years.

Other Policies

Health care entities are required to have polices that allow health care professionals to report incompetence and unprofessional conduct. Moreover, health care professionals are obliged to make these reports in good faith.

Fair Credit Reporting Act

Employers who utilize reports from consumer reporting agencies to evaluate applicants or employees are required by federal (the Fair Credit Reporting Act) and state (NJ Fair Credit Reporting Act) law to disclose to such individuals certain information concerning these reports. Generally, the New Jersey law follows closely the federal law, any differences between the two are noted in brackets. The federal law is enforced by the Federal Trade Commission and other federal agencies and by the state of New Jersey. The Division of Consumer Affairs in the Department of Law and Public Safety is designed as the agency in New Jersey to enforce the provisions of the sate law.

Definitions

Consumer report: a written or oral communication [NJ: includes other communications] of any information from a consumer reporting agency bearing on an individual's character, reputation, personal characteristics, mode of living, credit worthiness, credit capacity, or credit standing, which is used or expected to be used, or is collected in whole or part, for employment purposes - i.e., for evaluating an individual for employment, promotion, reassignment or retention in employment.

Investigative consumer report: a consumer report which contains information about a person's character, reputation, personal characteristics or mode of living that is obtained from personal interviews with the individual's neighbors, friends, associates or others with whom he is acquainted or who may have knowledge concerning such items of information.

The Acts exclude from the definition of "consumer report" and "investigative consumer report" any communications made to an employer by outside counsel or other third parties in connection with an investigation of:

1) Suspected misconduct relating to employment, or

2) Compliance with federal, state or local laws and regulations, the rules of a self regulatory organization, or any preexisting written policies of the employer.

Consumer reporting agency (CRA): any individual or organization which for a fee or on a cooperative non-profit basis regularly engages in whole or in part in the practice of assembling or evaluating information (including credit information) concerning individuals for the purpose of furnishing consumer reports to third parties -- e.g., employers or prospective employers.

Application to Particular Communications

The Act does not apply to reference checking conducted directly by a prospective employer, nor to any communication concerning an individual's job performance which is made directly to a prospective employer by a previous employer or by an employment agency.

When a consumer reporting agency verifies an individual's prior employment history or education, without more, and reports it to a prospective employer, the report is a consumer report but not an investigative report. However, it will become an investigative report if it contains additional information about the person's quality of work, work habits, disciplinary problems, etc. that either was obtained in response to inquiries or was volunteered.

(Reference checking conducted by a consumer reporting agency almost always is investigative in nature.)

When a consumer reporting agency provides an employer with a copy of a criminal record, motor vehicle driving record or other public record pertaining to an applicant or employee, the information submitted is a consumer report but not an investigative report. If an employer obtains such information directly from the source, such as a law enforcement agency, the report of the information is not a consumer report; a government agency is not a consumer reporting agency.

A report of the results of a drug test is not a consumer report if it is made directly to the employer by the testing lab.

Disclosure of Information by Employers

An employer or prospective employer may not obtain a consumer report on an applicant, employee or independent contractor unless he discloses to the individual that a consumer report may be obtained for employment purposes, and unless the individual has authorized, in writing, the procurement of the report. This disclosure must be made in writing, before the report is ordered, and by means of a separate document "that consists solely of the disclosure" which includes a description of the precise nature and scope of the investigation requested. (E.g., it cannot appear solely in an employment application form.)

If the report will be other than an investigative consumer report, no additional information need be furnished to the individual (unless "adverse action" is subsequently taken).

However, if after or simultaneously with making this disclosure the employer orders an investigative consumer report, then additional information must be furnished to the individual. He must be informed:

1. That such a report may be obtained and that it may include information about his character, general reputation, personal characteristics and mode of living (whichever is applicable), based on interviews with neighbors, friends, associates or others, and

2. That on written request, made within a reasonable period of time, he may obtain from the employer a summary of his rights under the statute and information concerning the "nature and scope" of the investigation. (The content of the report need not be revealed unless "adverse action" is thereafter contemplated).

This statement must be made in a writing mailed or otherwise delivered to the individual not later than 3 days after the investigative report has been ordered. Upon receiving a timely, written request from the individual for the foregoing information, the employer shall furnish it in a writing mailed or otherwise delivered within 5 days after the date when the request was received or the report was ordered, whichever is less.

Disclosure of Report to Employees

Before taking "adverse action" against an individual (such as deciding not to hire an applicant or not to retain or promote an employee), based in whole or part on any consumer report, the employer must provide a **Preliminary Notice of Adverse Action** to the consumer, either in writing, orally or by electronic means of the following:

- The name, address and telephone number of the CRA (including a toll-free telephone number, if it is a nationwide CRA) that provided the report.
- A statement that the CRA did not make the adverse decision and is not able to explain why the decision was made.
- A statement setting forth the consumer's right to obtain a free disclosure of the consumer's file from the CRA if the consumer makes a request within 60 days.
- A statement setting forth the consumers right to dispute directly with the CRA the accuracy or completeness of any information provided by the CRA.

(If the report was oral, the employer shall tell the individual what was in the report.)

After a reasonable period of time* the employer may take the adverse action, and if it is based in whole or part on the consumer report, the employer provides a **Notice of Adverse Action** which should:

1. Inform the individual of the action taken.
2. Report the name, address and telephone number of the consumer reporting agency which furnished the report.
3. Explain that the agency did not make the decision to take the adverse action and does not know the specific reason for it.

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* The statute does not specify what is a reasonable period. The Federal Trade Commission staff has informally stated that the amount of time depends on circumstances, such as the nature of the job, and that 5 business days usually would be a reasonable period, although the period "would likely be much shorter in the case of an employer who was taking required action to remedy sexual harassment."

4. Inform the individual that he has the right to obtain an additional free copy of the report if he requests it from the reporting agency within 60 days.

5. Advise the individual that he has the right to dispute with the reporting agency the completeness and accuracy of any information in the report.

As noted in the Definitions section above, communications made to an employer by outside counsel or other third-parties concerning misconduct, violations of company policies and compliance with laws and regulations are not "consumer reports." However, if the employer takes an adverse action based in whole or in part on such communications, the employer must provide a summary containing the nature and substance of the third-party communications to the affected employee. NOTE, however, that this summary need not include any of the sources of the information upon which the report was made, thus preserving witness confidentiality.

Disposing of Records

When a company obtains consumer report information, they have an obligation to properly dispose of such information by taking reasonable measures to protect against unauthorized access to, or use of, the information in connection with its disposal. This may require implementing and monitoring compliance with policies and procedures that require the burning, pulverizing, or shredding of paper records, and deleting reports stored electronically containing consumer report information so the information cannot be read or reconstructed.

As noted in the **Definitions** section, communications made to an employer by outside counsel or other third-parties concerning misconduct, violations of company policies and compliance with laws and regulations are not "consumer reports." However, if the employer takes an adverse action based in whole or in part on such communications, the employer must provide a summary containing the nature and substance of the third-party communications to the affected employee. **NOTE**, however, that this summary need not include any of the sources of the information upon which the report was made, thus preserving witness confidentiality.

Employer Certification

Before furnishing a consumer report the consumer reporting agency shall obtain from the employer a certification that the employer has complied with the disclosure requirements and that the individual has properly authorized the procurement of the report, that the information being obtained will not be used in violation of any federal or state equal opportunity law or regulation, and that if any adverse action is taken based in the consumer report, a copy of the report and a summary of consumers' rights will be provided to the applicant or employee.*

Disclosure of Information by Consumer Reporting Agencies

Upon the request of any individual a consumer reporting agency shall disclose to him all information concerning him in its files, the source of the information (other than information acquired solely for use in preparing an investigative consumer report), and names of recipients of any consumer reports about him which have been furnished for employment purposes within the past 2 years. It shall also supply the individual with a written summary of his rights under the statute.

If the individual disputes the completeness or accuracy of any item of information, the reporting agency must either delete it or verify it.

Limitations on Inquiries and Contents of Reports of Reporting Agencies

A consumer report shall not contain medical information about an applicant or employee unless the individual consents to its inclusion.

A consumer reporting agency shall not make any inquiry for the purpose of preparing an investigative consumer report if the inquiry would violate any federal or state equal opportunity law.

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* The entity or person providing the consumer report should offer a certification form that complies with the Act. If such a form is not offered, it should be requested from the consumer reporting agency when ordering the report.

Federal law provides that except in the case of a consumer report to be used in connection with the employment of an individual at an annual salary of $75,000 or more, no consumer report may contain information concerning:

1. Civil suits, civil judgments and records of arrest which from date of entry antedate the report by more than 7 years or as to which the applicable statute of limitations has expired, whichever is the longer period.

2. Bankruptcies adjudicated more than 10 years before the report.

3. Any other adverse information, except records of conviction of crimes, which antedates the report by more than 7 years.

Penalties

Under federal law an individual may recover actual damages in a civil proceeding from a consumer reporting agency or from an employer who is negligent in failing to comply with any of the foregoing requirements. If such failure is willful, he may also recover punitive damages. Any person who knowingly and willfully obtains information about an applicant or other individual from a consumer reporting agency under false pretenses shall be liable to a fine or imprisonment up to 2 years, or both.

Under New Jersey law any person who willfully fails to comply with any requirement under this act is liable for any actual damages sustained by the consumer which would be not less than $100 and not more than $1,000 and such amount of punitive damages as the court may allow, plus attorney's fees.

Independent Contractors

It is essential to determine correctly whether a worker is in an employer-employee relationship or whether he is an "independent contractor." His coverage and benefits under various federal and state laws will depend upon his status, and some of them involve important tax considerations.

The criteria for determining this status vary according to the particular federal or state statute which is implicated. Thus, an individual can be an employee under one law but not considered to be an employee under some other law. This relationship is not determined by any label or designation (such as "consultant") which is applied to him, nor by the manner in which his earnings are reported to the government.

Income Tax Laws

Under the federal and state income tax laws the worker's status is determined by the application of the so-called common-law rule or test:

A person is an independent contractor who engages to perform a task according to his own methods and who is subject to control and direction only as to the results to be accomplished; an individual is an employee if the employer has the right to direct and control not only the results but also the way the work is done (when, where and how), regardless of whether such right of control is actually exercised.

As an aid to determining whether an individual is an employee under the common-law rule, the Internal Revenue Service has identified a number of criteria, called the Twenty Factors, as indicating whether the element of control is present in particular cases. They are intended only as guides, no single factor is necessarily determinative, and the relative weight or importance of any factor may vary according to circumstances. The Twenty Factors are the following:

1. Instructions. The element of control exists if the firm has the right to require the worker to comply with instructions about when, where, and how work shall be performed.

2. Training. Training the worker is indicative of employee status, depending on the extent and frequency of the training.

3. Integration. This refers to the relationship of the services to the firm's general business operations. When the success or continuation of a business depends to an appreciable degree upon the performance of certain services, an individual who is engaged to perform those services necessarily is subject to a certain amount of control.

4. Personal Service. If the person who is engaged has the right to hire a substitute, this is some indication of independent contractor status.

5. Hiring Assistants. If the firm hires, supervises and pays individuals to assist the worker, this tends to indicate that he is an employee.

6. Continuing Relationship. The longer the worker's relationship with the firm, the more he appears to be an employee. A continuing relationship may exist even though the work is performed at frequently recurring but irregular intervals.

7. Set hours of work. The establishment of set hours of work by the business for whom the services are performed is a factor indicating control.

8. Full-time work. If the worker must devote substantially full time in order to complete the task, this is indicative of control of the worker.

9. Working on Premises. If the work is performed on the premises of the firm, this suggests some control over the worker, depending on the nature of the services performed.

10. Order or Sequence. If the company has the right to require the worker to perform services according to a schedule or routine, this indicates control.

11. Reports. A requirement that the worker periodically submit oral or written reports, time records, etc., indicates a degree of control.

12. Payment by Hour Week or Month. Payment on this basis, rather than payment of a lump sum, generally points to an employer-employee relationship, unless it is a form of installment payments.

13. Payment of Expenses. If the person for whom the services are rendered ordinarily pays the worker's business or travel expenses, usually the worker is an employee.

14. Furnishing Tools and Material. A worker who furnishes his own tools, materials and equipment, if they are of significant value, is more likely to be an independent contractor.

15. Significant Investment. Independent contractors almost always have a significant investment in facilities which they use in performing services.

16. Realization of Profit or Loss. The risk of economic loss and the opportunity for economic profit are a distinguishing feature of an independent contractor.

17. Working for Others. If a person performs more than de minimis services for several unrelated firms during the same time period, that factor usually indicates that he is an independent contractor, as distinguished from the case where all or most of his earnings were derived from a single source.

18. Services Available to Public. The fact that an individual makes his services available to the general public on a regular basis indicates that he is an independent contractor.

19. Right to Discharge. An independent contractor cannot legally be discharged so long as he continues to perform according to the specifications of his agreement.

20. Right to Terminate. If the worker has the right to end his relationship with the company at any time without incurring liability, that factor indicates employee status.

The IRS has condensed these factors into three main categories: 1) Behavioral Control, 2) Financial Control and 3) Relationship of the Parties. Factors within these categories are weighed accordingly.

Behavioral Control	Facts which illustrate whether there is a right to direct or control how the worker performs the specific task for which he or she is hired. • Instructions • Training
Financial Control	Facts which illustrate whether there is a right to direct or control how the business aspects of the worker's activities are conducted. • Significant investment • Unreimbursed expenses • Services available to the public • Method of payment • Opportunity for profit or loss
Relationship of the Parties	Factors which illustrate how the parties perceive their relationship. • Employee benefits • Intent of parties/written contracts • Permanency • Discharge/termination • Regular business activity

An individual who would otherwise be deemed to be an employee for tax purposes nevertheless need not be so treated where certain "safe harbor" provisions of the federal income tax law apply. These provisions, which are in Section 530 of the Revenue Act, state that an individual is not deemed to be an employee for tax purposes if he was never treated as an employee and the taxpayer had a reasonable basis for not treating him as such, and all required federal tax returns, including information returns, have been filed on a basis which is consistent with his treatment as a non-employee.

Reliance on any of the following constitutes "reasonable basis" for not treating an individual as an employee:

1. Judicial precedent, published rulings, technical advice with respect to the taxpayer, or a letter ruling to the taxpayer;

2. An IRS audit in which the employment status of the worker (or of another worker holding a similar position) was examined, and where no assessment was made attributable to an improper classification of a worker's employment status; or

3. A "long-standing, recognized practice of a significant segment" of the taxpayer's industry.

Section 530 does not apply to certain technical specialists (engineers, designers, draftsmen, computer programmers, systems analysts, etc.) who are supplied by a technical services firm to perform work for a client of the firm.

FICA and FUTA

The common-law test is also applied to determine coverage under these statutes. Therefore, if a worker is an employee for federal income tax purposes, he is automatically an employee for FICA and FUTA purposes. Conversely, with certain exceptions, if he is an independent contractor for income tax purposes, he is an independent contractor under FICA and FUTA.

The exceptions are workers in certain categories who must be treated as employees regardless of whether they would be employees under the common-law test. They are called "statutory employees."

The statutory employees designated by FUTA are, with some exceptions, (1) agent-drivers or commission drivers who deliver food or beverages (other than milk) or laundry or dry-cleaning services, and (2) salesmen who work full time (except for "sideline sales activities") for one firm, obtaining orders for items for resale or use as supplies in the customer's business. The customers must be retailers, wholesalers, contractors or operators of hotels, restaurants or other businesses dealing with food and lodging.

Statutory employees covered by FICA are drivers and salesmen as described in the preceding paragraph, and also full-time life insurance salesmen, and homeworkers.

Unemployment Compensation and Temporary Disability Benefits Laws

The New Jersey Unemployment Compensation and Temporary Disability Benefits laws state that all individuals who perform services are covered by these laws unless (a) the individual is free from control or direction as to the performance of his work, and (b) the service is either "outside the usual course" of the company's business or is outside the company's place of business, and (c) the individual "is customarily engaged in an independently established trade, occupation, profession or business."

The phrase "outside the usual course" of the company's business means service other than that which is essential to the nature of the business.

According to the regulations of the New Jersey Department of Labor, to be "customarily engaged in an independently established trade, occupation, profession, or business," the individual's business activity must "exist and continue to exist independently of, and apart from, the particular service relationship; it must be a stable, lasting enterprise which will survive termination of the relationship." Some of the elements to be considered in applying this test are an office or business location separate from the individual's residence, a business telephone listing, possession of business cards and stationery, ownership or leasing of business equipment, and filing of a business (Schedule C) federal income tax return.

These are much stricter tests than the common-law test, with the result that in many cases individuals who are independent contractors for purposes of other laws will nevertheless be covered by these New Jersey statutes.

Workers' Compensation Law

The test which is applied in determining coverage under the New Jersey Workers' Compensation Act appears to be a hybrid. The element of control over the worker's performance is the primary factor, but the extent of his economic dependence upon the employer is also taken into account.

Wage and Hour Laws

The courts have been extremely liberal in applying the federal Wage-Hour law to workers who under other statutes would be regarded as independent contractors. Individuals have been declared to be employees where "as a matter of economic reality they are dependent upon the business to which they render service."

The factors used by the courts in assessing the degree of such dependence are (1) the worker' s opportunity for profit or loss arising from the rendition of his services, (2) the amount which the worker has invested in facilities, equipment, etc., (3) the permanence of the relationship (with permanency being indicative of employee status), and (4) the degree of skill and initiative called for by the work (if the tasks performed are of a routine nature, this is indicative of employee status,) whether the work performed is an integral part of the business, he serves, and (5) the extent to which the worker is economically dependent upon that business.

For purposes of the New Jersey Wage and Hour Law the criteria specified in the New Jersey Unemployment Compensation Law and TDB Law are used to determine whether an individual is an employee or an independent contractor.

Status Under Anti-Discrimination Laws of Workers Supplied by Temporary Help Agencies

Workers obtained from a "temporary-help" agency or obtained under "lease" from an agency typically are considered to be employees of the agency which supplied them. However, it is possible that the firm which utilizes the services of such persons may be the employer or a joint employer with the agency.

If the firm, either alone or jointly with the agency, has the right to control the means and manner by which the workers will perform the work, the workers are employees and the firm will be considered to be the employer (singly or jointly) for purposes of the federal laws against discrimination (Civil Rights Act, ADEA, ADA and the Equal Pay Act).

The EEOC has issued guidelines which are intended as aids in determining whether such workers are employees under these statutes. These guidelines are essentially the same as those used by the Internal Revenue Service—see page 179.

Dual Status

If an individual who is engaged as an employee on a particular job for an employer undertakes an additional job or services for the same employer, it is possible that he can be an independent contractor with respect to the additional job. Although the Wage-Hour Administrator takes the position that it is "unrealistic" to say that an employee and an independent contractor relationship may exist concurrently between the same parties, several courts have expressed disagreement with this position.

Penalties

If an employer treats a worker as an independent contractor when in reality and legally he is an employee, and fails to withhold payroll taxes due on that employee's account, the employer is liable for the amount of the taxes, plus substantial penalties.

The penalty for an unintentional failure to withhold income tax is 1.5% of the employee's wages, and for not withholding FICA tax it is 20% of the employee's share of the tax. These amounts are doubled if no 1099 Form was filed, and if the employer intentionally disregarded all withholding requirements (or withheld income tax but not FICA tax), the employer and any "responsible" corporate officer are liable for 100% of all taxes that should have been withheld.

Failure to cover an employee by Workers' Compensation insurance subjects an employer and its officers to a fine.

Non-payment of overtime compensation due under Wage-Hour laws can result in back-pay liability in double amount.

Leased Employees

Under New Jersey statute, when an employer engages an employee leasing company, the parties must enter into a written contract providing that the employee leasing company reserves a right of direction and control over each leased employee assigned to the employer/client. However, the employer/client may retain sufficient

direction and control over the employees as is necessary to conduct business and without which the employer could be unable to conduct its business, discharge any fiduciary responsibility that it may have, or comply with regulatory or statutory requirements. The contract must also provide, in relevant part, that the leasing company 1) assumes responsibility for payment of wages, 2) assumes responsibility for payment and collection of all payroll taxes, 3) retains authority to hire, terminate, discipline, and reassign leased employees, provided that no leased employee shall be assigned to another employer without the employee's consent, 4) the employer/client may have the right to accept or cancel the assignment of leased employees, and 5) the honoring of existing collective bargaining agreements.

Written notice of the relationship between the employee leasing company and the client company must be given to each employee assigned to perform services at the client company's work site. Further, except for newly established businesses, the leasing company must hire its initial employee complement from employees of the client company at comparable terms and conditions of employment.

Co-Employment

Throughout the term of the leasing agreement, leased employees are considered employees of the employee leasing company and the employer/client company and upon termination of the leasing agreement, the employees will be considered employees of the employer/client. Co-employers may be jointly and severally liable for violations of anti-discrimination, overtime, wage payment and benefits laws, as well as other labor laws.

Health and Safety

The leasing agreement must provide that the leasing company and the employer/client shall each retain a right of direction and control over management of safety, risk and hazard control, including responsibility for performing safety inspections, creating and administering employment and safety policies, and the management of workers' compensation claims.

Unemployment and Disability Insurance

As a co-employer, the leasing company may make contributions to the Unemployment Compensation and State Disabilities Fund. Contributions are based on the benefit experience assigned to the leasing company. The benefits experience of the client company cannot be transferred to the leasing company. The client company continues to report wages and pay contributions for the workforce not acquired by the leasing company, if any, using the client company's contribution rate. At termination of the leasing agreement, depending on how long and how many employees were leased, the client company may be given a new experience rating or a recalculated rating.

Workers' Compensation

The employee leasing company and the client company are co-employers for the purposes of workers' compensation, including the obligation to maintain insurance coverage.

The Workers' Compensation Law provides the exclusive remedy for personal injuries or death arising out of and in the course of employment as against the leasing company and the client company, and their employees.

Notice and Disclosure

At the time of entering into the leasing agreement, the leasing company provide a list of its clients to the prospective client company and provide written disclosure as to the method for calculating unemployment and disability contribution rates. Such calculation must also be given at the time the agreement is terminated.

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At Will Employment: Wrongful Discharge

The doctrine of "employment-at-will", which developed in the 19th century, holds that in the absence of any employment contract for a specified duration an individual's employment can be terminated, without liability, at the will of his employer - with or without cause, with or without notice.

