

## **Chapter Eleven**

# **LAW AND THE WORKPLACE**

### **Contents**

- Introduction
- Federal Laws Regulating the Workplace
  - The Hiring Process
  - Discrimination in the Workplace
  - Privacy in the Workplace
  - AIDS in the Workplace
- Special Rights of Public Sector Employees
  - Unions in the Workplace
  - Wages and Hours
  - Workplace Safety
  - Workplace Injuries
- Employment Termination
- Unemployment Insurance
- Pension Plans
- Where to Get More Information

## INTRODUCTION

**THE LAW AFFECTS JUST ABOUT EVERY ASPECT OF WORK.** Federal and state laws regulate the hiring process, terms and conditions of employment, and the circumstances under which employees can be fired.

The law helps shape the relationship between employer and employee. The law does not address every issues that can arise in the employment relationship, but a basic understanding of what the law does require can help both the employer and employee anticipate problems and avoid trouble.

Understanding your legal rights does not mean that those rights can only be enforced by a lawsuit in court. A lawsuit should be viewed as a last resort, not as a starting point. Lawsuits are costly and time-consuming. Rather, employers and employees should first try to discuss their differences. Such discussions are easier and more productive when both sides understand how the law affects the situation. Many employers try to anticipate problems before they occur, and solve problems when they do arise.

This chapter can help both employees and employers understand how the law affects their rights and obligations at work. It explains the laws and suggests places to turn for further details. Each section in this chapter briefly explains a specific area of law and then answers commonly asked questions.

**Q. Is there a single law of the workplace?**

**A.** No, there is no single "law of the workplace." Today's workplace law consists of federal and state laws, civil service rules, collective bargaining agreements, contracts, company personnel handbooks, and employer practices.

**Q. Will this chapter answer specific questions for the employee or employer?**

**A.** No, you should view it as a basic road map. This chapter will help employees determine if the law provides redress for a problem they encounter at work and it will help employers determine if their policies or practices are consistent with the law. It will tell you where to find more information, and which government agencies can provide help in dealing with certain workplace issues. After reading this chapter, you will be in a better position to decide whether to seek legal advice for a particular problem. This chapter cannot, however, cover every situation or offer advice on your specific problem.

**Q. Does it matter if a person works for a government instead of a private employer?**

**A.** Yes, it makes a big difference. Generally, labor contracts and federal and state laws regulate the relationship between a private sector employee and employer, such as a retail business or a manufacturer. The public sector employer, however, works for government and is subject not only to the labor contracts and laws but also to the restrictions imposed by federal and state constitutions. For example, the First Amendment restriction on government interference with free speech prohibits a governmental

employer from disciplining a worker who speaks out on issues of public concern. The First Amendment, however, generally does not apply to a private sector employer and thus does not prohibit a private sector employer from discharging such an employee. In addition, most governmental employment is also regulated by civil service rules.

**Q. What is the legal significance of a union contract?**

**A.** When employees select a union as their bargaining representative, the union negotiates a contract (collective bargaining agreement) with the employer containing the terms and conditions of employment for all employees. Individual employees cannot negotiate separate deals with the employer. If there is no union contract, the employee deals directly with the employer and negotiates his or her own terms of employment.

**Q. Does this chapter cover independent contractors?**

**A.** No. Workplace law deals with the regulation of the relationship between employers and employees. As a matter of law, independent contractors are not considered to be employees. Generally speaking, where an employer controls, directs and supervises the individual in the performance of his or her work, that individual is considered to be an employee. But, where the employer merely specifies the result to be achieved, and the individual uses personal judgment and discretion in the