This freedom to terminate is now subject to the limitations imposed by the many federal and state statutes which proscribe discharges for various reasons (such as the laws against employment discrimination) and which are described elsewhere in this publication. In addition, courts have recognized and applied one or more exceptions to the employment-at-will doctrine in upholding lawsuits for wrongful discharge. The exceptions which New Jersey courts currently recognize are hereafter discussed. It should be noted that this is a developing area of the law, and the courts may carve out additional exceptions in the future.

Contract Violation

One of the major exceptions to the employment-at-will concept is that an employer may become restricted by some contractual commitment to discharge only for good cause or only in prescribed circumstances or in a prescribed manner. Most commonly such commitments arise from statements in employee handbooks or policy manuals which set forth limitations on the employer's freedom to discharge. They are binding on the employer, according to the decision of the New Jersey Supreme Court in Woolley v. Hoffmann-La Roche, Inc. Such limitations may be express (such as a statement that employees will be discharged only for good cause) or they may be implied from other provisions in the handbook. Furthermore, the failure to follow pre-discharge disciplinary and other procedures specified in an employee handbook may constitute a violation of an employee's contractual rights regardless of the justification for the discharge.

The New Jersey Appellate Division has held that oral statements promising job security made by a management representative to an individual applicant or employee may be similarly binding.

That court also declared that policies regarding employee terminations may be established by practice, and are binding where employees reasonably believe that they exist and that they have been consistently and uniformly applied.

Public Policy

The other major exception to the employment-at-will rule is that a discharge in violation of "public policy" is wrongful.

The concept of public policy is difficult to define. Its sources are statutes, administrative regulations and decisions, judicial decisions and, in appropriate cases, codes of professional ethics.

Public policy has been held to have been violated by discharges of employees for refusing to engage in conduct which would have contravened a criminal statute or state code of ethics, for exercising a statutory right or performing a statutory duty, for refusing to perform an act which would expose the employee to civil liability, and for seeking access to a personnel file in order to substantiate a claim of wrongful discrimination.

The New Jersey Supreme Court has declared that invasion of an individual's privacy can be a breach of public policy when the privacy right outweighs the public interest. The court has also held that public policy protects employees who are in good faith pursuing information relevant to an alleged discriminatory discharge.

However, a claim of violation of public policy may not be raised in defense of a refusal to perform an act merely because it offends the employee's personal morals or conscience.

Implied Covenant of Good Faith and Fair Dealing

In every contract, there is an implied covenant of good faith and fair dealing, including employment contracts. Generally, neither party to a contract can do anything that frustrates the rights of the other party. While there must be a contract for there to be an implied covenant of good faith and fair dealing, an implied contract (i.e.: created by a handbook) also contains such an obligation.

In order to establish a breach of the covenant of good faith and fair dealing, New Jersey courts have required evidence of 1) an employment contract, expressed or implied, and 2) bad faith on the part of the employer. However, at least one New Jersey decision has held that the bad faith withdrawal of an offer of at-will employment may state a claim for violation of the covenant if good faith and fair dealing.

Interference with Contractual Relations

At-will employment is contractual in nature and even though it can be terminated at the will of either party, an employee has, at minimum, an expectation of continued employment. When this expectation is interfered with in malicious, devious or unethical ways, the harm that is caused is actionable. For example, an employer that deceitfully induces an employee to revoke his acceptance of a job with another company while simultaneously seeking to replace him has committed actionable harm. Decisions have also held that individuals can be liable, under certain circumstances, for interfering with another's employment.

Estoppel and Fraud

Estoppel is the legal principle that a person is prevented by his own conduct or statements, on which another individual has reasonably relied, from later taking an inconsistent position to the detriment of that individual.

Thus, in one New Jersey case the discharge of an employee for failure to comply with a particular work requirement was held to be wrongful where the employee earlier had been informed that he need not comply with that requirement. The employer was "estopped" from subsequently taking an inconsistent position without first informing the employee.

Fraud is when an employer intentionally misleads an employee or deliberately conceals information from the employee, and the employee relies on the statements or omissions to his detriment. Ordinarily, however such statements or omissions must be about present facts, not about future expectations.

Infliction of Emotional Distress

This is defined as extreme and outrageous conduct which goes beyond all possible bounds of decency and which intentionally, recklessly or negligently causes distress so severe that no person could reasonably be expected to tolerate it.

In New Jersey, this is recognized as an independent tort, applicable to employment situations, with the result that an otherwise permissible discharge becomes wrongful where the manner of effecting the discharge or the circumstances surrounding it fit this definition. However, where the emotional distress is merely the result of being terminated, it is not actionable.

Special Categories of Employees

Bargaining Unit Employees

If the resolution of a bargaining-unit employee's claim of wrongful discharge depends upon the interpretation and application of the collective bargaining agreement, that claim is preempted by the federal Labor Management Relations Act, and the employee's only remedy is to follow the grievance-arbitration provisions of the contract. However, if the claim can be resolved without reference to the union contract, there is no such preemption, in which case such employee has the same rights and remedies as other employees.

Employees of Financial Institutions

Depending on the particular category of financial institution and the governing statute, officers and employees of certain financial institutions may be terminated without "cause".

The New Jersey Banking Act of 1948, (which applies to state banks, including savings banks and trust companies) provides that a bank officer is "subject to removal by the Board of Directors at its pleasure". According to decisions of the New Jersey Appellate Division, this language authorizes the board of directors to dismiss officers at any time, for any reason, and without liability for breach of contract, except where a discharge violates public policy.

The National Bank Act provides that officers and cashiers of national banks (but not bank holding companies) may be dismissed by the board of directors "at pleasure". Similarly, the Federal Reserve Act and the Federal Home Loan Bank Act state that officers and employees of Federal Reserve Banks and Federal Home Loan Banks, respectively, may be dismissed "at pleasure". State and federal courts have consistently declared that these federal statutes preempt all "state-law" claims for breach of contract, including those based on provisions in employee handbooks or other documents. The extent to which they preempt claims of violation of employment discrimination laws is not settled. Three federal courts (none in New Jersey) have held that claims based on state anti-discrimination laws are preempted, but no court has ruled with respect to the federal anti-discrimination laws. Also, a few courts have held that despite these statutes, a discharge is wrongful if it violates a state's public policy.

As noted, some of these statutes specify that discharges shall be effected by action of the bank's Board of Directors. Courts have disagreed as to whether a Board may delegate this authority.

Savings and loan associations do not appear to have the same freedom to discharge as do the financial institutions in the other categories. The governing statutes are the New Jersey Savings and Loan Act of 1963 and the Federal Home Owners Loan Act,* neither of which contains any unqualified provision such as in the other bank statutes, and a decision of the New Jersey Superior Court held that an employee of a savings and loan association who had been discharged without good cause had a cause of action for wrongful discharge on the basis of the Woolley case (page 185).

Military Servicemen

Employees who have been restored to employment after performing military service for more than 30 days are protected from discharge without cause for a period of either 180 days or one year, depending on the duration of their military service (see Military Service, page 157).

* Both of these statutes provide that no person who has been convicted of a crime involving dishonesty or breach of trust may be employed by a state or federal savings and loan institution.

The Federal Deposit Insurance Act also prohibits the employment by insured banks and savings institutions of any person who has been convicted of an "offense involving dishonesty". Fines up to $1,000 for each day of a "knowing" violation may be imposed.

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Union Solicitation and Distribution

Employee Organizers - In General

Distribution of union literature by employees ordinarily may be prohibited at any time in work areas but only during working time in non-work areas. Solicitation by employees on behalf of a union ordinarily may be prohibited only during working time - i.e., the working time of either the soliciting or the solicited employee.* (The passing out of union authorization or membership cards is considered a form of "solicitation" rather than distribution.) Working time is not the same as working hours: working time does not include meal periods, rest periods, pre-shift time, etc. Therefore, a rule should be expressed in terms of "working time", not "working hours."

No-solicitation and no-distribution rules are "presumptively valid" if they conform to these limitations, in which case it is not incumbent upon the employer to demonstrate any actual need for the rules. On the other hand, rules which, in terms, exceed these limitations are "presumptively invalid", and the employer then has the burden (which he can seldom sustain) of rebutting the presumption of invalidity by showing that the application of the rule is necessary to the maintenance of production, discipline, safety, etc.

These limitations are graphically depicted below; an "x" means that a rule is valid only if its expressed prohibitions are limited to the areas and times indicated.

	WORK AREAS		NON-WORK AREAS
Subject of Rule	Working Time	Non-Working Time	Working Time
Solicitation	X		X
Distribution	X	X	X

The rule must be limited not only in its language but also in its application and enforcement. An otherwise valid rule may become invalid where its enforcement has been unduly discriminatory - e.g., when solicitation during working time on behalf of a union is forbidden but has been tolerated for other organizations or causes. However, where the solicitations on behalf of such other organizations or causes have been isolated and casual or where the causes were "beneficent" in nature (such as the United Way), the validity of the rule probably would not be impaired.

Prohibition of Union Activity in Absence of Valid Rule

An employer who has a valid rule against solicitation or distribution is entitled to enforce it by disciplining or discharging an employee who violates it, and he need not show that the employee's activity interfered with production, discipline or anything else. On the other hand, if an employer has no rule whatsoever on the subject, or if he has a rule which is invalid, then he may not lawfully discipline an employee for engaging, even during working time, in solicitation or distribution unless the employee's activity resulted in interference with his work or the work of others or created a problem of safety, discipline, etc. In other words, in such case it is not the mere act of solicitation or distribution which may be prevented or punished (as would be the case if there were a valid rule), but rather the employee's "abdication of working duties", and it must be demonstrated that the real reason for the punishment was the interference or problem created by the employee rather than the pro-union nature of the employee's activities.

Therefore, as in all cases of discharge and discipline, the employer's action would be unlawful if it resulted from an anti-union or discriminatory motive, and such a motive may be imputed to the employer if there is evidence of disparate treatment of other offenders. That is, the disciplining of an employee whose pro-union solicitation interfered with production may nevertheless be deemed an unfair labor practice if other employees who engaged in non-union activities which likewise interfered with production received no discipline or less severe discipline.

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*Retail stores and hospitals may lawfully prohibit solicitation during non-working time in certain areas.

Solicitation by Off-Duty Employees

A rule which is intended to prevent off-duty employees from entering the premises in order to engage in organizing activity may be enforced only if (a) it expressly forbids access by such employees for any purpose, (b) the prohibition against access is expressly limited to the interior of the premises and other working areas, and (c) it is clearly disseminated to all employees.

Outside Organizations

Non-employees may be barred at all times from an employer's property when they seek to enter upon it to conduct organizing activities, except in rare cases where the location of the worksite and employees' living quarters place the employees beyond the reach of reasonable union efforts to communicate with them by usual means.

As in the case of rules applicable to organizing activities of employees, the barring of non-employee organizers may not be done in a discriminatory manner - i.e., by denying access to union organizers while permitting solicitation or distribution by other individuals who are not employees.

Other Effects of Invalid Rules

The mere existence of a publicized rule which is unlawful because it is too broadly stated may constitute a basis for setting aside a representation election which a union has lost, despite the absence of any evidence that organizing efforts were impeded in any way by the existence of the rule. A possible exception, stated by the NLRB, is that if such a rule is not enforced in the face of "substantial and open" campaign activity, it will not cause the election to be set aside. If a rule is too broadly stated, it may not legally be enforced against activity which could have been proscribed by a proper rule.

An otherwise valid rule is not impaired merely because the employer engages in anti-union, but lawful, activities during working time. However, if while enforcing a no-solicitation rule which is invalid because it is too broadly stated, an employer campaigns against a union on company time and property, the campaigning itself may be rendered unlawful, and if the employer makes a pre-election speech on company time and premises to his employees, he must grant a union's request for a similar opportunity to address his employees. (Otherwise, such a request need not be granted.)

Posting of Printed Material

A company is not obliged to allow employees or anyone else to use its property or facilities for the purpose of posting or affixing union literature, signs, notices or other material. Accordingly, it may remove union material posted on any bulletin boards, walls or elsewhere, and forbid the use of any part of its premises for posting such material. Its right to do so is not affected by the fact that the company itself uses its bulletin boards or other facilities for the posting of anti-union materials. However, if it has allowed employees to post non-union material, it may not disallow them to post material relating to union or other concerted activities.

Defamation; Responding to Reference Inquiries

A statement is defamatory if it tends to injure an individual's reputation or disparages him in his occupation or exposes him to contempt or ridicule. If it is made in written or printed form it is called a libel; if it is made orally, it is termed a slander.

Thus, derogatory statements about an employee's ability to perform his job, imputations of dishonesty and accusations of criminal activity are defamatory.

To be actionable, the statement must be "published" - i.e., communicated to a third person. Publication can take the form of a direct response to an inquiry made by a third person (such as a prospective employer), a statement made about an employee to a coworker or a document circulated among or otherwise made available to his coworkers, or a statement made directly to the defamed person which is overheard by another individual. A repetition of a defamatory statement constitutes a new publication.

The traditional view of "publication" requires that the defamatory statement be communicated by someone other than the person defamed. Thus, where a statement is made to an employee in a "one-on-one" setting where no one else is present, the subsequent repetition of the statement by the employee is not a "publication", according to the great majority of courts (including those of New Jersey). However, courts in a few States have recognized "self-publication", and this may represent a trend. They have held that where the originator of the defamatory statement has reason to believe that the person defamed will be under a strong compulsion to disclose, or is likely to disclose, the defamatory statement to a third person (such as a prospective employer), such subsequent disclosure by the defamed person constitutes "publication".

There are two legal defenses to an action for defamation: truth and "privilege".

If a statement is true, this is a complete defense, regardless of how damaging it may be and regardless of the motivation of the person who made it.* In judging the truth or falsity of a statement its underlying implications will be considered, not merely its literal accuracy.

There are two kinds of privilege: absolute privilege, and "qualified" or "conditional" privilege. They may afford immunity from liability even for defamatory statements which are false.

Absolute privilege attaches to statements made in the course of "official" proceedings. Examples are statements and reports made in unemployment compensation and workers' compensation proceedings, court proceedings, arbitration hearings, law enforcement proceedings.

A statement or publication is said to be qualifiedly or conditionally privileged "where the recipient is one to whom the publisher is under a legal duty to publish the defamatory matter or is a person to whom its publication is otherwise within the generally accepted standards of decent conduct, and the information affects an important business interest of the recipient."

Replies to reference inquiries are in this category, as are statements made about employees to their supervisors and other management personnel who have a "need to know".

However, a qualified privilege will be lost if it is abused. It may be abused (1) if the person making the statement knows it to be false, or makes it recklessly -- i.e., with complete disregard for its truth or falsity, or (2) if the statement contains defamatory matter not reasonably believed to be necessary to accomplish the purpose for which the occasion is privileged (such as by volunteering false and harmful information to a prospective employer regarding matters not specifically inquired about), or (3) if the defamatory information is given to some person not reasonably believed to be entitled to it -- or possibly, if the information is maintained in a negligent manner with the result that it becomes accessible to some employee or individual who is not legitimately entitled to see it.

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* Even where published information is truthful, its publication may be an invasion of privacy if the manner and circumstances of publication are unreasonable.

Employee's Right to Representation at Interviews with Management

When a bargaining unit employee is to be interviewed by a management representative for the purpose of eliciting information concerning some act or conduct on his part, if the employee "reasonably believes" that some disciplinary action against him will result, he has the right, if he personally requests it, to have a representative present during the interview. Thereupon, the employer has the option of either (a) acceding to the request, or (b) dispensing with the interview and imposing whatever discipline is warranted, or (c) informing the employee that it will not proceed with the interview unless he waives his right to representation. NLRB v. Weingarten, Inc. (U.S. Supreme Court)

The employee's representative usually will be a union steward although it can be another union representative, or even a co-worker unless the union contract precludes this.

The reasonableness of the employee's belief that discipline may result is to be measured by objective, not subjective, standards.

The employer has no obligation to inform the employee of his right to such representation, nor is he required to postpone an interview because a particular union representative is unavailable, through no fault of the employer, where another one is available. Furthermore, if an employee refuses an order to leave his work station and report to an office unless he is accompanied by a representative, he may be lawfully disciplined for insubordination: his right to representation does not arise unless and until an interview begins.

However, according to the NLRB, at the request of either the employee or his representative an employee must also be accorded the right to consult with his representative, on company time, in advance of an interview at which he reasonably believes discipline will be imposed, and to be informed in advance of the subject matter to be investigated. The employer need not inform the employee of the evidence in its possession or the specifics of the misconduct to be discussed.

A federal Court of Appeals reversed the Board on this point, ruling that an employer is under no obligation to allow such consultation on company time if the scheduled time of the interview otherwise provides the employee with adequate opportunity to consult in advance on his own time with his representative.

An employee has no right to present witnesses on his behalf at the interview, nor is the employer obligated to bargain with the employee's representative or to give any weight to the representative's statements: the interview is not a grievance meeting. The representative may be excluded from the meeting if he obstructs or attempts to interfere with the employer's questioning of the employee.

There is a distinction between a meeting or interview which is intended to get information which may lead to discipline and one which is conducted solely to announce a previously made "final" decision to impose discipline; in the latter case the employee involved is not entitled to any representation. However, if during such a meeting the employer goes beyond the point of merely informing the employee and seeks information from the employee to support or justify this decision - e.g., by directing questions to him concerning the events involved or attempting to have him make admissions or asking him to state his version of events - then the Weingarten rule will come into play.

If the rule is violated, the NLRB may issue a "cease and desist" order. If in addition the employee is disciplined or discharged merely because he asserted his right to representation, the NLRB properly may issue a "make-whole" order: back-pay, and full reinstatement (if the employee has been discharged). On the other hand, even if this right has been violated, the NLRB will not issue such an order where the employee is disciplined or discharged for the act or conduct which was the subject of the interview, providing such act or conduct is not otherwise protected under the Labor Management Relations Act.

The union can waive the employee's Weingarten rights.

Employee Involvement Committees

The National Labor Relations Board (NLRB) has focused attention on employee involvement/participation committees. The National Labor Relations Act (NLRA) provides that it shall be an unlawful labor practice for an employer "to dominate or interfere with the formation of any 'labor organization' or contribute financial or other support to it." The term "labor organization" means "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

Under the statutory definition set forth under the NLRA, a committee or team is a "labor organization" if 1) employees participate 2) the organization exists, at least in part, for the purpose of "dealing with" employers, and 3) these dealings concern working conditions or concern other statutory subjects, such as grievances, labor disputes, wages, rates of pay, hours of employment. Further, if such a committee or team has as a purpose the representation of employees, it meets the statutory definition of "employee representation or plan" and will constitute a labor organization if it also meets the criteria of employee participation and dealing with conditions of work or other statutory subjects. Any group including an employee representation committee may meet the statutory definition of "labor organization" even if it lacks a formal structure, has no elected officers, constitution or bylaws, does not meet regularly, and does not require the payment of initiation fees. Thus, a group may be an "employee representation committee" within the meaning of the law even if there is no formal framework for conducting meetings among the represented employees (i.e.: those employees whose conditions of employment are the subject of committee dealings) or for otherwise eliciting the employees' views.

Employee committees formed in union-free environments to discuss absenteeism/discipline policies, pay progression or premium positions, attendance bonus programs, medical insurance benefits, the use of funds from the Employee Stock Ownership Plan, a company's termination policy, and time off for family and medical reasons have been held to be "labor organizations." On the other hand, groups whose purpose is limited to performing essentially a managerial or adjudicative function are not labor organizations, such as job enrichment teams and grievance committees that do not interact with management.

Whether an employee committee or team performs a managerial function depends on the authority it has been delegated to operate the employer's business. For example, in Crown Cork & Steel Co., an employee committee comprised of production workers and a management representative was given responsibility for monitoring company policies and recommending modifications to working hours, layoff procedures, smoking policies, vacations, leave policies and other terms and conditions of employment. Although the committee's authority was not final and absolute, the National Labor Relations Board held that its function was supervisory in nature because management rarely, if ever, overruled the committee's recommendations. Likewise, other committees that recommended pay increases, which management always accepted, and that had the authority to stop production lines without management's approval, were also performing management functions.

If an employee group constitutes a labor organization, the employer may not dominate or interfere with it. Generally, *actual* domination is established by virtue of the employer's specific acts of creating the group itself and determining its structure and function. Communicating with the group or implementing the group's recommendations does not constitute domination or interference.

NLRB Election Procedure

Representation petitions are filed by employees with the National Labor Relations Board (NLRB), to determine if employees wish to be represented for purposes of collective bargaining with their employer. To start the election process, a petition and associated documents may be filed via fax, mail or electronically with the nearest NLRB Regional Office showing support for the petition from at least 30% of employees.

The employer will be required to respond to the petition by filing a Statement of Position with the regional director and serving it on the other parties. The Statement should identify the issues the employer has with the Representation petition. As part of its Statement of Position, the employer will be required to provide all other parties with a list of prospective voters, their job classifications, shifts and work locations of all employees in the bargaining unit sought by the union.

NLRB agents will then investigate to make sure the Board has jurisdiction, the union is qualified, and there are no existing labor contracts or recent elections that would bar an election. Upon service of the election notice from NLRB Regional Offices, employers must immediately post and distribute the notice to employees of the region's service of the petition. The posting should be in a conspicuous place, including all places where notices to employees are customarily posted. If the employer customarily communicates with employees in the petitioned-for unit through electronic means, the employer must also distribute the Notice of Petition for Election electronically to those employees.

The NLRB agents will then seek an election agreement between the employer, union, and other parties setting the date, time, and place for balloting, the ballot language(s), the appropriate unit, and a method to determine who is eligible to vote. Once an agreement is reached, the parties authorize the NLRB Regional Director to conduct the election. If no agreement is reached, the Regional Director will hold a hearing and then may order an election and set the conditions in accordance with the Board's rules and its decisions.

Prior to a hearing, employers must file and serve on the union a detailed statement of position on any issue that may possibly be heard at the hearing or else it will waive its rights from presenting that issue.

The purpose of the pre-election hearing is to litigate only those issues that are necessary to determine whether it is appropriate to conduct an election. Issues regarding which employees should comprise the bargaining unit will not be litigated at the pre-election hearing unless they could have a "substantial impact" on the outcome of an election. Instead, employees in dispute are allowed to vote subject to challenge and their eligibility status determined later in a post-election hearing if the challenges would otherwise affect the results of the election.

Typically, the Regional Director will set a pre-election hearing to begin 8 days after a hearing notice is served and a post-election hearing 21 days after the tally of ballots.

The NLRB may postpone an election if a party requests to block the petition based on charges alleging conduct that would interfere with employee free choice in the election, such as threatening loss of jobs or benefits by an employer or a union, granting promotions, pay raises, or other benefits to influence the vote. When an election is scheduled, the employer is required to post a Notice of Election which will replace the previously posted Notice of Petition for Election.

When a union is already in place, a competing union may file an election petition if the labor contract has expired or is about to expire, and it can show interest by at least 30% of the employees. This would normally result in a three-way election, with the choices being the incumbent labor union, the challenging one, and "none." If none of the three receives a majority vote, a runoff will be conducted between the top two vote-getters.

Elections to certify or decertify a union as the bargaining representative of a unit of employees are decided by a majority of votes cast. Observers from all parties may choose to be present when ballots are counted. Any party may file objections and an offer of proof in support of its objections with the appropriate Regional Director within 7 days of the vote count. In turn, except where the parties have agreed otherwise, the Regional Director's ruling on objections may be appealed to the Board in Washington. Results of an election will be set aside if conduct by the employer or the union created an atmosphere of confusion or fear of reprisals and thus interfered with the employees' freedom of choice.

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Garnishments and Other Liens Against Wages

Types and Enforceability of Legal Processes

For the purpose of securing the satisfaction of certain monetary obligations, the earnings of employees are subject to withholding through several kinds of legal process: garnishments, support orders, and tax levies.

A garnishment is for the purpose of enforcing a money judgment entered by a court against an employee, usually arising out of some commercial transaction. It is enforceable against a New Jersey employer if issued by a New Jersey court. A support order is for the purpose of enforcing a court order for child support*. It is enforceable against a New Jersey employer regardless of the state of issuance. A tax levy, which is issued by the Internal Revenue Service for the purpose of collecting unpaid taxes, requires no underlying court order or judgment.

When any such document is served on an employer, he shall deduct from the employee's income the amount which is called for (subject to the limitations of federal law) and remit it to the creditor. If the employer fails to fulfill such obligation, the employer becomes liable to the creditor for the amount which he did not withhold.

In order to partially defray the expense of making such deductions, in the case of a support order the employer may retain $1 of the employee's earnings in addition to the amount called for by the terms of the support order. In the case of a garnishment the employer may withhold 5% from each amount payable to the creditor and the amount so withheld shall be treated as though paid to the creditor.

An employer who discharges or disciplines an employee because of the issuance of a garnishment or tax levy is subject to a fine. An employer who discharges or disciplines an employee because of a support order, or who rejects an applicant because of a support order or potential support order, is subject to a fine and to double damages, and to a reinstatement order.

In addition to the foregoing, state agencies which administer the student loan program on behalf of the federal government are authorized by federal statute to garnish the wages of students who have defaulted on repayment of their loans. Such garnishments are not based on court judgments, and are enforceable across state lines. Failure on the part of an employer to comply with such garnishment, or discharging an employee whose wages are subject to garnishment, may subject the employer to severe civil penalties.

Limits on Amounts Collectible

The federal Consumer Credit Protection Act and other federal laws impose limits on the amount of an employee's "disposable earnings" which may be withheld pursuant to garnishments (other than those to enforce repayment of student loans) and support orders.

1. "Disposable earnings" are the earnings which remain after deduction of federal, state and local payroll taxes (income tax, Social Security tax, unemployment insurance tax, etc.) Sums withheld pursuant to tax levies, court orders for the support of any person, or orders of a bankruptcy court issued under Chapter XIII do not reduce the amount of "disposable earnings."

*This type of support order should not be confused with a medical child support order.

2. In the case of a garnishment (other than one issued pursuant to the student loan program), in any pay period the amount which can be withheld is the lesser of (a) 10% of gross earnings* or (b) 25% of disposable earnings for that period or (c) the difference between disposable earnings for that period and a multiple of the federal minimum wage.

The specific application of these limitations is as follows:

Disposable Earnings in Pay Period				Maximum Deductible Amount
Weekly	**Bi-Weekly**	**Semi-Monthly**	**Monthly**	
$196.50 or less	$393.25 or less	$425.75 or less	$851.50 or less	(No deduction allowed)
Between $196.50* and $262.00	Between $393.25* and $524.00	Between $425.75* and $567.67	Between $851.50* and $1,135.33	Amount in excess of figure with asterisk
$262.00 or more	$524.00 or more	$567.67 or more	$1,135.33 or more	25% of disposable earnings in pay period

3. Different limits apply to child support orders: they are 60% of disposable earnings (regardless of the amount of such earnings) unless the individual is supporting another spouse or dependent child, in which case the limit is 50%. In either case these limits are increased by 5% with respect to support payments which are more than 12 weeks in arrears.

In the case of an IRS tax levy the entire amount (except for certain exemptions) of the employee's take-home pay is withheld until the levy is satisfied.

1. Take-home pay, for this purpose, is not the same as "disposable earnings"; it is the amount remaining after the usual payroll deductions, such as those for taxes, insurance premiums, union dues, etc.

2. Also, portions of the employee's income are exempt from levy. The exempt amount depends on his tax status and number of dependents. (At the time the levy is served, a form is supplied by IRS on which the employee can record the information which will enable his employer to calculate the exempt amount.)

3. The amount awarded by a judgment for the support of a minor child, if rendered prior to the date of the levy, is exempt from levy.

Where a garnishment is issued pursuant to provisions of the student loan program a maximum of 15% of disposable earnings may be withheld unless the debtor has authorized a greater percentage. "Disposable earnings" is that part of the individual's compensation remaining after deduction of amounts required by law to be withheld -- i.e., taxes and amounts already being withheld for other garnishments, child support, IRS levy.

Multiple Processes

If two or more garnishments have been issued and are outstanding against the same employee, only one of them is collectible at one time and they shall be satisfied in the order of priority in which they were served on the employer.#

If two or more support orders have been issued and are outstanding against the same employee, payments shall be withheld simultaneously for both unless the total would exceed the limits allowed under the federal law (50% or 60%) of disposable earnings), in which case they are simultaneously collectible on a pro rata basis, to the extent of those limits.

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*NJ requirement

If one of them was issued pursuant to the provisions of the federal student loan program both may be simultaneously satisfied, but subject to the limitations of the Consumer Credit Protection Act.

If both a garnishment and a support order are outstanding against the same employee, regardless of which one was first served, the support order shall have priority. This means that the amount called for by the support order is first deducted from the particular wage payment, then an additional deduction may be made for the garnishment to the extent that it is within the limitations of the Consumer Credit Protection Act.

Thus, if the amount withheld pursuant to the support order was 25% or more of the employee's disposable earnings, no additional amount may be withheld for the garnishment; if less than 25% is withheld, the balance of the 25% may be applied to the garnishment.

Example:

Disposable earnings	$500 per week
25% of disposable earnings	$125 per week
Amount of support order	$100 per week
Maximum amount deductible for garnishment	$25 per week

The amount called for by the support order can be paid in full, as it is less than 60% of disposable earnings.

Because the maximum amount which may be deducted for both the support order and the garnishment is $125 (25% of disposable earnings), deducting $100 for the support order leaves a balance of $25 available for the garnishment.

Note that the amount of disposable earnings is not reduced by the amount deducted for the support order.

(If disposable earnings were less than $262.00 per week, the 25% rule would not apply -- see chart above.)

When both a support order and a tax levy are in effect for the same employee, if the support order resulted from a court judgment which was entered prior to the date of the levy and which is for the support of a minor child, both the support order (up to the 60% limit) and the levy are simultaneously collectible.

If the support order is other than as described, the amount called for by the levy is to be paid in full, and if that amount exceeds the permissible percentage amount (50% to 65%) of the employee's disposable earnings, nothing can be deducted for the support order. If the levy is for less than this amount, there can be an additional deduction toward the support order of only the difference, if any, between the amount of the levy and the applicable ceiling for the support order (50% to 65% of disposable earnings).

When both a garnishment and a tax levy are outstanding against the same employee, regardless of which is served first the amount called for by the levy is paid in full, and if that amount exceeds 25% of the employee's disposable earnings, nothing further can be deducted for the garnishment. If it is less than 25%, the balance of the 25% is applied to the garnishment.

Acquisition of a Unionized Business (Successorship)

Whether and to what extent a purchaser of a company whose employees are represented by a labor union must deal with that union depends upon the facts of each case.

The initial inquiry is whether the purchaser is a "successor" employer. Successorship can arise in the case of either a merger or a purchase of "substantial" assets, such as machinery, equipment, inventory, materials, trade name, good will, customer lists, etc. The new employer will be considered a successor if after the transaction it continues the predecessor's business operations without substantial change. The principal elements of continuity are similarity of product lines or services; utilization of the same plant, machinery, equipment or methods of operation; similarity of job classifications and working conditions; employment of the same supervisors.

A hiatus between the cessation of the predecessor company's operations and their resumption by the new owner is not determinative of the successorship question, but it is one of the factors to be considered in making the determination.

If the purchaser is not a successor, it has no obligation, by reason of the purchase, to recognize the union which represented the predecessor's employees. (That union or any other union may, of course, subsequently "organize" the purchaser's employees and acquire representation rights via a representation election or otherwise.)

On the other hand, if the purchaser is deemed a successor, it will become obligated to recognize the predecessor's union if two conditions occur:

1. A majority of its production workforce is comprised of the predecessor's employees.

   The point at which this determination is to be made is when a "substantial and representative" complement of workers have been hired, which is when the job classifications have been filled or substantially filled, a majority of the intended number of employees has been hired, and normal or substantially normal production has begun. (But if the purchaser refuses to hire the seller's employees because of their union affiliation, the rejected employees are counted as though they had been hired.)

2. The union must have made a specific and unequivocal bargaining demand during or before the time when this "substantial and representative" complement exists.

The foregoing is subject to the general rule that an employer that has acquired another company may refuse to recognize the union involved if it has reason to believe the union has ceased to have the support of a majority of the bargaining unit employees, and if there is no current collective bargaining agreement.

A successor employer who has become obligated to recognize the union is not bound to assume the collective bargaining contract (unless it is the alter ego of the predecessor). Prior to the time when recognition is required the successor can unilaterally change initial terms and conditions of employment. (The changes should be announced to employees at time of hire.) Thereafter they can be changed only after bargaining to impasse.

Where corporate ownership changes through a stock acquisition and the corporation remains intact, with no significant change in operations, no question of successorship arises; the corporation continues to be bound to the contract.

Even though a purchaser is deemed to be not a successor for purposes of recognizing and bargaining with a predecessor's union, the purchaser may be obligated to arbitrate claims arising under the predecessor's collective bargaining contract. This is most likely to happen when a majority of the predecessor's employees are hired by the new employer and where the contract expressly provides that it will be binding on "successors and assigns". However, the question of successorship itself is not an arbitrable matter; this is a representation issue within the exclusive jurisdiction of the NLRB.

Motor Vehicle Operators

Commercial Motor Vehicle Safety Act of 1986

This federal statute prohibits multiple licensing of drivers of commercial motor vehicles, requires such drivers to report their traffic violations to their employer, prohibits employment of drivers who violate the provisions of the Act, and disqualifies drivers who operate while under the influence of drugs or alcohol. It applies to intrastate and interstate driving, and provides the following:

1. No person who operates a commercial motor vehicle shall at any time have more than one driver's license. (This means that drivers licensed to drive commercial vehicles in New Jersey must surrender any licenses they hold from other states.)

2. Within 30 days after such a driver "is found to have committed" a traffic violation (other than a parking violation) in any state, he must notify his employer of the violation and if it is an out-of-state violation, he must notify the motor vehicle department of the state which issued his driver's license. He must similarly notify his employer of any suspension or revocation of commercial driving privileges by any state, and of any other disqualification from operating.

3. An applicant for employment as a commercial motor vehicle operator must supply the prospective employer with a 10-year prior employment history as such an operator.

4. No employer shall knowingly allow any employee or independent contractor to operate a commercial motor vehicle in the United States during any period (a) in which his driver's license has been suspended or revoked by a state or he is otherwise disqualified from operating a commercial vehicle, or (b) in which the individual has more than one driver's license in violation of (2), above.

5. Drivers of commercial motor vehicles are required to be tested for fitness for driving, and their licenses will not be renewed unless they pass the test. The test is given by the New Jersey Division of Motor Vehicles.

6. A driver will be disqualified from driving for 1 year for a first violation of driving any motor vehicle while under the influence of drugs or alcohol; if he was transporting hazardous materials, the disqualification period will be 3 years. A second offense will result in a disqualification for from 10 years to life.

Other disqualifications include, but are not limited to: causing a fatality due to the negligent operation of a commercial motor vehicle - 1 year; repeat serious traffic violations (e.g., excessive speeding, reckless or erratic driving) - 60 or 120 days.

7. A "commercial motor vehicle" is a vehicle used to transport passengers or property which:

   a. Has a gross weight rating of over 26,000 pounds, or

   b. Is designed to transport more than a total of 15 passengers, including the driver, or

   c. Is used to transport materials determined by the Secretary of Transportation to be hazardous (with certain exceptions).

8. Drivers or employers who violate the provision of this Act are subject to civil penalties up to $2,500 for each violation, and to criminal penalties up to $5,000 and imprisonment up to 90 days.

Federal Highway Administration Regulations

FHA regulations prohibit a person from driving any motor vehicle in interstate commerce for a common carrier, a contract carrier, or a private carrier of property unless he has completed an application form which includes the following information.

1. Date of birth, Social Security number, and addresses during previous 3 years.

2. Identification number, expiration date, and issuing state of each operator's license of applicant.

3. For the previous 3 years, details of all accidents in which applicant was involved, (including reporting of fatalities and injuries), and a list of all violations of motor vehicle laws and ordinances (other than parking violations) of which the applicant was convicted or for which he forfeited bond or collateral.

4. Details concerning any denial, revocation or suspension of applicant's license.

5. Nature and extent of driving experience, including specification of kind of equipment operated; names and addresses of employers during previous 3 years, and reasons for leaving their employ.

Driver's Limitation on Hours (Department of Transportation)

The federal Department of Transportation* has promulgated regulations which are applicable to drivers employed by "private" carriers of property, common carriers and contract carriers.

1. A motor vehicle operator must be at least 21 years of age, with these exceptions:

a. When he drives wholly within a municipality or the "commercial zone" thereof as defined by the I.C.C., or

b. When he drives only a lightweight vehicle (i.e., one with a gross weight rating of 10,000 pounds or less), and if he is age 18 or older, or

c. When he drives a passenger-type vehicle with a capacity of 10 or fewer persons, and does not transport passengers for hire.

These exceptions do not apply when the vehicle is used to carry certain hazardous materials.

2. A driver may not drive for more than 11 hours, nor be on duty more than 14** hours, without 10 consecutive hours off duty. (Two periods of at least 2 hours each of resting in a truck "sleeper berth" may be cumulated toward the required 10 hours' off-duty time.)

a. This means that after 10 or more off-duty hours a driver may drive a maximum of 11 hours in the aggregate, or be on duty a maximum of 14 hours in the aggregate, at which point another off duty period must be allowed.

b. A mandatory rest break of at least 30 minutes must be taken after 8 hours of driving. This break counts towards the 14-hour maximum.

c. These limitations do not apply to drivers used wholly in driving lightweight vehicles with 2 axles. Also, in case of adverse weather conditions the driving time limit is increased by 2 hours when necessary to enable a driver to safely complete his "run" or to reach a place offering safety for vehicle occupants and security for the vehicle and its cargo. Drivers of passenger carrying commercial vehicles are limited to a maximum drive time of 10 hours (15 hours on-duty) with 8 consecutive hours off-duty.

3. He may not be on duty for more than 60 hours driving any period of 7 consecutive days.

This limitation does not apply to driver-salesmen whose total driving time does not exceed 40 hours during any 7 consecutive days. Also, carriers operating vehicles every day in the week may permit drivers to remain on duty for 70 hours in any period of 8 consecutive days. Drivers may restart the 7/8 consecutive day period after taking at least 34 hours off-duty.

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*NJ Department of Transportation regulates intrastate (within NJ) commercial vehicle drivers specifying in general that drivers may drive up to 12 hours within a 16 hour on-duty shift. Each duty period must follow 8 hours off duty.

**May be extended to 16 hours once in a seven day period for legitimate business needs and only for short-haul (return to base) drivers.

Complete hours of service rules for drivers can be found on the http://www.dot.gov website.

4. Definitions

a. A driver is "on duty" from the time he begins work or is required to be in readiness to work until he is relieved from work and all responsibility for performing work. It includes driving, waiting to be dispatched, attending a disabled vehicle and inspecting and servicing equipment.

Time spent by an employee in traveling at the direction of his employer, during which he performs no driving and assumes no other responsibility to his employer, shall be counted as on-duty time unless he is afforded at least 8 consecutive hours off duty upon arrival at his destination.

b. "Seven" and "eight consecutive days" refer to a period of time commencing on any day and hour designated by the employer.

5. A record of each driver's on-duty time must be prepared by carriers and maintained for 6 months, except for drivers of lightweight vehicles.

A driver's "qualification file" must be maintained during and for 3 years after termination of employment. This file contains the driver's employment application form; his driving record; the certifications of his medical examination, road test and written examination; the annual review of his driving record; and record of driving violations. It shall also include information concerning drug tests.

Smoking in Places of Employment

The "New Jersey Smoke-Free Air Act" prohibits smoking (including e-cigarettes and vapor from electronic smoking devices) in all indoor public places or workplaces.*

"Indoor public place" means a structurally enclosed place of business, commerce or other service-related activity, whether publicly or privately owned or operated on a for-profit or nonprofit basis, which is generally accessible to the public, such as a commercial building, restaurant, etc.

"Workplace" means a structurally enclosed location or portion thereof at which a person performs any type of service or labor, and includes all areas of factories, offices, warehouses, etc.

The "person having control" of an indoor public place or workplace (the building owner or operator) must post in every public entrance to the place a sign, clearly visible to the public, indicating that smoking is prohibited therein, and that violators are subject to a fine.

Compliance is the responsibility of the "person having control", who must order any individual smoking in violation of the law to comply with its provisions. Additionally, the Department of Health and Senior Services or the local board of health upon written complaint or having reason to suspect that an indoor public place or workplace is in violation, shall, by written notification, advise the person having control of the place accordingly and order appropriate action to be taken.

An individual who smokes in violation of the law or a person in charge of an indoor public place or workplace that fails or refuses to comply with the order is subject to a fine of not less than $250 for the first offense, $500 for the second offense and $1,000 for each subsequent offense.

A municipal court shall have jurisdiction over proceedings to enforce and collect any penalty imposed. The penalties provided shall be the only civil remedy for a violation; there is no private right of action against a party for failure to comply with this law.

Lie Detector (Polygraph) Tests

Both federal law (the Employee Polygraph Protection Act) and state law prohibit the use of lie detector tests except in very limited situations. Both laws must be observed, and violators are subject to severe penalties.

The two laws, in combination, provide that an employer shall not require, request or influence any employee or applicant to take any lie detector test nor use, accept, refer to or inquire concerning the results of a test taken by an employee or applicant, except an employer who is authorized to manufacture, distribute or dispense certain "controlled dangerous substances".

Such an employer may administer a polygraph test (but not any other kind of lie detector test) to employees and prospective employees, subject to extremely strict limitations as to the circumstances and manner in which the test may be given, the particular categories of employees and applicants to whom it may be given, the use of the test results, and other limitations.

Every employer shall post a notice, supplied by the U.S. Department of Labor, which contains references to the federal statute.

*Certain casino gaming floors, cigar bars, tobacco retail establishments and hotel sleeping rooms are exempt from the requirements.

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Part-Time Employees

There is no legal or common definition of part-time employment. Furthermore, the various employment laws almost uniformly make no distinction between full-time and part-time employees for purposes of determining their applicability to particular employers and employees.

Note: For the purpose of the Affordable Care Act, a full-time employee is defined as 30 or more hours per week (see page 214.13).

With respect to company provided benefits given by an employer which are not required by law (vacations, holidays, paid sick days, severance pay, etc.) there is no requirement that they be given to part-time employees, and every employer is free to make his own definition of "part-time".

However, pursuant to the requirements of ERISA, where a retirement or deferred compensation plan determines eligibility for participation or the extent of vesting and benefit accrual by reference to years (or other periods) of employment, an employee must be credited with a year of employment in which he performs 1,000 or more hours of service. As a general rule, "hours of service" include time actually worked and time not worked but paid for, although there are alternate methods for making the calculation.

Industrial Homework

Industrial homework, which (generally speaking) means the production, preparation, repair, packaging, etc. of goods or articles by a person in his home for a manufacturer, is subject to regulation under both State and federal law.

New Jersey law prohibits the home manufacture of the following: articles of food and drink, and articles for use in connection with their serving; toys and dolls; dolls' clothing in tenements; wearing apparel; tobacco, drugs and poisons; bandages and sanitary goods; explosives, fireworks and similar articles; and articles whose processing requires exposure to hazardous substances.

Every employer of industrial homeworkers who work on any other products must secure a permit from the New Jersey Department of Labor and must maintain specified records. A homeworker also must have a permit. The number of homeworkers may not exceed one-third of the number of employees in the factory or place of business.

Clerical work is not subject to the provisions of the New Jersey law.

Regulations issued under the federal Wage-Hour Law require a special certificate to employ homeworkers in any of the following industries: women's apparel, jewelry, gloves and mittens, buttons and buckles, handkerchiefs, embroideries, and knitted outerwear.

It is not permissible to utilize homeworkers in any industry to produce articles to be furnished by a manufacturer pursuant to a contract with the federal government which is subject to the Walsh Healey Act - i.e., a contract exceeding $10,000 to manufacture or furnish materials, articles or equipment. Regulations issued under that statute stipulate that the materials or articles required by the contract be produced on the manufacturer's premises.

Taxability of Payments to Employees During and Because of Disability

Payments to employees for periods of disability due to sickness or injury may take several forms and be subject to one or more "employment tax" laws.

The following are the general rules on the subject. A more complete exposition of the federal rules appears in IRS Publication 952, Sick Pay Reporting.

Workers' Compensation Payments

Payments made pursuant to the Workers' Compensation Law are not taxable under any law. However, any payments in excess of such requirements may be taxable - see Sick Leave, below.

Temporary Disability Benefits

Federal Income Tax

Benefits paid by state or private plans of TDB are subject to federal income tax to the extent of the employer's contribution to the plan - i.e., the portion attributable to the employer's contributions is taxable.

If the payments are made directly by the employer as a self-insurer, they are subject to normal withholding and reporting requirements. If they are made by a third party (an insurance company or the state), the amount of payment, though taxable, is not subject to income tax withholding unless the employee has submitted a written request to the payer to withhold tax.

FICA and FUTA Taxes

TDB payments made during the period ending 6 months after the calendar month in which the employee last worked are subject to Social Security tax, Medicare tax, and FUTA tax, up to the applicable maximum taxable wage base. Only the portion of TDB attributable to employer contributions is taxable.

If the benefit payments are made by an insurance company or the state, the payer is responsible for withholding the employee's share of the Social Security and Medicare taxes on the benefit payments.

Such third-party payer is responsible also for payment of the FUTA tax and the employer's portion of the Social Security and Medicare taxes on the benefit payments unless the payer notifies the employer of the amounts of the payment.

New Jersey Taxes

Except as noted, payments made under the state plan or an approved private plan of TDB are not subject to state income tax, Unemployment Compensation tax or TDB tax.

The exception is that payments made under an approved private plan for any of the first 7 calendar days following the date of disability are subject to UC and TDB taxes; however, if the period of disability extends to 22 days and payment is made for the twenty-second day, then the payment for any of those first 7 days would not be subject to such taxes.

Sick-Leave Pay; Salary Continuation

This refers to payments to employees which supplement amounts received from a TDB plan or from Workers' Compensation, or which are made for a period of disability when benefits are not paid under a state or approved private plan of TDB or under the Workers' Compensation law.

Federal Taxes

Such payments are subject to federal income tax, Social Security tax, Medicare tax, and FUTA tax to the same extent as in the case of Temporary Disability Benefit payments.

State Income Tax

Such payments are not subject to New Jersey income tax if made pursuant to a legally enforceable plan, insured or otherwise, provided that (1) by the terms of the plan payment is limited to instances of disability (i.e., the plan does not provide for or permit payment for absences other than those caused by disability), and (2) the plan provision under which payments are made is non-discretionary on the part of the employer.

Tax and withholding of tax is required on all payments to employees which do not meet these conditions. Moreover, even though sick-leave pay or salary continuation which meets these conditions is excludable from tax, the amount of the tax must nevertheless be withheld (later claimable as a refund by the individual employee) unless the payment is made pursuant to an insurance policy issued by a commercial insurance company.

U.C and T.D.B. Taxes

Sick-leave pay or salary continuation made directly by the employer is considered taxable "wages" under the New Jersey Unemployment Compensation and TDB laws. However, such payments are not considered as wages for these purposes if they are made via an insurance policy purchased by the employer.

Taxability of Payments For Educational Expenses

Reimbursement of or payment for employees' educational expenses (tuition, fees, books, etc.) is excludable from employees' gross income and not subject to federal or New Jersey income tax or to FICA or FUTA tax where the course of instruction is job-related. (Internal Rev. Code, Sec. 132)

A course of instruction is "job-related" only if it maintains or improves skills required by the individual's employment in his current job, or which meets the express requirements of his employer or of law as to job retention, pay or status. Courses may include graduate level work.

A course of study may not be treated as job-related if it is part of a program of study being pursued that will lead to qualifying the individual for a new occupation, even though it also improves or maintains skills on the current job, or if it is required of the employee in order to meet his employer's minimum occupational requirements for his job.

Reimbursement or payment for expenses for courses of instruction which are not job-related is subject to New Jersey income tax. However, under Section 127 the Code it is excludable from federal income and other federal payroll taxes, subject to the following:

1. The employer's payment must be pursuant to a written plan or program providing legally enforceable rights to employees. It must be established with the intention of being maintained for an indefinite period of time, and reasonable notification of its provisions must be provided to employees.

2. The exclusion is limited to the first $5,250 paid in a calendar year.

3. The program must not discriminate in favor of "highly compensated" employees.

4. Payment for courses involving sports, games or hobbies is not excludable from tax.

To the extent that any reimbursement or payment is not subject to tax under either Section 127 or 132, the amount paid is not to be included in the employee's W-2 form

Employee Earned Income Tax Credit

Both federal and State laws provide for “earned income tax credits (EITC)” to reduce tax liability for certain low-income workers. The amount of the credit is based on gross earned income, filing status, and the number of any qualifying children in the home.

Employers in New Jersey must give written information to potentially eligible employees regarding availability of these tax credits. The notification is to be distributed between January 1 and February 15 of each year (to coincide with the employer’s distribution of the W-2s) and must use the statement developed by the State Treasurer, posted on the NJ Department of Treasury website.

The employer shall notify only those employees whom the employer knows, or reasonably believes, may be eligible for the federal credit based on the wages the employee earned during the prior year as reported on the W-2. New Jersey states that it is reasonable to believe that any employee whose wages earned during the calendar year were below a certain threshold may be potentially eligible for the tax credit and should be given the required written notification.

The qualifying income levels and thresholds change each year. Visit the Division of Taxations website for details: http://www.state.nj.us/treasury/taxation/eitcinfo.shtml

Notification Concerning Health Benefits Plans

This New Jersey statute requires employers who offer health benefit plans to employees through a health care insurer to provide notice in cases of plan termination or when changing health care plans. The law does not apply to self-insured plans or employers that participate in a joint insurance fund. The law also requires health insurance carriers to provide employers with notice of premium rate increases.

An employer that provides a health benefits plan which pays or provides hospital and medical expense benefits to its employees in New Jersey shall provide 30 days' prior notice to those employees before termination of the plan. However, in the case where an employer is changing health benefit plans as opposed to eliminating coverage altogether, the employer must immediately notify their employees in writing of the change upon receipt by the health insurer that its employees will be covered by the new plan.

“Change” means any modification to a health benefits plan, including a modification to the level of benefits within an existing health benefits plan, whether that modification results in an increase or diminution in the level of benefits, or a change in the identity of the carrier or health insurer, whether that change in carrier or health insurer results in an increase, diminution or zero-net-effect in the level of benefits.

“Immediately” means: on or before the end of the first scheduled work day following receipt of notice from the health insurer.

In either the case of a plan termination or changing plans, the employer shall provide such notice in writing, include the effective date of the plan termination or change, provide the name and contact information of the individual to whom the employee may direct questions, and, in the case of a plan change, a description of the change. The employer must be able to show verifiable proof that such notice was delivered.

The law is enforced by the New Jersey Department of Labor. The Department has the authority to enter any establishment or field site of any employer if there is reason to believe that a violation has occurred. Further, employers are required to permit the questioning, in private, of any employee or manager. The Department may also review relevant records. Violations are punishable by monetary penalties, not to exceed $200 per employee covered by the health benefits plan.

For the renewal of a health benefits plan for which the premium rate will increase, a health insurance carrier shall provide that there will be an increase for the renewal of the plan and 60 days' prior notice of the amount of the increase to the employer that purchased that plan.

Special Enrollment Rights Under Health Insurance Portability and Accountability Act (HIPAA)

HIPAA provides employees with additional opportunities to enroll in a group health plan if other coverage is lost or the employee experiences certain life events. Special enrollment allows individuals who previously declined health coverage to enroll for coverage. Special enrollment rights arise regardless of a plan's open enrollment period.

There are two types of special enrollment – upon loss of eligibility for other coverage and upon certain life events. Under the first, employees and dependents who decline coverage due to other health coverage and then lose eligibility or lose employer contributions have special enrollment rights. For instance, an employee turns down health benefits for herself and her family because the family already has coverage through her spouse's plan. Coverage under the spouse's plan ceases. That employee then can request enrollment in her own company's plan for herself and her dependents.

Under the second, employees, spouses, and new dependents are permitted to special enroll because of marriage, birth, adoption, or placement for adoption.

For both types, the employee must request enrollment within 30 days of the loss of coverage or life event triggering the special enrollment.

A special enrollment right also arises for employees and their dependents who lose coverage under a state Children's Health Insurance Program (CHIP) or Medicaid or who are eligible to receive premium assistance under those programs. The employee or dependent must request enrollment within 60 days of the loss of coverage or the determination of eligibility for premium assistance.

Eligible employees must be provided with a notice of their special enrollment rights at the time they are initially offered the opportunity to enroll.

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Mandated Health Insurance

No federal or New Jersey law requires an employer to provide health insurance. However, where it is provided, federal and state laws require that it be extended or continued in some circumstances where the insurance coverage would otherwise terminate.

Consolidated Omnibus Budget Reconciliation Act (COBRA)

This federal statute requires that employees and their dependents be allowed to continue their coverage of group health insurance plans in specified situations (such as termination of employment) where the coverage would otherwise end.

Application

The statute applies to all types of group plans maintained by an employer, regardless of whether the employer contributes to the plan, which provide medical care to employees through insurance, self-insurance, reimbursement, HMO' s, or cafeteria plans and other flexible-benefit arrangements.

"Medical care" includes hospital, medical, surgical, dental and vision care, and prescription drug plans. It does not include life insurance, accidental death and dismemberment insurance, temporary or long-term disability benefits, lost-time payment plans, medical savings accounts, or qualified long-term care services.

The statute does not apply to "small-employer plans" or to "church plans". A small-employer plan is one maintained by an employer who had fewer than 20 employees (full-time and part-time) on at least 50% of the typical business days in the preceding calendar year -- i.e., if there were 19 or fewer employees on half or more of such days, COBRA does not apply.

1. Only "common law employees" are counted; independent contractors (see page 179) are not counted nor are corporate directors.

2. A part-time employee is counted fractionally according to the relationship between his hours of work and the hours of work required for full-time status.

3. When an employer is part of a "controlled group" (such as two corporations in a parent-subsidiary relationship, or two organizations under common control), the number of all employees in the group shall be aggregated.

4. Foreign corporations are not excluded from membership in a controlled group of corporations.

Qualifying Events

The option of continuing the coverage of a health plan must be provided if a "qualifying event" occurs. A qualifying event is any of the following which, under the terms of the plan, would result in loss of coverage of an employee, his spouse, or dependent child.

1. The termination, voluntary or involuntary (including permanent layoff or retirement), of a covered employee for any reason other than "gross misconduct" (not defined), or a reduction in the hours of work of a covered employee.

   An employee' s absence from work (as, for example, in the case of leave of absence, temporary layoff, strike or disability) is equated with a reduction in his hours of work. (But note the exception created by the Family and Medical Leave Act—see page 211).

2. The death of a covered employee

3. The divorce or legal separation of a covered employee.

4. The covered employee becoming entitled to Medicare benefits, Part A or B.*

   "Entitled" does not mean the same as "eligible". Entitlement to Medicare is automatic only if the individual in addition to attaining age 65 is a recipient of Social Security benefits. (He may elect to defer receipt of SS benefits).

5. A dependent child of the covered employee ceasing to be a dependent child under the terms of the plan (such as by exceeding the maximum specified age for coverage).

6. A bankruptcy proceeding under Chapter 11 (if it affects the coverage of a retired employee).

"Loss of coverage" includes an increase in the premium or contribution that must be paid by an employee or former employee (or by his spouse or dependent child) that results from the occurrence of one of the foregoing events.

A loss of coverage need not occur immediately after the event so long as it occurs before the end of the maximum coverage period.

Qualified Beneficiaries

Only "qualified beneficiaries" have COBRA rights. With the exceptions noted, to be a qualified beneficiary an individual (employee, former employee, spouse, or other dependent of the employee) must have been covered under the health plan on the day immediately before the qualifying event. The exceptions are:

1. A child not covered by a plan before a qualifying event may be added to the plan, and may become a qualified beneficiary. See page 213, Adding Family Members.

2. Where an individual' s coverage has been eliminated or reduced by either an employee or the employer in anticipation of a qualifying event, this will not affect an individual' s COBRA rights. For example, if in anticipation of a divorce an employee discontinues his spouse's coverage, when the qualifying event (divorce) occurs, the spouse will acquire COBRA rights on the day of the divorce, despite the earlier loss of coverage.

If the employer' s group plan covers retirees, the same continuation benefits are available to their spouses as in the case of spouses of active employees.

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* An employee' s or former employee's entitlement to Medicare is a qualifying event only for his covered spouse and dependents, if any, and only if such entitlement would cause loss of dependent coverage under the group health plan; not for the employee himself.

Continuation Coverage

When a qualifying event occurs, each qualified beneficiary who by terms of the plan would suffer a loss of coverage must be offered "continuation coverage". With the following exceptions, the plan coverage which may be continued shall be no more or less than the plan coverage he had before the qualifying event.

1. If an open enrollment period is available to similarly situated, active employees during which they can change plans or plan benefits, the same privilege must be accorded to each qualified beneficiary who is receiving continuation coverage.

2. If coverage is modified for similarly situated active employees, then the coverage which is made available to qualified beneficiaries who are receiving continuation coverage shall be similarly modified.

3. If the health plan in which the qualified beneficiary is enrolled is region-specific (such as an HMO), and after a qualifying event he relocates to an area that is not serviced by the plan, he must be allowed to elect an alternative plan which covers or can be extended to cover the area, if such a plan is available to other employees.

4. The availability of continuation coverage of a health flexible-benefit arrangement is subject to certain limitations.

Maximum Coverage Period

If the qualifying event is a termination of employment or reduction in hours, the employee or former employee and his qualified dependents may elect to continue the coverage of the health plan for up to 18 months from the date of the qualifying event. Upon the occurrence of any of the other qualifying events (other than bankruptcy proceedings) the employee' s qualified dependents have the option of continuing the coverage for up to 36 months. (Note the effect of payment by the employer for extended insurance coverage, page 211).

This 18-month period is extended for all qualified beneficiaries for an additional 11 months if **any one of them** is totally disabled at any time during the first 60 days of continuation coverage (i.e., usually, during the 60-day period following the qualifying event), as determined by the Social Security Administration, provided a qualified beneficiary has given notice of the Social Security determination to the plan administrator within 60 days of the issuance of such determination and within the 18-month period (see also NJ law page 215).

A Social Security Administration determination made before the first day of continuation coverage will also satisfy this requirement if there has been no subsequent determination that the disability ended before that day.

Where a covered, retired, former employee sustains a loss of coverage because of his former employer's Chapter 11 bankruptcy, he and his covered spouse and dependent children may elect to continue coverage for the lifetime of the employee and for an additional 36 months upon his death. If such employee died before the date of the bankruptcy filing, spouse and dependents covered on that date may elect to continue coverage for the lifetime of the spouse. A beneficiary's entitlement to Medicare will not affect his rights under this section.

Loss of coverage in this context means "a substantial limitation" of the group coverage within one year before or after the commencement of the bankruptcy proceedings.

Multiple Qualifying Events

A beneficiary may experience more than one qualifying event. Where the first qualifying event is the employee's termination or reduction in hours, then if another qualifying event (the employee's or former employee's death, divorce or legal separation*) occurs within 18 months after the date of the first qualifying event, and while the dependents' (spouse and children) continuation coverage is in effect, the maximum period of COBRA coverage of all qualified dependents is extended to 36 months from the date of the first qualifying event. The period of coverage will be similarly extended for a child who ceases to be a dependent during the 18-month period.

If the second such qualifying event occurs during the 11-month extension of continuation coverage which is available in cases of total disability and at a time when the beneficiary is still totally disabled, the maximum period of COBRA coverage of qualified dependents is similarly extended to 36 months.

A termination of employment following a reduction in hours is not a second qualifying event.

Qualifying Events Occurring Subsequent to Medicare Entitlement

Where an employee upon attaining age 65 continues to work and selects his employer's health plan as "primary" and Medicare as a "secondary" payer (see page 41), this does not constitute a qualifying event because there is no resulting loss of coverage: the insurance continues unchanged. However, one or more qualifying events may thereafter occur.

1. If within 18 months the employee is terminated (by retirement or otherwise) or suffers a reduction in hours, and loses coverage as a result, his qualified spouse and dependents will then acquire COBRA rights for a period ending 3 years after the date when the employee had selected (i.e., had become enrolled in) the Medicare coverage as secondary.*

2. If the qualifying event is the employee' s termination or reduction in hours occurring more than 18 months after the date of selection of secondary Medicare coverage, the employee' s qualified spouse and dependents will then acquire COBRA rights for a period of 18 months from the date of the termination or reduction in hours.**

3. If while still actively employed a qualifying event other than termination or reduction in hours occurs at any time after the date the employee had selected secondary Medicare coverage, qualified spouse and dependents will then acquire COBRA rights for a period of 36 months from the date of such qualifying event.

4. In either (1) or (2) if a second qualifying event occurs after the employee' s termination or reduction in hours, and during the period of COBRA continuation coverage, that period may be extended for spouse and dependents to 3 years from the date of termination or reduction in hours.

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*In very limited circumstances, an employee's entitled to Medicare after an initial qualifying event could extend dependents COBRA coverage. This would occur only if an active employee's entitlement to Medicare would cause dependents to lose coverage under the group health plan. Due to the Medicare Secondary Payer Rule (see page 41), this is highly unlikely.

** The employee also can probably exercise COBRA rights and continue coverage for himself for the 18-month period following his termination or reduction in hours.

Notification Requirements

An initial "general" notification describing in fairly specific terms the provisions of the statute must be provided to each newly-hired or newly enrolled employee and his spouse within 90 days of the time their coverage commences under the plan. The importance of this communication, aside from the fact that it is mandatory, is that it puts beneficiaries on notice that they must report certain qualifying events. If they have not been so informed, continuation coverage can't be denied for their failure to report. (A sample form of this notification for single-employer plans is on page A-25 of the Appendix.)

A description of COBRA rights must also be included in the Summary Plan Description which is required by ERISA. The Summary Plan Description can suffice as initial notification. (However, due to specific delivery methods and the fact that a covered spouse must receive notice, it appears best to provide separate COBRA notice).

The employer must inform the plan administrator within 30 days of the occurrence of a qualifying event where that event is the employee's death, termination, reduction of hours, entitlement to Medicare benefits, or a filing for bankruptcy. This notice must provide sufficient information for the administrator to determine the plan, covered employee, qualifying event, and date of qualifying event.

Upon the occurrence of any of the other qualifying events (including second qualifying events and disability determinations, see page 207), it is the responsibility of a beneficiary to notify the plan administrator within 60 days of the date of the qualifying event or the date when coverage would be lost on account of the event, whichever is later. COBRA rights will be lost for failure to provide timely notice. It is the plan's responsibility to establish reasonable procedures for the supplying of this notice, describe such procedures in the SPD, specify how and to whom the notice must be given, and the type of information necessary to include in the notice.

Within 14 days after the plan administrator has received notification of a qualifying event, the administrator must inform the employee and his spouse and children (if they are qualified beneficiaries) of their rights and obligations concerning continuation coverage, including the cost. (See sample form of this “election” notification on page A-27a of the Appendix). A single notice addressed to the employee and spouse will suffice as notice to all beneficiaries residing at that same address. Notification to the covered employee alone is not considered notification to anyone else. Failure to provide timely notification does not extend the period of continuation coverage.

Where the employer is also the plan administrator, the beneficiaries must be notified within 44 (30 plus 14) days of the qualifying event.

The 14-day and 30-day notice periods may be extended in the case of a multi-employer health plan.

Where a beneficiary is mentally incompetent, special care should be taken to provide his guardian or other surrogate with a complete description of the health insurance plan so that he can make an informed decision about electing to continue coverage. This can be done by providing a copy of the Summary Plan Description. Also, where a beneficiary becomes mentally incapacitated during the election or payment period, the period will be "tolled" or suspended during the incapacity until a guardian is appointed, and will then resume running.

However, the foregoing does not apply if the beneficiary's incapacity occurs after he has rejected continuation coverage.

Notice is also required when a qualified beneficiary notifies the administrator of a qualifying event (or second qualifying event or disability determination) and the administrator determines the individual is not entitled to COBRA coverage. This notice should be provided to the qualified beneficiary by the plan administrator within 14 days and explain the reasons for ineligibility.

Additionally, when COBRA coverage is terminated prior to the maximum coverage period the qualified beneficiary must be notified of the reason for the termination, the date of the termination and any conversion rights there may be. This notice should be provided "as soon as practicable."

Election of Coverage

The option of electing continuation coverage must be made available during a period which (1) begins not later than the date when coverage is lost under the terms of the plan by reason of a qualifying event, (2) lasts at least 60 days, and (3) ends not earlier than 60 days after such loss of coverage or 60 days after the date of sending of the notice from the plan administrator to the individual notifying him of his right to elect continued coverage, whichever is later.

An election is deemed to be made on the day it is sent to the plan administrator. Failure to make a timely election results in loss of COBRA rights. A waiver of election rights may be effectively revoked if the revocation is made before the expiration of the election period; in such case, however, coverage need not be provided for the period prior to the date of the revocation.

Each qualified beneficiary is entitled to make a separate election with regard to continuation and type of coverage. Although a qualified beneficiary who is either the employee, the former employee, or the spouse can make a binding election on behalf of another qualified beneficiary to continue the insurance, one beneficiary cannot reject coverage on behalf of another person unless that person is a minor child.

If an election which is made by a qualified beneficiary who is the employee, former employee or spouse does not specify that it is for self-only coverage, it is deemed to constitute an election on behalf of all qualified beneficiaries. An election on behalf of a beneficiary who is incapacitated or has died can be made by the executor or administrator of the estate or by his spouse.

Election and Payment by Others

COBRA elections can be made by a third-party, such as a health provider, and payments can be made by a third-party, such as a new employer, as well as by the employee or other beneficiary.

Election Choices

Qualified beneficiaries need only be offered the right to elect the coverage they had prior to the qualifying event. If an employer has a single plan which provides both "core" benefits (medical benefits) and one or more kinds of "non-core" benefits (such as vision care, dental care and prescription drug benefits) each qualified beneficiary can elect to continue all of the coverage he had immediately before the qualifying event -- i.e., both the core coverage and all of the non-core coverage. He cannot elect the core coverage alone, nor the non-core coverage alone.

If an employer has a plan providing core benefits only and a separate plan providing non-core benefits only, a qualified beneficiary can elect to continue any single plan or any combination of plans that he had immediately before the qualifying event. If he was covered only by the plan which provided non-core benefits, he may elect to continue that one; in such case he has no COBRA rights with respect to the core benefits unless they become available to him during an open enrollment period. Similarly, if he was covered only by the plan that provided core benefits, he can elect that one only.

When determining the number of health plans maintained, generally all health care benefits provided by an employer will be considered a single plan, unless it is clear from the plan documents that benefits are being provided under separate plans.

Employer-Paid Extended Coverage

If an employer continues and pays for the insurance after the occurrence of a qualifying event, except as noted such payment does not extend the period of COBRA continuation coverage.

For example, if an employee is terminated on January 1 but his employer continues coverage for 3 months until the end of March, the beneficiaries' rights to COBRA coverage would extend for only an additional 15 months. In such case, however, note the following:

1. It is mandatory that the notification to the plan administrator of the qualifying event be sent within 30 days after January 1, and to the beneficiaries within 44 days (or 14 days) after January 1.) Failure to comply can subject the employer to penalties.

2. The period for electing coverage would begin no later than April 1 and end either on May 31 (60 days after loss of coverage) or 60 days after the notice was sent, whichever was later.

There are two exceptions to the foregoing:

1. If by the terms of the insurance plan the date of loss of coverage, rather than the date of the qualifying event, is specified as the commencement of the maximum period of COBRA coverage, then in the example above the 30-day and 44-day notice periods would begin on April 1, and the 3-month period during which the insurance had been continued would be in addition to the 18-month period of COBRA continuation coverage. The beneficiaries' election period would end 60 days after April 1 or 60 days after sending the notice, whichever was later.

2. If the insurance is continued in effect pursuant to the requirements of the federal Family and Medical Leave Act, the period of such continuation cannot be treated as part of the period during which COBRA coverage must be made available. This is because the onset of a leave of absence taken under that Act is not a qualifying event.

If the employee does not return from an FMLA leave, the qualifying event occurs on the day the leave ends, whether it ends because the employee has exhausted his FMLA leave entitlement or because he has unequivocally informed his employer that he does not intend to return or because he has lost FMLA rights as a result of layoff. The maximum coverage period (usually, 18 months) is measured from that point even though the insurance may have lapsed because the employee did not pay his share of the insurance premiums during the leave.

Payment By Beneficiaries For Coverage

The employer may require payment from beneficiaries to whom COBRA coverage is provided even though the plan is otherwise a non-contributory plan.

With one exception the maximum amount which may be charged is 102% of the "applicable" group rate or cost. The applicable rate is the amount of gross premium paid or cost incurred to insure "similarly situated", active employers and their dependents.

The exception applies where as a result of the disability of a beneficiary the normal 18-month period of COBRA coverage has been extended by an additional 11 months. If upon the occurrence of the qualifying event (the employee's termination or reduction in hours) the disabled family member had elected and received continuation coverage, the plan may charge 150% of the applicable rate. This rate may be charged during the 11-month extension period, and if a second qualifying event occurs during that period which would result in an extension to 36 months of COBRA coverage, 150% may be charged to the end of the 36 months.

However, if the disabled family member had not accepted continuation coverage for himself, although the 11-month extension would be available to the other non-disabled family members, the plan could charge only 102% of the applicable rate during that period.

In advance of a "determination period" an employer must specify the amounts that COBRA recipients will pay for coverage. Amounts may not exceed 102% (or 150%) of the "applicable rate" -- i.e., the cost, as of the beginning of the determination period, of insuring active employees.

The "determination period" is a 12-month period established by the plan and applied consistently from year to year. It is a single period, applicable uniformly to all beneficiaries who elect to continue coverage of a particular plan.

During this period the amount charged to COBRA recipients cannot be increased because of an increase in the cost of the insurance. However, the percentage of the applicable rate can be increased where the plan previously charged less than the allowable percentage. Also, beneficiaries who change coverage to a more expensive or less expensive coverage may be charged accordingly.

The initial premium payment must be made within 45 days of the date when continuation coverage was elected. Earlier payment may not be required. The beneficiary cannot choose to have his first payment applied prospectively; it must be applied to the period beginning immediately after the date that coverage under the plan would otherwise have been lost.

Information about the payment of premiums should be given promptly and can be given by the plan administrator at the same time he notifies individuals about their election rights following the occurrence of a qualifying event.

Pending receipt of the initial premium payment, in the case of an indemnity or reimbursement arrangement, the employer can provide for plan coverage, or if the plan allows retroactive reinstatement, the employer can drop the qualified beneficiary from the plan and reinstate him when the payment is made. Claims incurred by a qualified beneficiary do not have to be paid before the payment is made.

In the case of a group health plan that provides health services, such as an HMO, the plan can require that a qualified beneficiary who has not yet elected and paid for COBRA continuation coverage choose between electing and paying for the coverage or paying the reasonable and customary charge for the plan's services (then being reimbursed within 30 days after electing COBRA continuation coverage, and paying any balance due). In the alternative, the plan can provide continued coverage and treat the qualified beneficiary's use of the facility as a constructive election. In such a case, the qualified beneficiary is obligated to pay any applicable charge for the coverage, provided he was informed of the meaning of the constructive election before using the facility.

Beneficiaries must be allowed to pay subsequent premiums at monthly intervals if they wish to do so. Payment at longer or shorter intervals is permitted but is not required to be permitted. A grace period after the due date must be allowed, which will be the longest of (1) 30 days, or (2) the period allowed by the terms of the group plan for submitting payment, or (3) the period which the insurance carrier or third-party administrator allows for receiving payment from the employer. The employer may require the payer to remit payments without being billed, if the payer is notified to this effect in advance. Payment is considered made as of the date of its mailing.

If timely payment is made in an amount that is not "significantly less" than the required amount, such payment will be deemed to satisfy the plan's requirements unless the qualified beneficiary is notified of the amount of the deficiency and given a reasonable period of time (e.g., 30 days) to pay it. An amount is not "significantly less" than the amount the plan requires to be paid for a period of coverage if the shortfall is no greater than the lesser of 1) $50 or 2) 10% of the amount the plan requires to be paid.

Alternate Coverage

Former employees who are entitled to COBRA coverage may be given the opportunity to choose alternate coverage instead, such as retiree medical coverage. However, if an employee chooses alternate coverage and an event such as the employee's death or a divorce terminates a dependent's right to the alternate coverage, the dependent must be given the opportunity to elect COBRA coverage.

Extinguishment of COBRA Rights

COBRA rights of a qualified beneficiary which would otherwise continue for the stated periods will end upon the occurrence of any of the following:

1. A qualified beneficiary becomes actually covered under any other group health plan, as an employee or otherwise, after electing COBRA coverage. This is so even though its benefits are less than those available under the COBRA continuation coverage, except that if the other plan contains an exclusion or limitation with respect to any preexisting condition of the beneficiary, coverage under the other plan will not affect any COBRA rights so long as the exclusion or limitation continues to apply to the beneficiary.

2. A qualified beneficiary becomes enrolled in Medicare Part A or Part B, or both, after electing COBRA coverage.

   If a beneficiary became enrolled in Medicare before electing COBRA coverage, this would not preclude his acquisition or continuation of COBRA rights, even if he enrolled in Part A before, and in Part B after, electing COBRA coverage.

3. A determination is made by the Social Security Administration before the end of the 11-month disability extension that the beneficiary's disability has ended. This allows the termination of continuation coverage of all individuals who had become entitled to the extension solely by reason of the disability.

4. Premiums are not paid as required. However, coverage cannot automatically be terminated when premium payments are insufficient by an "insignificant amount" ($50 or less or 10% of the amount required, if less). The beneficiary who underpays by an insignificant amount is deemed to have made the correct payment unless the plan notifies him to the contrary and requires payment within 30 days of the deficiency notice.

5. The employer discontinues all group health benefits for all employees.

   However, if the employer has more than one plan and discontinues only the one covering the beneficiary, the beneficiary must be allowed to become covered under any other health plan remaining for similarly situated, active employees.

Also, an individual's coverage can be cancelled for "cause" (not defined) on the same basis that active employees' coverage can be cancelled. When COBRA coverage is terminated prior to the maximum coverage period, the qualified beneficiary must be notified of the reason for the termination (see page 209).

Adding Family Members

Each qualified beneficiary who is receiving COBRA continuation coverage can add individuals to the insurance plan (such as a newborn child or a new spouse) who join the beneficiary's family on or after the date of the qualifying event, if the plan covering the qualified beneficiary allows active employees to make such additions during an open enrollment period or otherwise.

However, because of the general rule that an individual cannot be a "qualified beneficiary" unless he was covered by the plan at the time of a qualifying event, except in the case of a child (see below) the newly added family member does not become a qualified beneficiary, and so acquires no right to elect continuation coverage should a second qualifying event thereafter occur.

For example, if A, a single employee who elects continuation coverage upon termination of employment thereafter marries and adds his spouse under the plan, his spouse does not become a qualified beneficiary because she was not covered by the plan at the time of the qualifying event (termination of A's employment). Therefore, upon the occurrence of a subsequent qualifying event, such as A's death, the spouse does not acquire the right to elect COBRA continuation coverage.

The exception is the case of a child that is born to or placed for adoption with an employee or former employee while he is receiving continuation coverage. When added to the plan, the child will become a qualified beneficiary and at any time thereafter he can elect the same coverage that is received by dependent children of active employees.

If a qualified beneficiary does not elect to receive continuation coverage, he ceases to be a qualified beneficiary even though he is thereafter added to the plan.

Business Reorganizations

In the case of either a sale of stock or a sale of substantial assets, generally the seller retains the obligation to continue to provide the health insurance to qualified beneficiaries who were receiving COBRA continuation coverage at the time of the sale. However, if in connection with the sale the seller ceased to provide any group health plan to any employee, then the buyer will be responsible for continuing the coverage of such individuals -- if the transaction is either a stock sale, or an asset sale where the buyer continues the business operations without interruption or substantial change.

The foregoing obligations can be modified by contract between buyer and seller.

Waiver of COBRA Rights

The employer can condition a payment for extended coverage upon the waiver by beneficiaries of their COBRA rights. A beneficiary might be required to choose, for example, between receiving either coverage for 6 months, paid for wholly or partially by the employer, or coverage for 18 months, paid for by himself.*

Dual Coverage

COBRA coverage cannot be denied because an otherwise qualified beneficiary has coverage through another group health plan or Medicare prior to COBRA election.

Conversion Privilege

During a 180-day period ending with the expiration of a qualified beneficiary's continuation coverage (18, 29 or 36 months), that beneficiary shall be allowed to implement whatever conversion option is available to active employees under the terms of the health plan.

Sanctions

The employer and the plan administrator are liable for a tax of $110 per day for each individual with respect to whom a violation of the statute occurs. Also, if an employer's violation results in a denial or loss of an individual's right to insurance coverage, the employer will be liable for payment of claims which would have been paid by the insurance, and will be subject to a penalty in the form of an excise tax imposed by the IRS.

Michelle's Law

This federal statute requires that a dependent child be allowed to continue coverage under a group health insurance plan if they otherwise would have lost coverage due to loss of student status because of a medically necessary leave of absence from school.

Michelle's Law will affect plans (insured and self-insured) that link dependent coverage to student status (as example: a dependent is a child under the age of 19, or under 24 if enrolled as a full-time student in an institution of higher education).

In such cases, the plan must allow the dependent to continue coverage upon written certification by a physician stating the dependent is suffering from a serious illness or injury and that a leave of absence (or reduction in student hours) is medically necessary. Coverage must continue for one year or less if coverage under the plan would otherwise terminate. (e.g. if covered parent is terminated).

Group health plans are required to provide notice of this law along with any notice regarding a plan requirement for certifying student status.

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* A waiver by a beneficiary will be ineffective unless he has been fully informed of his COBRA rights and how they will be affected by various contingencies.

Patient Protection and Affordable Care Act

The Patient Protection and Affordable Care Act (PPACA), also referred to as the Affordable Care Act (ACA) is a United States federal statute signed into law on March 23, 2010. The ACA was enacted with the goals of increasing the quality and affordability of health insurance, lowering the uninsured rate by expanding public and private insurance coverage, and reducing the costs of healthcare for individuals and the government. It introduced a number of mechanisms - including mandates, employer penalties, subsidies, and insurance exchanges - meant to increase coverage and affordability. The law also requires insurance companies to cover all applicants within new minimum standards and offer the same rates regardless of pre-existing conditions or sex. In 2012, the United States Supreme Court upheld the constitutionality of the ACA's individual mandate.

Essential Health Benefits

All healthcare plans must provide “essential health benefits” effective January 1, 2014. Essential Health Benefits includes the following category of benefits:

- Ambulatory patient services
- Emergency services
- Hospitalization
- Maternity and newborn care
- Mental health and substance use disorder services, including behavioral health treatment
- Prescription drugs
- Rehabilitative and habilitative services and devices
- Laboratory services
- Preventive and wellness services and chronic disease management
- Pediatric services, including oral and vision care

Minimum Essential Coverage and the Individual Mandate

Effective January 1, 2014 most people will be required to have a healthcare plan that provides “minimum essential coverage,” which includes the following:

- Employer-sponsored coverage (including COBRA coverage and retiree coverage)
- Coverage purchased in the individual market
- Medicare Part A coverage and Medicare Advantage
- Most Medicaid coverage
- Children's Health Insurance Program (CHIP) coverage
- Certain types of veterans health coverage administered by the Veterans Administration
- TRICARE

Minimum essential coverage does not include coverage providing only limited benefits, such as coverage only for vision care or dental care, Medicaid covering only certain benefits such as family planning, workers' compensation, or disability policies.

Regulations provide that “a typical employer plan” would fulfill the minimum essential coverage requirement. In New Jersey, Horizon’s HMO Access HSA Compatible is the benchmark, although it does not include pediatric dental and vision.

Minimum Actuarial Value

Coverage must also provide “minimum value,” which means at least 60% of the total allowed cost of benefits provided under the plan.

Orientation and Waiting Periods

After an individual is otherwise eligible for coverage under the terms of the plan, any waiting period cannot exceed 90 calendar days. Eligibility may include a "reasonable and bona fide" orientation (probationary) period not to exceed one month. In such a case, the waiting period begins on the first day after the orientation period.

Other conditions for eligibility under the terms of a group health plan not based solely on the lapse of a time period are permissible, such as full-time status.

If a group health plan conditions eligibility on an employee regularly having a specified number of hours of service (or working full-time) and it cannot be determined that a newly-hired employee is reasonably expected to regularly work that number of hours (or work full-time) the plan may take a reasonable period of time, not to exceed 12 months, to determine eligibility. In such an event, coverage must be effective no later than 13 months from the employee's start date plus, if the employee's start date is not the first day of the calendar month, the time remaining until the first day of the next calendar month.

If a group plan conditions eligibility on an employee's having completed a number of cumulative hours of service, such cumulative hours-of-service cannot exceed 1,200 hours.

If reasonable under the circumstances, an employee who is terminated and re-hired can be required to meet eligibility and waiting periods anew.

There is a $100 per-affected employee per day penalty for violating the waiting period restriction.

Non-discrimination in health plans

Health plans (fully-insured and self-insured) cannot discriminate with respect to the eligibility to participate in the plan or with respect to the benefits offered under the plan in favor of highly compensated employees.

Highly compensated employees are employees who are (a) one of the five highest paid officers, (b) a shareholder owning more than 10%, or (c) among the highest paid 25% of all employees. These definitions are not mutually exclusive. For instance the five highest paid officers could also be among the highest paid 25%.

For a plan to be considered non discriminatory with respect to eligibility, it must pass one of two numerical "coverage" tests. The two tests are: (1) 70% of all employees are covered under the plan, or (2) the plan covers at least 80% of eligible employees and 70% of all employees are eligible for coverage. If the employer fails either of the above tests, a plan will be considered as providing discriminatory benefits. Some employees can be excluded from the eligibility tests.

They include:

- Employees with less than three years of service at the beginning of the plan year;
- Employees who are younger than age 25 at the beginning of the plan year;
- Part-time or seasonal employees;
- Employees who are covered under a collective bargaining agreement; and
- Nonresident aliens who receive no income from a U.S. source.

In addition to the eligibility rules, all benefits provided to highly compensated employees must also be provided to all other employees. This is called the benefits test. A plan will be considered discriminatory unless all employees, both highly compensated employees and non- highly compensated receive the same benefits. If the group of highly compensated employees receives a greater choice of benefits or more favorable benefits, including higher benefit amounts, lower premiums, or a higher employer subsidy, the group health plan would not pass the benefits test and would be considered discriminatory.

A fully insured plan's failure to comply with the non-discrimination rules will subject the employer sponsoring such a plan to an excise tax of $100 per day for each non-highly compensated who is being discriminated against, up to a maximum of $500,000

Dependent Coverage to Age 26

A health care plan or health care issuer that makes available dependent coverage must make such coverage available for children until they reach 26 years of age. This applies to all insured and self-insured group health plans for plan years beginning on or after September 23, 2010.

No Exclusions Because of Status

Plans cannot condition dependent coverage on whether a child is a tax dependent or a student, or resides with or receives financial support from the parent (compare with New Jersey law on page 216). Surcharges for children under age 26 are disallowed, except where the surcharges apply regardless of the age of the child.

Eligibility

The health care plan or issuer must give children who have not attained age 26 an opportunity to enroll for coverage who lost eligibility under the plan due to reaching an age prior to 26.

An opportunity to enroll must also be given to children who were not first eligible for coverage under a parent's plan because they were under age 26 but older than the age at which the plan stopped covering children.

The plan may not exclude coverage for a child prior to age 26 irrespective of whether that child was previously enrolled in the plan.

In the case of an adult child who is eligible for coverage under the plans of the employers of both parents, neither plan can exclude the adult child on the basis that the adult child is eligible under the other parent's plan.

Plan Benefits

Plans cannot vary benefits based on the age of a child.

Notice

Plans or issuers must give each child an opportunity to enroll that continues for at least 30 days, including written notice of the opportunity to enroll, regardless of whether the plan offers open enrollment and regardless of when any open enrollment period might otherwise occur.

The enrollment opportunity, including written notice, must be provided not later than the first day of the first plan year beginning on or after September 23, 2010. If open enrollment begins and ends before the start of the plan year, that open enrollment period can be used to provide the enrollment opportunity. In subsequent years, dependent coverage may be elected for an eligible child in connection with normal enrollment opportunities under the plan.

Written notice may be provided to an employee on behalf of the employee's child. Notice can also be included with other enrollment materials, provided that the statement is prominent. The following model language can be used to satisfy the notice requirement:

> Individuals whose coverage ended, or who were denied coverage (or were not eligible for coverage), because the availability of dependent coverage of children ended before attainment of age 26 are eligible to enroll in [Insert name of group health plan or health insurance coverage]. Individuals may request enrollment for such children for 30 days from the date of notice. Enrollment will be effective retroactively to [insert date that is the first day of the first plan year beginning on or after September 23, 2010.] For more information contact the [insert plan administrator or issuer] at [insert contact information].

Enrollment

A child enrolling in group health plan coverage must be treated as a special enrollee under the Health Insurance Portability and Accountability Act (HIPAA).

Transitional Rules

If a child qualifies for an enrollment opportunity and the parent is not enrolled but is otherwise eligible for enrollment, the plan must provide an opportunity to enroll the parent, in addition to the child.

If a plan has more than one benefit package option, a child qualifies for enrollment, and the parent is enrolled in one benefit package option, the plan must provide an opportunity to enroll the child in any benefit package option for which the child is otherwise eligible (thus allowing the parent to switch benefit package options).

A child who qualifies for an enrollment opportunity and who is covered under a COBRA continuation provision must be given the opportunity to enroll as a dependent of an active employee (i.e., other than as a COBRA-qualified beneficiary). In this situation, if the child loses eligibility for coverage due to a qualifying event (including aging out of the coverage at age 26), the child has another opportunity to elect COBRA continuation coverage. (If the qualifying event is aging out, the COBRA continuation coverage could last 36 months from the loss of eligibility that relates to turning age 26.)

If an employee who joined a plan prior to the applicability date of the Act, and has a child who never enrolled because the child was too old under the terms of the plan but has not yet turned 26, must be provided an opportunity to enroll the child under this section even though the child was not previously covered under the plan.

If the parent is no longer eligible for coverage under the plan (for example, if the parent has ceased employment with the plan sponsor) as of the first date on which the enrollment opportunity would be required to be given, the plan would not be required to enroll the child.

Patient Bill of Rights

Preexisting Conditions Prohibited

For plan years beginning on or after January 1, 2014, a group health care plan, whether insured or self-insured, including those that are grandfathered, may not impose any preexisting condition exclusion. However, for enrollees who are under 19 years of age, this prohibition becomes effective for plan years on or after September 23, 2010.

No Co-Pays for Preventative Services

In addition to annual check-ups, plans must cover the following list of preventive services for all adults without charging a copayment or coinsurance, regardless of whether the Plan's deductible has been met for the year. This applies only when these services are delivered by a network provider:

1. Abdominal Aortic Aneurysm one-time screening for men of specified ages who have ever smoked
2. Alcohol Abuse screening and counseling
3. Aspirin use to prevent cardiovascular disease for men and women of certain ages
4. Blood Pressure screening for all adults
5. Cholesterol screening for adults of certain ages or at higher risk
6. Colorectal Cancer screening for adults over 50
7. Depression screening for adults
8. Diabetes (Type 2) screening for adults with high blood pressure
9. Diet counseling for adults at higher risk for chronic disease
10. HIV screening for everyone ages 15 to 65, and other ages at increased risk
11. Immunization vaccines for adults--doses, recommended ages, and recommended populations vary:
12. Obesity screening and counseling for all adults
13. Sexually Transmitted Infection (STI) prevention counseling for adults at higher risk
14. Syphilis screening for all adults at higher risk
15. Tobacco Use screening for all adults and cessation interventions for tobacco users

For women:

1. Anemia screening on a routine basis for pregnant women
2. Breast Cancer Genetic Test Counseling (BRCA) for women at higher risk for breast cancer
3. Breast Cancer Mammography screenings every 1 to 2 years for women over 40
4. Breast Cancer Chemoprevention counseling for women at higher risk
5. Breastfeeding comprehensive support and counseling from trained providers, and access to breastfeeding supplies, for pregnant and nursing women
6. Cervical Cancer screening for sexually active women
7. Chlamydia Infection screening for younger women and other women at higher risk
8. Contraception: Food and Drug Administration-approved contraceptive methods, sterilization procedures, and patient education and counseling, as prescribed by a health care provider for women with reproductive capacity (not including abortifacient drugs). This does not apply to health plans sponsored by certain exempt “religious employers” or to closely-held private firms whose owners have a genuine religious objection
9. Domestic and interpersonal violence screening and counseling for all women
10. Folic Acid supplements for women who may become pregnant
11. Gestational diabetes screening for women 24 to 28 weeks pregnant and those at high risk of developing gestational diabetes
12. Gonorrhea screening for all women at higher risk
13. Hepatitis B screening for pregnant women at their first prenatal visit
14. HIV screening and counseling for sexually active women
15. Human Papillomavirus (HPV) DNA Test every 3 years for women with normal cytology results who are 30 or older
16. Osteoporosis screening for women over age 60 depending on risk factors
17. Rh Incompatibility screening for all pregnant women and follow-up testing for women at higher risk
18. Sexually Transmitted Infections counseling for sexually active women
19. Syphilis screening for all pregnant women or other women at increased risk
20. Tobacco Use screening and interventions for all women, and expanded counseling for pregnant tobacco users
21. Urinary tract or other infection screening for pregnant women
22. Well-woman visits to get recommended services for women under 65

For children:

1. Alcohol and Drug Use assessments for adolescents
2. Autism screening for children at 18 and 24 months
3. Behavioral assessments for children at the following ages: 0 to 11 months, 1 to 4 years, 5 to 10 years, 11 to 14 years, 15 to 17 years.
4. Blood Pressure screening for children at the following ages: 0 to 11 months, 1 to 4 years , 5 to 10 years, 11 to 14 years, 15 to 17 years.
5. Cervical Dysplasia screening for sexually active females
6. Depression screening for adolescents
7. Developmental screening for children under age 3
8. Dyslipidemia screening for children at higher risk of lipid disorders at the following ages: 1 to 4 years, 5 to 10 years, 11 to 14 years, 15 to 17 years.
9. Fluoride Chemoprevention supplements for children without fluoride in their water source
10. Gonorrhea preventive medication for the eyes of all newborns
11. Hearing screening for all newborns
12. Height, Weight and Body Mass Index measurements for children at the following ages: 0 to 11 months, 1 to 4 years, 5 to 10 years, 11 to 14 years, 15 to 17 years.
13. Hematocrit or Hemoglobin screening for children
14. Hemoglobinopathies or sickle cell screening for newborns
15. HIV screening for adolescents at higher risk
16. Hypothyroidism screening for newborns
17. Immunization vaccines for children from birth to age 18 —doses, recommended ages, and recommended populations vary
18. Iron supplements for children ages 6 to 12 months at risk for anemia

19. Lead screening for children at risk of exposure
20. Medical History for all children throughout development at the following ages: 0 to 11 months, 1 to 4 years , 5 to 10 years , 11 to 14 years , 15 to 17 years.
21. Obesity screening and counseling
22. Oral Health risk assessment for young children Ages: 0 to 11 months, 1 to 4 years, 5 to 10 years.
23. Phenylketonuria (PKU) screening for this genetic disorder in newborns
24. Sexually Transmitted Infection (STI) prevention counseling and screening for adolescents at higher risk
25. Tuberculin testing for children at higher risk of tuberculosis at the following ages: 0 to 11 months, 1 to 4 years, 5 to 10 years, 11 to 14 years, 15 to 17 years.
26. Vision screening for all children.

Lifetime Limits on Coverage Eliminated

Lifetime limits on "essential health benefits" are prohibited.

“Essential health benefits” include ambulatory patient services, emergency services, hospitalization, maternity and newborn care, mental health and substance use disorder services, prescription drugs, rehabilitation and habilitation services and devices, laboratory services, preventive and wellness services and chronic disease management, pediatric services, including dental and vision care.

Rescissions Prohibited

Beginning on or after September 23, 2014, insurers, insured and self-insured health care plans, will no longer be able to rescind or fail to renew essential health coverage except in cases of fraud or intentional misrepresentation. Where a plan seeks to rescind coverage, at least 30-days advance notice must be given.

Plans may discontinue health coverage that is effective retroactively for failure to timely pay required premiums and employers can discontinue group coverage prospectively.

Choice of Doctors

All plans, whether insured or self insured, must provide notice to covered individuals that they are entitled to designate any available participating primary care provider as their health care provider. Parents may choose any available participating pediatrician for their children.

The following model language can be used to satisfy the notice requirement:

> [Name of group health plan or health insurance issuer] generally [requires/allows] the designation of a primary care provider. You have the right to designate any primary care provider who participates in our network and who is available to accept you or your family members. [If the plan or health insurance coverage designates a primary care provider automatically, insert: Until you make this designation, [name of group health plan or health insurance issuer] designates one for you.] For information on how to select a primary care provider, and for a list of the participating primary care providers, contact the [plan administrator or issuer] at [insert contact information].
> For children, you may designate a pediatrician as the primary care provider.

Required referrals for OB-GYN care are prohibited. The following model language can be used to satisfy the notice requirement:

> You do not need prior authorization from [name of group health plan or issuer] or from any other person (including a primary care provider) in order to obtain access to obstetrical or gynecological care from a health care professional in our network who specializes in obstetrics or gynecology. The health care professional, however, may be required to comply with certain procedures, including obtaining prior authorization for certain services, following a pre-approved treatment plan, or procedures for making referrals. For a list of participating health care professionals who specialize in obstetrics or gynecology, contact the [plan administrator or issuer] at [insert contact information].

Summary of Benefits Coverage

A Summary of Benefits and Coverage (SBC) must be provided by group health plans and health insurers starting with the first open enrollment or plan year.

The SBC must be provided in a consistent four-double-sided-page format with 12-point font. It must also be written in a "culturally and linguistically" appropriate manner and use language that is understandable to the average plan participant and beneficiary. The SBC must address a total of 12 specific required content elements (e.g., descriptions of coverage, cost sharing, limitations or restrictions of coverage, renewability and continuation of coverage provisions, a coverage facts label that includes examples of coverage and related cost sharing, a disclosure statement regarding whether the plan provides minimum essential coverage, etc.) and be provided free of charge.

This requirement applies to all fully insured and self-insured health plans including certain health flexible spending arrangements (FSAs) and stand alone health reimbursement arrangements (HRAs), regardless of grandfathered status. The SBC rules do not apply to health savings accounts (HSAs) or HIPAA-excepted benefits, such as stand-alone dental or vision plans and most FSAs.

An SBC must be provided to each participant or beneficiary who is enrolled in a group health plan. However, the SBC may be provided to the participant on behalf of the beneficiary (including by furnishing the SBC to the participant in electronic form), unless the plan or insurer has knowledge of a separate address for a beneficiary (e.g., a spouse or adult dependent).

For fully insured plans, health insurers are responsible for developing the SBC. For self-insured plans, the plan sponsor (or designated administrator) is responsible for developing the SBC.

Plans must include, in the English versions of SBCs sent to an address in a county in which 10% or more of the population is literate only in a non-English language, a statement prominently displayed in the applicable non-English language clearly indicating how to access the language services provided by the plan or insurer.

Additionally, plans must notify participants no later than 60 days prior to the effective date of any material modification that would affect the content of the most recently provided SBC, unless the change is made in connection with a renewal or reissuance of coverage.

A group health plan or insurer that willfully fails to provide an SBC is subject to a fine of not more than $1,000 per enrollee (or beneficiary if they reside at a known address that is different than the participant) per failure.

Out-of-pocket Maximum/Limit

The maximum out-of-pocket cost limit for 2015 can be no more than $6,600 for an individual and $13,200 for a family. The maximum out-of-pocket cost limit for 2016 can be no more than $6,850 for an individual and $13,700 for a family.

This limit must include deductibles, coinsurance, copayments, or similar charges and any other expenditure required of an individual which is a qualified medical expense for the essential health benefits. This limit does not have to count premiums, balance billing amounts for non-network providers and other out-of-network cost-sharing, or spending for non-essential health benefits.

The out-of-pocket maximum will be adjusted based on increases in the average per capita premium for health insurance coverage

Note: the annual limitation on out-of- pocket maximums will be the same as those that apply in to high-deductible health plans combined with Health Savings Accounts (HSAs).

Health Savings Accounts

Stand-alone Health Savings Accounts (HSAs) are subject to the same annual dollar limit and preventative services under PPACA. As such, they do not comply with the law. If an HRA is integrated with another type of coverage as part of a group health plan, and the other coverage complies with the annual dollar limit and preventative services standards, the combined coverages are lawful. The HSA need not share the same plan administrator or fill a single Form 5500.

Reporting the cost of employer-sponsored health coverage on W-2 Forms

The Patient Protection and Affordable Care Act (PPACA) requires employers that issue 250 or more Forms W-2 to report the cost of employer-sponsored health coverage on the Form W-2 issued to employees starting with the 2012 Forms W-2 that employers are generally required to furnish to employees in January 2013. The purpose of the reporting requirement is to provide useful and comparable consumer information to employees on the cost of their health coverage. It does **not** cause otherwise excludable employer-provided health coverage to become taxable.

Covered Employers

The requirement applies to most employers, including federal, state and local government entities, churches and other religious organizations, and employers that are not subject to continuation coverage requirements under COBRA, to the extent such employers provide applicable employer-sponsored coverage under a group health plan (although employers who only sponsor self-funded group health plan coverage that is not subject to COBRA are not required to report the cost of the coverage on Form W-2).

Small Employer Exemption: Small employers (those that are required to file fewer than 250 Forms W-2 for the calendar year prior to the reporting year) are not subject to the reporting requirement for 2012 Forms W-2, nor subsequent years, until further guidance is issued.

Multiemployer Plans: An employer that contributes to a multiemployer plan is not required to report the cost of coverage under that multiemployer plan. If the only applicable employer-sponsored coverage provided to an employee is provided under a multiemployer plan, the employer is not required to report any amount with respect to that employee.

The cost of coverage

The amount reported includes both the employer's and the employee's contributions towards coverage, regardless of whether the employee paid for the coverage on a pre-tax or after-tax basis. A fully-insured plan can report the premium charged by the insurance carrier. In the case of a self-insured plan, the plan administrator can calculate the premium using either an actuarial method or past cost method.

The reportable amount may be based on the information available to the employer as of December 31, and a corrected Form W-2 need not be provided if an election change occurs that has a retroactive event (e.g., notice of a divorce in the prior year);

The types of coverage reported

The reporting requirement applies to employer-sponsored group health plans (whether fully insured or self-funded), which generally include major medical plans and limited benefit plans (e.g., so-called "mini-med" plans).

The types of coverage not reported

- Employee assistance program (EAP), wellness program, or on-site medical clinic coverage if the employer does not charge a premium to COBRA-qualified beneficiaries with respect to that type of coverage ; however, an employer may include it if desired, provided that the coverage is applicable to employer-sponsored coverage.
- Dental or vision coverage, to the extent it qualifies as a HIPAA-excepted benefit; *
- Long-term care and accident-only or disability coverage;
- Specified disease or illness and hospital indemnity or other fixed indemnity insurance, to the extent that the cost of coverage is paid by the employee on an after-tax basis and the coverage is offered as an independent, noncoordinated benefit;
- Contributions made to an Archer medical savings account (MSA) or a health savings account (HSA) because they are reported separately in box 12 using code R for MSAs and code W for HSAs;
- Employee contributions to a health flexible spending account (FSA). Note: The cost of an employer-funded FSA is reported only if the amount of the FSA for the plan year exceeds the salary reduction elected by the employee for the plan year (in other words, the requirement does not apply to FSA coverage if contributions occur only through employee salary reduction elections); and
- Coverage under a health reimbursement arrangement (HRA); however, an employer may include it if desired.

Terminated Employees

An employer may apply any reasonable method of reporting the cost of coverage provided under a group health plan for an employee who terminated employment during the calendar year, provided that the method is used consistently for all employees receiving coverage under the plan who terminated employment during the plan year and otherwise received coverage after termination of employment.

> **Example 1:** Employee is employed on January 1 and is terminated on April 25. During that entire period and through April 30, employee had coverage that cost $350 per month. Employee elects COBRA continuation coverage for six months following termination from May 1 through October 31, for which the employee pays $350 per month. Employer reports $3,500 as the reportable cost under the plan for the calendar year, covering both the months of employment and the months of COBRA coverage.

*Generally, to be an excepted benefit for purposes of Health Insurance Portability and Accountability Act (HIPAA), the dental or vision coverage must (1) be offered under a separate policy, certificate, or contract of insurance or (2) provide participants with the right not to elect the dental or vision coverage and if they do elect the dental or vision coverage, they must pay an additional premium or contribution for that coverage.

Example 2: Same as Example 1, except that Employer reports $1,400 as the reportable cost under the plan for the calendar year, covering only the four months the employee was employed (January 1—April 25).

Both examples above are a reasonable method of reporting employee's reportable cost under the plan as long as it is applied consistently to all terminated employees.

The Health Insurance Marketplace

Effective January 1, 2014, individuals will be able to purchase minimum essential coverage through the Health Insurance Marketplace. Choices that meet minimum value are categorized as follows:

- Platinum (pays 90% of the value of benefits)
- Gold (80%)
- Silver (70%)
- Bronze (60%)

To make coverage more affordable, individuals may be eligible for a refundable health insurance premium tax credit (premium tax credit) that will subsidize the cost of coverage in the marketplace. Generally, the premium tax credit will be available only to individuals:

- Whose household income for a taxable year is between 100% and 400% of the federal poverty line for the taxpayer's family size, and

- Who are not eligible for other Minimum Essential Coverage, such as Medicare, Medicaid, the Children's Health Insurance Program, and TRICARE. It also generally includes employer-sponsored coverage. However, minimum essential coverage for purposes of the premium tax credit does not include employer-sponsored coverage that is "unaffordable" or that fails to provide "minimum value."

Notices to Employees

Employers covered by the Fair Labor Standards Act (generally those firms with at least one employee and at least $500,000 in annual dollar volume) are required to provide each newly hired and current employee with a notice informing them of healthcare coverage options available through the Health Insurance Marketplace. The US Department of Labor has released two model notices (one to be used by employers who offer insurance and one to be used by employers who do not offer insurance) and well as compliance guidance. Below is a summary of the guidance with links to the model notices.

Providing Notice

Employers must provide a notice of coverage options to each employee, regardless of plan enrollment status (if applicable) or of part-time or full-time status. Employers are not required to provide a separate notice to dependents or other individuals who are or may become eligible for coverage under the plan but who are not employees.

Form and Content of the Notice

Pursuant to the statute, the notice to inform employees of coverage options must include information regarding the existence of a new Marketplace as well as contact information and description of the services provided by a Marketplace. The notice must also inform the employee that the employee may be eligible for a premium tax credit if the employee purchases a qualified health plan through the Marketplace; and a statement informing the employee that if the employee purchases a qualified health plan through the Marketplace, the employee may lose the employer contribution (if any) to any health benefits plan offered by the employer and that all or a portion of such contribution may be excludable from income for Federal income tax purposes.

The notice also requires the employer to affirm that the health plan that it offers meets minimum actuarial value and is affordable.

Timing and Delivery of Notice

Employers are required to provide the notice to each new employee at the time of hiring beginning October 1, 2013. For 2014, the Department will consider a notice to be provided at the time of hiring if the notice is provided within 14 days of an employee's start date.

With respect to employees who are current employees before October 1, 2013, employers are required to provide the notice not later than October 1, 2013. The notice is required to be provided automatically, free of charge.

The notice must be provided in writing in a manner calculated to be understood by the average employee. It may be provided by first-class mail. Alternatively, it may be provided electronically if the requirements of the Department of Labor's electronic disclosure safe harbor are met.

Model Notice

There is one model for employers who do not offer a health plan: http://www.dol.gov/ebsa/pdf/FLSAwithoutplans.pdf

And another model for employers who offer a health plan to some or all employees: http://www.dol.gov/ebsa/pdf/FLSAwithplans.pdf

Employers may use one of these models, as applicable, or a modified version, provided the notice meets the content requirements described above.

Employee Protections

Under the Act, it is unlawful to discriminate or retaliate against any person who receives a premium tax credit or subsidy, who objects to any practice that he or she believes violates an order, rule, regulation or standard under the Act. A person who believes that he or she has been retaliated against or otherwise discriminated against by any person in violation of the Act may, not later than 180 days after the date on which such violation occurs, file (or have any person file on his or her behalf) a complaint with the U.S. Department of Labor alleging such retaliation or discrimination and identifying the person(s) responsible for the unlawful conduct.

The Act does not prohibit an employer from reducing an employee's hours of service in order to avoid a potential employer shared responsibility payment. However, reducing hours of an employee that an employer knows or suspects of receiving a premium tax credit or subsidy may violate the Act if receiving the tax credit or subsidy is a contributing factor in the decision to reduce hours.

The Employer Shared Responsibility Penalty

Applicable large employers (ALEs) are subject to the employer "shared responsibility penalty" for not offering "affordable" health care, or a health care plan that does not provide "minimum essential benefits" or meets "minimum value." An ALE is an employer who employed at least 50 full-time employees* (including full-time equivalent employees) on average during the prior calendar year.

A "full time" employee is one who has on average at least 30 hours of service per week during the calendar month, or at least 130 hours of service during the calendar month.

In general, an "hour of service" means

- Each hour for which an employee is paid, or entitled to payment, **for the performance of duties**, for the employer; and
- Each hour for which an employee is paid, or entitled to payment by the employer for a period **for time during which no duties are performed** due to vacation, holiday, illness, incapacity (including employer paid disability), layoff, jury duty, military duty or leave of absence.

"Full time equivalent" employees are determined by adding together the number of hours of the non-full time employees, to a maximum of 120 hours per month/per employee, and dividing by 120. This calculation should be done for each month of the prior year and the months' totals of full-time and full-time equivalent should be divided by 12 to determine an average.

Employees employed under "common ownership" are combined. Common ownership is determined by such factors as common management, interrelation between operations, centralized control of labor relations, and the degree of common ownership.

Effective dates: January, 2015 for employers with 100 or more full-time employees January, 2016 for employers with 50-99 full-time employees.

Affordability

Coverage is considered "affordable" if the required employee contribution** towards the cost of self-only coverage does not exceed 9.5%*** of the employee's household. Because of the difficulty in calculating "household income," an employer has the option of using one of several "Safe Harbors."

Form W-2 Safe Harbor

Under the Form W-2 safe harbor, an employer could determine affordability by referring to an employee's wages from that employer. Wages for this purpose would be the amount required to be reported in box 1 of Form W-2.

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*All employees, including temporary, are counted when determining ALE status. An employer that exceeds 50 employees only for a limited period and only due to its seasonal workforce will not be considered an ALE.

**Some companies offer an "opt-out" payment to employees who decline employer health coverage. These payments can impact an employee's contribution and therefore affordability of the coverage. An unconditional opt-out payment must be added to the employee's premium contribution and reported on the 1095-C form, whether or not the employee chooses the option. Opt-out payment which are "conditional" – those requiring the employee and his tax family to have group coverage elsewhere – are not included in the employee's premium if certain conditions are met, such as the other group health plan provides minimum essential coverage at minimum value and the employee provides reasonable evidence of other coverage that is not from the individual market or an insurance exchange. (Currently, there are only proposed regulations governing the above).

***9.66% in 2016; 9.69% in 2017

Application of this safe harbor is determined after the calendar year on an employee-by-employee basis. So, the employer would determine whether it met the Form W-2 safe harbor for 2014 by looking at a particular employee's 2014 Form W-2 wages, i.e.: the wages reported on the 2014 Form W-2 that is furnished to the employee in January 2015.

Or an employer could use this safe harbor prospectively at the beginning of the year, to set the employee contribution at a level so that the contribution for each employee would not exceed 9.5 percent of that employee's Form W-2 wages for that year. For example, an employer could automatically deduct 9.5 percent, or a lower percentage, from an employee's Form W-2 wages for each pay period, the IRS noted in the proposed rule.

For an employee who was not a full-time employee for the entire calendar year, the Form W-2 safe harbor is applied by adjusting the employee's Form W-2 wages to reflect the period when the employee was offered coverage. The adjusted wages will then be compared to the employee share of the premium during that period.

For new employees, the amount of the employee's compensation for purposes of the Form W-2 safe harbor is determined by multiplying the wages for the calendar year by a fraction equal to the months the employee was employed. That adjusted wage amount is then compared to the employee share of the premium for the months that coverage was offered to determine whether the Form W-2 safe harbor was satisfied for that employee.

Rate of Pay Safe Harbor

The rate of pay safe harbor was designed to be easy to apply and allow employers to prospectively satisfy affordability without the need to analyze every employee's wages and hours. **For hourly employees**, the rate of pay safe harbor allows an employer to:

- Take the hourly rate of pay for each hourly employee who is eligible to participate in the health plan as of the beginning of the plan year;
- Multiply that rate by 130 hours per month (the benchmark for full-time status for a month); and
- Determine affordability based on the resulting monthly wage amount.

Specifically, the employee's monthly contribution amount (for the self-only premium of the employer's lowest cost coverage that provides minimum value) is affordable if it is equal to or lower than 9.5 percent of the computed monthly wages (that is, the employee's applicable hourly rate of pay multiplied by 130 hours). **For salaried employees,** monthly salary would be used instead of hourly salary multiplied by 130 hours.

An employer may use the rate of pay safe harbor only if, with respect to the employees for whom the employer applies the safe harbor, the employer did not reduce the hourly wages of hourly employees, or the monthly wages of salaried employees, during the year.

Federal Poverty Line (FPL) Safe Harbor

An employer may also rely on a design-based safe harbor using the federal poverty line for a single individual. The FPL safe harbor allows employers to disregard certain employees in determining the affordability of health coverage (that is, employees who cannot receive a premium tax credit because of their income level or eligibility for Medicaid, and therefore cannot trigger an employer's liability for a shared responsibility penalty).

Specifically, employer-provided coverage is considered affordable if the employee's cost for self-only coverage under the plan does not exceed 9.5 percent (indexed annually) of the FPL for a single individual. For households with families, the amount that is considered to be below the poverty line is higher, so using the amount for a single individual ensures that the employee contribution for affordable coverage is minimized. Employers can use the most recently published poverty guidelines as of the first day of the plan year of the applicable large employer member's health plan.

Minimum Actuarial Value

Coverage fails to provide "minimum value" if it fails to pay at least 60% of the total allowed cost of benefits provided under the plan.

Penalties for failure to offer Minimum Essential Coverage

If an employer does not offer health coverage or offers coverage to fewer than 95% of its full-time* employees (70% for 2015), and at least one of the full-time employees receives a premium tax credit to help pay for coverage on a Marketplace, then that employer owes a penalty equal to the number of full-time employees, minus 30 (80 for 2015), multiplied by $2,000 (*Penalty amount to be indexed annually)*.

Example: An employer has 1,000 full-time employees. The employer does not offer health coverage in 2015. An employee enrolls in a health plan through the employee's state-based exchange and receives premium tax credits (these are available if the employees household income is below 400 percent of the federal poverty level). The employer is subject to a penalty for not offering coverage. The annual penalty is $2,000 times the number of full-time employees minus 80. ($2,000 times 920 = $1,840,000).

Penalties for coverage that is not Affordable or fails to provide Minimum value

If an employer offers health coverage to its full-time* employees, but at least one such employee receives a premium tax credit to help pay for coverage on a Marketplace (either because the employer did not offer coverage to that specific employee or because the coverage the employer offered was unaffordable or did not provide minimum value) a penalty applies. The penalty equals the number of full-time employees who receive a premium tax credit multiplied by $3,000 (*Penalty amount to be indexed annually).*

Example: An Employer has 102 employees, offers minimum essential health coverage to all full-time employees, and charges employee annual premiums of $2,500 for single coverage. Seven employees work full-time and have household annual incomes of $20,000 or less. The Employer's group health plan is not affordable to them because the employee premium contribution of $2,500 is more than 9.5 percent of their household annual income ($20,000 x 9.5 percent = $1,900). Five of the seven employees enroll in health plans through their state-based exchange and receive premium assistance tax credits. The Employer must pay an annual penalty of $15,000 ($3,000 x 5 = $15,000).

The amount of penalty is capped at the total number of full-time employees, minus 30 (or 80 in 2015), times $2, 000 (as explained above) to ensure that the penalty for an employer that offers coverage is not more than what would be owed if no coverage was offered.

Employer penalties do not apply if employees have health care coverage provided by Medicare, Medicaid or provided though other employers.

***Important: For the purposes of calculating a penalty, "full-time employee" means an average of 30 "hours of service" per week or 130 hours/month. Full-time equivalents or seasonal workers are not counted.**

PPACA does not define "temporary" employee. Therefore, regardless of an employer's policy, a direct-hire individual who regularly works 30 or more hours on a temporary basis may be classified as full-time unless they are seasonal workers.

A seasonal employee is an employee who is employed in a position for which the customary annual employment period is six months or less, and the employment period should begin in approximately the same part of the year, such as summer or winter.

"Hours of service" means hours paid or paid time off. Employees paid a commission must have reasonable method of crediting hours of service.

Penalty Avoidance: Safe Harbors

Employers may need time to determine if variable hour and seasonal employees are eligible for coverage, when eligibility is based on hours worked. “Safe harbors” allow employers to avoid waiting period penalties, in addition to non-coverage or under-coverage penalties.

Safe Harbor for Ongoing Employees

For ongoing employees, an employer may select a standard measurement period of at least three and not more than 12 consecutive calendar months. If an employee averages at least 30 hours per week during this period, the employee must be treated as a full-time employee during the following Stability Period. To allow for administrative issues and coordinate with the waiting period restriction, the Stability Period may begin up to 90 days after the standard measurement period ends. If the employee is determined to be full- time the Stability Period must be at least 6 months long and no shorter than the standard measurement period. If the employee is determined not to be full-time, the Stability Period must be no longer than the standard measurement period.

Employers may establish measurement and stability periods that differ in length or provide different starting and ending dates for collectively bargained employees, hourly vs. salaried employees, employees of different entities and employees located in different states.

Most employers who wish to take advantage of the safe harbor will likely find it administratively most convenient to establish a 12-month measurement period and a 12-month Stability Period for all employees.

Safe Harbor for New Hires

If it cannot be determined on the employee’s start date whether the employee is reasonably expected to work on average at least 30 hours per week, the safe harbor for new employees provides for an initial measurement period of between 3 and 12 months to determine if the employee averages 30 hours of work per week. The Stability Period may begin 90 days (an administrative period) after the initial measurement period ends. But the initial measurement period and the administrative period cannot extend beyond the last day of the first calendar month beginning on or after the first anniversary of the employee’s start date.

For example, for an employee hired on March 2, 2013, the initial measurement period and any administrative period cannot extend beyond April 30, 2014. Additionally, if an employee is determined not to be full-time, the Stability Period cannot be more than one month longer than the initial measurement period.

This safe harbor also applies to seasonal employees who may work more than 30 hours per week for a seasonal period and less thereafter.

Premium Rebates

Health insurance companies are required to issue consumer rebates for non-compliance with the Affordable Care Act. With employer-purchased plans, employers will receive the rebates directly on behalf of the plan participants and then must be responsible for payments.

Employers must decide how much of the rebate belongs to the Plan (employer) and how much belongs to the participant (employee). In a simple case, this allocation can be based on the manner in which the employer and employee have shared in the cost of health care. The portion retained by the employer is not considered a plan asset and may be used at the discretion of the employer.

Payments to participants must be made within 90-days from the employer's receipt of the rebate and will be taxable income according to the IRS guidance. Accordingly, rebates will be wages for purposes of withholding taxes and compensation under most retirement plans.

As an alternative to issuing a check to participants, employers may reduce an employee's health care premium contribution for a payroll period. This approach has the same effect as the issuance of a check, resulting in an additional wages for withholding purposes.

Employers must decide whether to issue checks to employees or to utilize the offset approach.

If the amount of a premium rebate is minimal, an employer may determine that the cost of issuing checks will exceed the amount of the checks. In these situations, employers must determine the manner in which to use the rebates, such as for wellness or other health programs.

IRS Reporting and Statements

Employers, plan sponsors and insurers are required to report certain plan and coverage information to employees and the IRS in order to establish whether the employer shared responsibility penalties are triggered, whether an individual satisfies the individual mandate and whether an individual is eligible for a premium tax credit when purchasing a health plan through the Marketplace.

Statements to Employees

Applicable Large Employers (ALE) must complete IRS form **1095-C** for every full-time employee, regardless of whether an offer of health insurance coverage was made. A form must be complete even if the employee was full-time for only one-month of the year. Forms must be furnished to employees on or before January 31st, coinciding with the furnishing of form W-2.

Large employers offering health coverage through a self-insured health plan must complete Form 1095-C for any employee who enrolls in the plan, whether or not the employee is full-time for any month of the calendar year.

Small employers offering a self-insured health plan (including MEWAs) must complete IRS form **1095-B** for each insured individual.

Statements to the IRS

IRS form **1094-C** is a summary transmittal form which must be completed by ALEs and submitted to the IRS along with copies of each 1095-C form completed. IRS filings must be completed by no later than February 29th for paper filing or March 31st for electronic filing (NOTE – employers filing 250 or more 1095-C forms MUST file electronically).

Small employers offering a self-insured health plan must complete IRS form 1094-B to be transmitted to the IRS along with copies of each 1095-B form completed.

Mandated Health Insurance--NJ Law

Continuation Upon Total Disability

The New Jersey insurance law requires that group health insurance policies "delivered or issued for delivery" in New Jersey shall provide that employees who would otherwise lose coverage due to termination of employment* as a result of total disability shall be entitled to have the insurance continued in force for themselves and their covered dependents, subject to certain conditions.

An insurance policy covering New Jersey employees is considered to have been "delivered or issued for delivery" in this state unless it was issued outside of New Jersey to a multi-facility employer who had a facility in the state of issuance, and the policy provisions are uniform among all the establishments covered by the policy.

The statute does not apply to self-insured health plans. It is also inapplicable if the insurance carrier does not have the right to cancel the policy unilaterally.

The right to continue coverage is subject to the following conditions:

1. The employee must have a "total disability," which exists only if he is completely unable, because of sickness or injury, to engage in any gainful occupation for which he is "reasonably fitted by education, training, or experience."

2. The employee must have been continuously insured for 3 months prior to his termination.*

3. The employee may be required to pay for the insurance, but at not more than the group rate.

4. At least 31 days before coverage would expire (or as soon thereafter as is reasonable) he must notify the employer, in writing, of his intention to continue the coverage, and make the first payment of the premium.

5. Continuation coverage provided to a Medicare recipient shall be subject to any nonduplication-of-benefits provision in the insurance policy.

Coverage which is being continued on a dependent of an employee may be terminated if the employee ceases to be totally disabled or if the dependent becomes employed and eligible for health insurance under another group plan.

Continuation rights apply to all health-care expenses provided under the insurance policy, including dental and vision care, and prescription drugs.

A notification of the right to continue the insurance shall be included in a certificate of coverage, which is to be furnished by the insurance carrier and distributed to each employee.

The primary responsibility for providing this extended insurance coverage rests with the insurance carrier, not the employer. However, if an employee was unaware of his rights because of the employer's failure to distribute a certificate of coverage provided by the carrier, and as a result the insurance is cancelled, the employer will be liable for the payment of the benefits.

Continuation Upon Death

The New Jersey insurance law also provides that a group health insurance policy which covers employees and their dependents must permit the dependents to continue the coverage for at least 180 days after the death of an insured employee, upon payment of the "appropriate premium", subject to the policy provisions as to termination of the dependents' coverage for reasons unconnected with the employee's death.

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* The New Jersey Department of Insurance interprets "termination" as including leave of absence.

Continuation Upon Loss of Dependent Status

Group health insurance plans issued or renewed in New Jersey on or after May 12, 2006 must allow adult children to continue as dependents on their parent's health plan until age 31, if those individuals would otherwise lose coverage under the plan at a specific age. Plans covered are health benefits plans and stand alone prescription drug plans, but not dental only plans. Self-insured plans are not covered.

Eligibility

An eligible "dependent" means an insured employee's child who:

1. is less than 31 years of age;
2. is unmarried;
3. has no dependent of his/her own;
4. is a resident of this state or is enrolled as a full-time student at an accredited institution of higher education; and
5. is not actually provided coverage under any other group or individual health benefits plan, or Medicare

Election

A dependent whose coverage is terminated under the plan because they reached a specific age, may make a written election for coverage to continue until their 30th* birthday:

- within 30 days prior to losing coverage due to a specific age;
- within 30 days after meeting the eligibility requirements for a "dependent" (Interpretive note: this means an individual may re-establish eligibility multiple times if circumstances change prior to their 30th birthday); or
- during an open enrollment period.

Coverage must be identical to the coverage previously provided to that dependent and cannot be conditioned upon evidence of insurability. If coverage is modified under the policy for dependents generally, this extended coverage shall also be modified in the same manner.

The insurer may require premium payment by the insured employee or the dependent. The premium shall not exceed 102% of the applicable portion of the premium previously paid for that dependent's coverage under the policy. Such premiums may be made monthly, and will be considered timely if made within 30 days after the due date. There is no requirement that an employer pay all or part of the cost of coverage for a dependent provided under this law. Additionally, an employer is not required to collect the premium from the dependent or through payroll deduction. Procedures can be agreed to between the carrier and the employer.

Coverage for a dependent will end when a dependent fails to meet the eligibility requirements, fails to make a premium payment, or when the insured parent loses coverage under the policy.

Notice

Notice regarding this extended dependent coverage shall be provided to an insured employee by the insurer.

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*Although coverage can remain in effect until a dependent turns 31, the cut-off for electing coverage is the dependent's 30th birthday.

Continuation Upon Termination or Reduction in Hours (Small Employers)

By state law, every policy of group health insurance issued to a "small employer" not otherwise covered by COBRA (20 or more employees) in New Jersey shall provide that an employee and his spouse and dependents, may elect to continue the insurance for up to 18 months for himself where the coverage would have been lost due to termination of employment for a reason "other than cause" (not defined) or due to reduction in the employee's weekly hours of work to fewer than 25. A spouse and dependents could continue coverage for 36 months if coverage would have been lost due to the death of the employee, divorce, or a dependent losing dependent status under the plan. An employee could also extend coverage for 29 months if he was determined disabled under the Social Security Act at any time during the first 60 days of continuation coverage.

1. A "small employer" is defined as one who had at least 2, but not more than 49, employees on 50% or more working days in the preceding calendar quarter, the majority of whom worked in New Jersey.

2. These provisions do not apply to persons who are eligible for COBRA continuation coverage.

3. Employees must be notified of their continuation rights by the insurance carrier in the certificate of coverage once they become covered under the group health policy. The employer must *also give notice at the time of the "qualifying event"*, (e.g. termination, reduction in hours). The employee, spouse or dependent must make a written election for continuation coverage within 30 days after the qualifying event.

4. The employer may require payment of 102% of the gross premium. No premium payment shall be due before the 30th day after election of continued coverage, but subsequent payments must be made within 30 days after a specified due date; otherwise, the coverage will cease. In the case of continuation coverage due to disability, the required payment can be 150% of the gross premium.

5. Coverage of a person whose insurance is being continued will end if that person becomes eligible for Medicare, or becomes covered under another group health plan which does not contain a preexisting-condition exclusion which is applicable, or continues to be applicable, to that person.

6. Dental and vision care insurance need not be continued where such coverage is provided separate from the basic health insurance.

Qualified Medical Child Support Orders

Federal law requires health plan coverage to be extended to a dependent child in response to a "qualified medical child support order."

This is a court order that requires a parent to enroll a child in an employer-provided group health plan in which the parent is a participant. Typically, such an order is issued where the child's parents are divorced, and it is sought by the custodial parent, to be enforced against the other parent.

To be "qualified" (and enforceable) the order must (1) state the names and last known addresses of the health plan participant and the child, (2) provide a reasonable description of the type of coverage to be provided to the child by the plan or the manner of determining the type, and (3) specify the period to which the order applies and each health plan to which it applies.

The order may not require a health plan to provide any type or form of benefit, or any option, which is not otherwise generally available under the plan. (For example, it could not require a plan to cover a child if the plan provided only single coverage.)

When a medical child support order is received by a plan, the plan administrator shall promptly notify the named parent and child of its receipt and of the procedures for determining whether it is a "qualified" order. Within a reasonable period of time the administrator shall inform them of his determination.

If a court order names an employee who is not enrolled in a group health plan but is otherwise eligible to enroll, and the plan administrator determines that the order is qualified, the health plan must provide coverage to the child. If the plan requires that the employee must enroll in order for the child to have coverage, the plan administrator is required to enroll both.

Written procedures must be incorporated in the plan for making the determination and for providing the notification of such procedures.

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Genetic Information Nondiscrimination Act

General

The same general provisions of the Civil Rights Act of 1964 apply to the Genetic Information Nondiscrimination Act (GINA).

Under GINA it is unlawful to fail or refuse to hire or to discharge or otherwise discriminate against any individual with respect to his "compensation, terms, conditions, or privileges of employment" because of “genetic information” with respect to an employee. It is also unlawful for an employer to limit, segregate, or classify employees that would deprive or tend to deprive any employee of job opportunities or adversely affect the status of an employee because of genetic information.

Definitions

“Genetic Information” with respect to any individual means information 1) about such individual’s genetic tests, 2) the genetic tests of family members of such individual, and 3) the manifestation of a disease or disorder in family members of such individual (which includes a first, second, third and fourth-degree relative).

Genetic information does not include information about the sex or age of any individual.

“Genetic test” means an analysis of human DNA, RNA, chromosomes, proteins, or metabolites that detects genotypes, mutations, or chromosomal changes.

A genetic test does not mean an analysis of proteins or metabolites that does not detect genotypes, mutations, or chromosomal changes.

“Genetic Services” means a genetic test, genetic counseling, or genetic education.

Permissible Uses of Genetic Information

An employer may acquire or use genetic information with respect to an employee or a family member of an employee under other circumstances, including, but not limited to:

1. where the employer offers health and genetic services as part of a wellness program,
2. the employee provides prior, knowing, voluntary, and written authorization,
3. where the information involved is to be used for genetic monitoring of the biological effects of toxic substances in the workplace and certain other conditions are met, and
4. where the employer conducts DNA analysis for law enforcement purposes as a forensic laboratory.

Privacy Protections and Confidentiality

To the extent that an employer possesses genetic information about an employee, such information must be maintained on separate forms and in separate medical files and treated as a confidential medical record. Such information cannot be disclosed, except in compliance with the Family Medical Leave Act (FMLA) or under State family and medical leave laws; under a court order, provided that the employee is informed; under federal regulations governing health research; or under federal, state, or local rules concerning contagious diseases.

Mandatory Notice to Health Care Providers

Medical examinations

In all cases where an employer requests a health care professional to conduct an employment -related medical examination on the employer’s behalf, including pre-employment, fitness for duty, and return to work medical examinations, the employer must tell health care providers not to collect genetic information, including family medical history, to determine the ability of the employee to perform the job, and must take reasonable measures within its control if it learns that health care providers are requesting genetic information during medical examinations.

Safe Harbor Notice for FMLA and other medical inquiries where Genetic Information may be inadvertently disclosed

FMLA – Employee's own serious health condition

To take advantage of GINA's "safe harbor" when an employer may inadvertently obtain genetic information, the a following notice can appear as an addendum on a separate sheet of paper when requesting health-related information about the employee under the FMLA or other disability leave policy:

> The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of employees or their family members. In order to comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. "Genetic information," as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.

Alternative language may also be used, as long as individuals and health care providers are informed that genetic information should not be provided.

If an employer fails to give written or verbal notice, it may nonetheless establish that a particular receipt of genetic information in response to a request for medical information was an inadvertent acquisition if the employer's request was not made in a way that was "likely to result in obtaining genetic information."

ADA – Reasonable accommodations and direct threat

Requests for medical-related information are often made under the ADA or the New Jersey Law Against Discrimination to evaluate 1) a request for a reasonable accommodations, 2) whether a medical condition or disability is impairing, or may impair, an employee's ability to perform his/her job, or 3) whether an employee's medical condition poses a direct threat.

Assuming that the employer takes care to narrow its request for medical information consistent with the ADA, the same considerations pertaining to the FMLA apply. Note: If the employer is unsure whether its request is sufficiently narrow, it should provide a mandatory notice to the health care professional.

No Notice Required – caring for an ill family member

Individuals requesting leave to care for a seriously ill family member under the FMLA or similar state law may be required to provide family medical history (for example, when completing the certification form required by the FMLA.). An employer that receives family medical history under these circumstances would not violate GINA and no GINA notice is required.

This exception also applies to an employer that is not covered by the FMLA or similar state law but that has a policy allowing for the use of leave to care for ill family members, as long as that policy is applied evenhandedly by requiring all employees seeking leave to provide documentation about the health condition of the relevant family member.

Family medical history received from individuals requesting leave pursuant to the FMLA, similar state law, or company policies, is subject to GINA's confidentiality requirements and must be placed in a separate medical file and treated as a confidential medical record.

Health Insurance Portability and Accountability Act (HIPAA)

GINA does not limit the rights or protections under HIPAA (see page 222).

State Laws

The New Jersey Law Against Discrimination prohibits discrimination based on genetic information. Nothing in GINA prohibits a state from providing equal or greater protection.

Workers' Compensation

Nothing in GINA limits or expands the protections, rights, or obligations of employers or employees under applicable workers' compensation laws.

Medical information that is not genetic information

An employer does not violate GINA when it obtains, uses or discloses medical information that is not genetic information. Note: Other laws, including but not limited to the FMLA ADA, and HIPPA may apply.

Poster

GINA requires employers to post in conspicuous places within the workplace a notice that summarizes GINA for employees and applicants. Failure to post the required notice will result in a fine of not more than $525 for each separate offense.

Enforcement and Remedies

Enforcement and legal remedies are the same as those under the Civil Rights Act of 1964, although a claim for "disparate impact" is barred.

Privacy of Personal Health Information

The Health Insurance Portability and Accountability Act (HIPAA) establishes safeguards to protect the security and confidentiality of medical information, guarantees individuals' rights, and protects against the misuse or disclosure of health information.

Covered Entities

Covered entities are 1) health plans, including self-insured and fully-funded group health plans, with 50 or more participants or with fewer than 50 participants that are administered by another entity; 2) health care providers; and 3) health care clearinghouses.

"Group health plan" means an employee welfare benefit plan as defined by the Employee Retirement Income Security Act of 1974 (ERISA).

In short, only the few insured or self-insured plans that have less than 50 participants and are self-administered are excluded from the rules.

Not Covered

Excluded from the privacy rules are policies, plans or programs that provide or pay the cost of certain benefits, including workers' compensation and automobile insurance plans, property and casualty insurance health plans, disability income insurance plans, fixed indemnity illness plans and long-term care plans.

Discount or membership incentive programs that are not employee welfare plans as defined by ERISA are excluded from the privacy rules.

Dental and Vision Plans

Plans that provide dental and vision benefits may be covered group health plans, to the extent that they are employee welfare plans under ERISA and directly and exclusively provide "health care," ie: care, services or supplies related to the health of an individual.

Employee Assistance Programs

EAPs may be a covered group health plan to the extent that they are employee welfare benefit plans under ERISA and provide health care.

Protected Health Information

"Protected health information" means information created, maintained or received by a health care provider, health plan or health care clearinghouse that relates to a person's past, present or future physical or mental health condition, or past, present or future payment for the provision of health care to an individual.

Protected health information also includes genetic information (see Genetic Information Nondiscrimination Act).

Protected health information can exist in any form, including, but not limited to, verbal discussions, paper documents or electronically.

Restrictions on Use and Disclosure of Health Information-In General

Generally, covered entities are not permitted to use or disclose protected health information unless authorized by the privacy rules. While neither employers nor plan sponsors are covered directly by the privacy rules, plan sponsors may perform certain functions that are related to the functions of group health plans. For example, plan sponsors may receive protected health information from the group health plan, health insurance issuer or HMO for the purpose of administrating the plan. In this case, plan sponsors must amend plan documents and implement policies and practices to safeguard and protect health information.

Plan Administration and Disclosure of Health Information to the Plan Sponsor

The group health plan may permit disclosure of protected health information by the plan, an insurance carrier or HMO to a plan sponsor for the purpose of administering the plan. Plan administrative functions include quality assurance, claims processing and payment, auditing, monitoring and management of carve-out plans, such as dental or vision. Enrollment functions by the plan sponsor are not considered plan administration functions.

Notice of Privacy Rights

Where the plan sponsor receives personal health information for the purpose of performing administrative functions, notice of privacy rights must be given to plan beneficiaries. The notice must be in writing and in plan language and must be provided at enrollment, upon request and every three years. The notice must describe how health information can be used and under what circumstances it can be disclosed, ie: for plan administration functions.

This notice must prominently display the following: THIS NOTICE DESCRIBES HOW MEDICAL INFORMATION ABOUT YOU MAY BE USED AND DISCLOSED AND HOW YOU CAN GET ACCESS TO THIS INFORMATION. PLEASE REVIEW IT CAREFULLY.

The notice must contain 1) a description, including at least one example, of the types of uses and disclosures that the health plan is permitted to make, and 2) a statement that other uses and disclosures will be made only with the individual's written authorization and that the individual may revoke such authorization in writing.

A separate statement must inform the individual that the group health plan, health insurance issuer or HMO, may disclose protected health care information to the plan sponsor.

The notice must also contain a statement of the individual's privacy rights, including 1) the right to review health information; 2) to request restrictions on certain uses and disclosures of protected health information, including a statement that the group health plan is not required to agree with the requested restriction; 3) the right to amend protected health information; and 4) the right to receive an accounting of disclosures of protected health information.

The notice must also contain a statement that the individual may file a complaint with the group health plan or the U.S. Department of Health and Human Services and that the individual will not be retaliated against. The notice must also contain the name and telephone number (or the office) of a person to contact for further information, as well as the effective date of the notice.

Notice Not Required

If the plan sponsor does not receive or use protected health information, for example, when the plan's administration is out-sourced to a third-party plan administrator, no notice is required.

Amending Plan Documents

In order for group health plans to permit the disclosure of protected health information to the plan sponsor, the plan sponsor must amend the plan documents, including the Summary Plan Description (SPD), to:

1) describe the permitted uses and disclosures of protected health information;

2) specify that disclosure is permitted only upon receipt of a certification from the plan sponsor that the plan documents have been amended and the plan sponsor has agreed to certain conditions regarding the use and disclosure of protected health information;

3) describe those employees or classes of employees or other persons under the control of the plan sponsor to be given access to health information, including persons who receive such information relating to payment or other matters pertaining to the group health plan in the ordinary course of business;

4) restrict the access to, and use by, such employees or other persons to the administrative functions of the group health plan; and

5) provide an effective mechanism for resolving any issues of noncompliance.

Any employee of the plan sponsor who receives protected health information for payment, health care operations or other matters related to the group health plan must be identified in the plan documents either by name or function. Since individuals employed by the plan sponsor may change frequently, the group health plan should describe such individuals in a general manner. Any disclosure to employees or classes of employees not identified in the plan documents is not a permissible disclosure. To the extent a group health plan does have its own employees separate from the plan sponsor's employees, as employees of a covered entity (i.e. the group health plan), they also are bound by the permitted uses and disclosures of this rule.

Amendment Not Required

If the plan sponsor does not receive or use protected health information, amending the plan documents is not required.

The Plan Sponsor's Certification

Plan sponsors have access to protected health information only to the extent that group health plan's do and are permitted to use or disclose health information only as would be permitted by group health plans. As noted, the rules require the plan sponsor to agree to follow use and disclose criteria. The plan sponsor evidences this agreement with a signed certification.

The certification that must be given by the plan sponsor to the group health plan for the purpose of receiving protected health information must affirm that the plan sponsor agrees to:

a) not use or further disclose the health information other than permitted or required by the plan documents or as required by law;

b) ensure that any agents, including subcontractors, to whom it provides health information agree to the same restrictions and conditions that apply to the plan sponsor;

c) not use or disclose health information for employment-related actions and decisions or in connection with any other benefit or employee benefit plan of the plan sponsor;

d) report to the group health plan any use or disclosure of health information inconsistent with privacy regulations;

e) provide access to individuals to inspect and obtain a copy of their own health information;

f) make available to individuals their own health information for amendment;

g) make available to individuals their own health information and to provide an accounting of any disclosures made within six years prior to the date the request is made;

h) make its internal practices, books, and records relating to the use and disclosure of health information received from the group health plan available to the Secretary of Health and Human Services for purposes of determining compliance;

i) if feasible, return or destroy all health information received from the group health plan and retain no copies or, if not feasible, limit further uses and disclosures; and

j) ensure and provide for adequate separation between the group health plan and the plan sponsor.

Certification Not Required

Plan sponsors that do not receive or use protected health information are not required to execute and submit the certification to the group health plan.

Implementing Privacy Policies and Practices

As noted above, before receiving protected health information from a group health plan, insurance carrier or HMO for the purposes of administering the plan, the plan sponsor must promise, by way of a certification, that it will follow and implement use and disclosure rules and to safeguard the privacy of health information. Among the policies and practices listed in the certification are making available protected health information, amending protected health information, and providing an accounting of protected health information.

1. Making Health Information Available: With certain exceptions, an individual has a right to access and inspect, and to obtain a copy of, protected health information about the individual. The group health plan and/ or plan sponsor may require the notice to be in writing and must act on the request within 30 days.

If the request is denied, a written explanation as to the reasons for the denial must be given to the individual. Upon denial of the request, the individual has the right to have the denial reviewed by a licensed health care professional who is designated by the group health plan.

2. Amending Health Information: With certain exceptions, an individual has a right to have the group health plan and/or plan sponsor amend protected health information. Such a request may be required to be in writing and must be acted on within 60 days. If amended, persons identified by the individual or persons known by the plan and/or sponsor as having received the health information must be informed of the amendment. If the request to amend the health information is denied, the denial must be in writing and in plain language. Upon denial, the individual has a right to submit a statement of disagreement, which the plan and/or sponsor may rebut. A a copy of the individual's statement of disagreement, or a summary of the statement, and rebuttal must be appended to the health information record. The individual must also be informed of the right to file a complaint to the U.S. Department of Health and Human Services.

3. Accounting of Health Information Disclosures: With certain exceptions, an individual has the right to receive an accounting of disclosures of protected health information made by a group health plan and/or plan sponsor within 6 years of making the request. If such a request is made orally, the plan and/or sponsor must document the request and provide the accounting within 60 days of the request. One 30-day extension is permitted.

Disclosures Not Related to Plan Administration

Plan sponsors may not engage in administrative functions but may still require health information for other reasons, such as for modifying, amending or terminating a plan or for evaluating bids. These are known as "settlor" functions. A group health plan that is providing insurance may disclose only "summary health information" to a plan sponsor for settlor functions, i.e.: to allow the plan sponsor to shop for replacement coverage, or to allow the plan sponsor to consider changing or terminating group health coverage. Summary health information is information that summarizes claims history, claims expenses, or types of claims experienced by individuals for whom the plan sponsor has provided health benefits under a group health plan, provided that specified identifiers, such as name, address, social security number and account number, are not included, except that geographic subdivisions smaller than a state can be aggregated to the level of a 5-digit zip code. This type of disclosure can be made without the submission of the certification by the plan sponsor.

Administrative Compliance by Covered Entities

While degrees of compliance may vary according to size and resources, covered entities must:

1. identify a privacy official who is responsible for developing policies and procedures;

2. designate a contact person or office who is responsible for receiving complaints and who is able to provide additional information;

3. train all members of the workforce on the policies and procedures with respect to protected health information no later than the compliance date and within a reasonable time for all new hires;

4. establish appropriate administrative, technical and physical safeguards to protect the privacy of health information;

5. establish a process for making and receiving complaints;

6. establish appropriate sanctions against employees that violate privacy policies and procedures;

7. mitigate, to the extent possible, any harmful effect that is known from the unauthorized use or disclosure of health information;

8. to refrain from coercion, retaliation or discrimination against an individual that complains about privacy violations; and

9. establish a record retention policy.

Administrative Compliance Not Required

However, a group health plan that provides health benefits only through an insurance contract and, therefore, does not create, maintain or receive protected health information (except for summary information described above) does not have to meet the administrative requirements above.

Non-Waiver of Rights

Further, in all circumstances, a covered entity can not require individuals to waive their privacy rights as a condition of treatment, payment, enrollment in a health plan, or eligibility for benefits.

Disclosures to Third-Party Administrators (Business Associates)

A covered entity may disclose protected health information to third-party administrators (business associates) for the purposes of plan administration, or may allow a business associate to create, maintain or receive health information on behalf of the covered entity. This typically occurs when a group health plan out-sources the plan's administration to a third-party plan administrator. However, in such cases, the business associate must give contractual assurances to the group health plan that it will, among other things, safeguard health information, use or disclose it for permissible reasons, and guarantee the privacy rights of individuals. The U.S. Department of Health and Human Services has published a model Business Associate Contract for guidance.

Workers' Compensation and Medical Surveillance

Generally, the rule requires a person's written consent before individualized health information can be disclosed by a covered entity, including a health care provider. However, written consent is not required if the health care provider is a company doctor (i.e.: employed by the employer), or where the health care is being provided at the request of the employer to 1) conduct an evaluation relating to medical surveillance of the workplace, or 2) to evaluate whether an individual has a work-related illness or injury. However, if health care is provided on the worksite by the employer, the employer must post a notice explaining privacy rights in a prominent place at the location.

ADA, FMLA and Medical Examinations

Generally, a group health plan or health care provider can not disclose protected health information to an employer absent an authorization from the individual. Likewise, health information received by the employer relating to pre-employment physical examinations, fitness for duty, and drug and alcohol tests are subject to the individual's authorization. However, in these cases, employment decisions can be conditioned on the individual's authorization to release health information to the employer.

Helping Employees with Benefit Claims

An employer may help its employees with health care benefit claims. However, an insurer, health maintenance organization or third-party administrator will require an authorization signed by the employee before sharing information with the employer. The need for such authorization may be avoided if the employer is otherwise required to amend its plan documents to comply with the privacy rules and the amendments expressly permit this type of disclosure necessary for this type of employee assistance.

Enforcement and Penalties

The Office of Civil Rights within the US Department of Health and Human Services has authority to enforce the privacy rules. A person who believes the rule has been violated may file a complaint with the Office on Civil Rights within 180 days of when the person knew or should have known the violation occurred.

The Office may conduct an investigation and/or conduct a compliance review, followed by either an informal settlement conference or the issuance of written findings documenting the noncompliance.

Penalties include $100 per violation, not to exceed $25,000 and fines and imprisonment for intentional violations.

Non-Discrimination and Retaliation

The rules prohibit discriminating or retaliating against any person for exercising any right under the rules.

Wellness Programs

HIPAA prohibits discrimination against health plan participants and beneficiaries based on "health status-related factors." These factors include medical condition, claims experience, receipt of health care, medical history, genetic information, evidence of insurability, and disability. In many cases, however, the essence of a wellness program is to discriminate against plan participants, based on health status, by giving rewards to employees who satisfy a standard related to a health factor or who attain or maintain a certain health outcome to receive a reward, such as not smoking, attaining certain results on biometric screenings, attaining a certain body-mass index, blood pressure or glucose level, or meeting a target for weight loss or exercise. These wellness programs are considered "health-contingent" programs.

Health-Contingent Wellness Programs

Health-contingent wellness programs are typically part of a self-insured health care plan that is governed by a summary plan description. Fully-insured plans purchased by smaller employers could also implement a health-contingent wellness programs, typically through the plan administrator.

HIPAA provides that a health plan can vary a deductable, co-payment or co-insurance as a reward under a health contingent wellness program as long as the following requirements are met:

1. Frequency of Opportunity to Qualify

   The program must give individuals eligible for the program the opportunity to qualify for the reward at least once a year.

2. Size of Reward

   The reward under the program, when added to all other program rewards, which are based on health status-related factors, may not exceed 20% 30% of the total cost of employee-only coverage under the employer's health plan. , taking into account both employer and employee contributions toward the cost of coverage. To reduce smoking the reward can be as high as 50%.

   If spouses or beneficiaries participate in the wellness arrangement, this reward can be increased to 30% of the total cost of their coverage as well.

   The reward limit is based on total cost of the relevant coverage, not just what employees pay for their share of coverage. The reward can come in the form of discounts or rebates of premiums, waivers of all or part of a cost-sharing mechanism under the plan (such as deductibles, co-payments or coinsurance), the absence of a surcharge, or the value of a benefit, which would otherwise not be provided under the plan.

   This limitation is imposed to avoid having a reward so large that it has the effect of denying coverage or creating too heavy a financial burden on individuals who do not meet initial wellness program standards that are related to a health factor.

3. Uniform Availability and Reasonable Alternative Standards

   A reward must be available to all "similarly situated" individuals.
   If someone's medical condition keeps him or her from achieving a reward under the program, or if it is medically inadvisable for him or her to try to achieve the reward, then an alternative way to achieve the reward must be made available. Generally, the costs of an alternative are incurred by the employer. The alternative need not be available in advance but must be provided upon an individual's request.

   If necessary, the wellness program may require verification if reasonable under the circumstances, including a statement from an individual's physician, unless the condition is known or obvious. For example, the health care

plan may already know the individual's health condition and therefore it would not be reasonable to require verification.

4. Reasonable Design

Programs must be reasonably designed to promote health or prevent disease. Thus, the program must be designed so that it has a "reasonable chance" of improving health, is not overly burdensome, is not a subterfuge for discrimination based on a health factor, and is not "highly suspect" in the method chosen to promote health. A plan is not reasonably designed unless it makes available to all individuals who do not meet the standard a different, reasonable means of qualifying for the reward.

A plan can always waive a standard as an alternative.

Notice of Other Means of Qualifying for the Reward

Plan materials describing the terms of the program must disclose the availability of the reasonable alternative standard for similarly situated individuals, or disclose that the standard will be waived. The following language can be used:

"Your health plan is committed to helping you achieve your best health status. Rewards for participating in a wellness program are available to all employees. If you think that you might be unable to meet a standard for a reward under this wellness program, you might qualify for an opportunity to earn the same reward by different means. Contact us at [insert contact information] and we will work with you to find a wellness program with the same reward that is right for you in light of your health status."

Participatory Wellness Programs

The following participatory wellness programs need not comply with the above referenced standards since they already comply with HIPAA (they do not discriminate on the basis of "health status-related factors":

- A program that reimburses all or part of the cost for memberships in a fitness center.
- A diagnostic testing program that provides a reward for participation and does not base any part of the reward on testing outcomes.
- A program that encourages preventive care by waiving co-payments or deductibles under a group health plan for the cost of such programs as prenatal care or well-baby visits.
- A program that reimburses employees for the cost of smoking cessation programs without regard to whether the employee quits smoking.
- A program that rewards employees for attending a monthly health education seminar.

Children's Health Insurance Program Reauthorization Act (CHIPRA or CHIP)

Several states, including New Jersey, provide premium assistance for the purchase of an employer's group health plan coverage to certain individuals under a Medicaid or "CHIP" program. In order to determine whether an individual qualifies for this assistance, the State may reach out to the employer for information regarding your plan.

Under the CHIP program, group health plans also must offer special enrollment opportunities to employees and dependents that either become eligible for this State premium assistance, or who lose coverage under Medicaid or CHIP.

Additionally, employers are required to notify all employees residing in states that offer subsidized programs (like New Jersey) of the potential opportunity for this premium assistance. The notice must be issued annually before the first day of each new plan year and can be provided along with other health care information, as long as it is on a separate and prominent document. The notice may be provided by first-class mail or electronically as long as DOL electronic disclosure regulations are satisfied. Failure to comply with these notice requirements may result in penalties of up to $110 per day for each affected employee.

A model multi-state notice, which may be modified for single state employers, is available on the EBSA website.

Medicare Eligibility and Entitlement

1. Employee and spouse are each under age 65

   Neither is eligible for Medicare.

   (An exception to this is that if either has collected Social Security disability benefits for 2 years, he or she will receive Medicare benefits by applying for them, in which case no premium need be paid for Part A. There are some other exceptions, but only rarely will they arise.)

2. Employee is under age 62, Spouse is 65 or older

   Employee is not eligible for Medicare (except as noted above).

   If the spouse is in receipt of Social Security benefits, primary or otherwise, the spouse is automatically enrolled in Medicare, Part A.*

   If the spouse is not eligible for any Social Security benefits, the spouse can enroll in Medicare Parts A and B, on application, and must pay a premium for both parts.

   If the spouse is eligible for primary Social Security benefits but defers their receipt by not applying for them, the spouse can enroll in Medicare by making application therefore. No premium is payable for Part A.

3. Employee is between age 62 and age 65, Spouse is 65 or older

   Same as in (2), above. Also, if the employee is receiving Social Security early-retirement benefits, the spouse can enroll in Medicare Parts A and B, in which case no premium is payable for Part A.

4. Employee is age 65 or older, Spouse is under 65

   If the employee is in receipt of Social Security benefits, he is automatically enrolled in Medicare, Part A.* If he defers receipt of or is ineligible for Social Security benefits, he can enroll in Medicare, on application; premium for Part A must be paid if he is ineligible for Social Security.

   The spouse is not eligible for Medicare (subject to the exception noted in (1), above).

5. Employee and spouse are each 65 or over

   If either is in receipt of Social Security benefits, primary or otherwise, that person is automatically enrolled in Medicare, Part A.* If either of them defers receipt of primary benefits or is ineligible for any Social Security benefits, that person can enroll in Medicare, on application; premium for Part A is payable if the person is ineligible for Social Security.

Medicare Part D

A prescription drug plan was added to Medicare in 2006, called Medicare Part D. To assist individuals covered under a group health plan decide if they should enroll in Part D, employers that provide prescription drug coverage to Medicare Part D eligible individuals must notify them whether the employer coverage is “creditable prescription drug coverage”; (as good as or better then Medicare). This notice is required prior to the individual’s enrollment in the employer’s plan, prior to their initial enrollment for Medicare Drug benefits, by October 15th (Medicare open enrollment) each year, when a change occurs that affects the plans “creditability,” and upon request.

Notice is also required to be sent to the Centers for Medicare & Medicaid Services (CMS) on an annual basis and upon any change to the plans creditable coverage status. The proper reporting format is available from: https://www.cms.hhs.gov/CreditableCoverage/45_CCDisclosureForm.asp

*The automatic enrollment in Medicare does not affect any right which the individual may have to select the employer's health plan as the primary payer of benefits and Medicare as the secondary payer (see page 41).

Miscellaneous

Physical Examinations

An employee or applicant for employment may not lawfully be required to pay for a medical examination which is a condition of employment if such examination is made at the request or direction of the employer and is performed by a physician designated by the employer.

Driving Records

The Driver's Privacy Protection Act permits the use of personal information contained in a motor vehicle record to verify the accuracy of personal information submitted by an individual to a legitimate business in the normal course of business.

Minimum Number of Employees on Premises

No law requires any minimum number of employees on the premises at any time.

Time Off for Voting

No law requires that employees be excused from work for the purpose of voting in any election, but hours of work should not be scheduled on Election Day so as to interfere with employees' access to the polls.

State and Federal Holidays

State (New Jersey) holidays are days designated by statute on which certain banking transactions may not be performed and on which state government offices are closed. Federal holidays are those observed by employees of the federal government. There is no legal requirement that any of them be otherwise observed or paid for by a New Jersey employer.

When a state or federal holiday falls on a Sunday, the following Monday is substituted as the holiday; when it falls on a Saturday, it is observed on the preceding Friday for state employees.

The following are both state and federal holidays unless otherwise designated:

New Year's Day (January 1)
Martin Luther King's Birthday (the third Monday in January)
Washington's Birthday (Presidents' Day) (the third Monday in February)
#Good Friday
Memorial Day (the last Monday in May)
Independence Day (July 4)
Labor Day (the first Monday in September)
Columbus Day (the second Monday in October)
#General Election Day (first Tuesday after first Monday in November)
Veterans' Day (November 11)
Thanksgiving Day (the fourth Thursday in November)
Christmas Day (December 25)

State holiday only

Claims for Wages and Other Benefits

In the case of any dispute as to the amount of wages or salary owed an employee, the employer must pay that part thereof which is "conceded by him to be due". The employee may then seek whatever remedies may be available to him with respect to the balance.

A claim for unpaid wages, salary or any other monetary benefits arising out of an employment agreement or a New Jersey statute may be filed by an employee with the Wage Collection Division of the New Jersey Department of Labor. The Division is empowered to investigate and conduct a hearing when the amount in controversy does not exceed $10,000. If it is determined that an amount is legally due under the terms of an employment agreement, policy, etc., or statute, an award will be made which shall constitute a judgment when a copy of it is filed in the proper court. The Division can assess an administrative fee of 10% to 25% of its award.

Workplace Temperature

There is no state of federal law which requires that either a minimum or maximum temperature be maintained in a workplace. (There may be municipal ordinances on the subject.)

Negligent Hiring

An employer is liable for injuries to third persons proximately caused by its negligent hiring or retention of an incompetent, unfit or dangerous employee where it knew or had reason to know of those characteristics and could reasonably have foreseen that they created a risk of harm.

Unclaimed Wages

Wages are presumed to be abandoned if unclaimed for 1 year. In such case they escheat (i.e., must be surrendered to the state) if the former employee's last known address (a) was in New Jersey, or (b) was in a state which does not provide for escheat of wages and the employer either is incorporated in New Jersey* or is incorporated in a state* which does not provide for escheat.

The employer holding wages subject to escheat must submit a report to the New Jersey Treasurer on or before November 1 each year which shows, as of the previous June 1, the name, social security number, and last known address of each former employee whose wages are abandoned, their amount, and the date when they were payable. The unclaimed wages shall be surrendered to the Treasurer when the report is filed. A record of such names and addresses must be retained for 10 years.

Not more than 120 days before filing this report the employer shall send written notice to each former employee whose abandoned wages are $50 or more, informing him that they are subject to surrender. If the employee or his representative establishes his right to the money before it has been surrendered to the state, it may be paid to him.

Seats for Employees

State law requires that employees be provided with and permitted to use conveniently located seats except when their work cannot be performed properly in a sitting position.

* Or if unincorporated, has its principal place of business there.

Uniforms

If employees are required to wear uniforms or clothing which are "not appropriate for street wear or use in other establishments", the employer must pay for them or reimburse employees for their cost. If the uniforms are "appropriate", but more than one style, type or color is required during a year, the employer must pay for or reimburse employees for the cost of the additional uniforms.

When the uniforms are "appropriate" and not more than one style, type or color is required, an employer is not obliged to pay for them or reimburse employees for their cost, subject to the following:

1. If the amount paid by an employee for a uniform reduces his compensation in a week to below the New Jersey minimum wage, the employer shall make up the difference for the minimum wage for that week.

2. Deductions may not be made from an employee's wages for the purpose of defraying the cost of a uniform supplied by the employer.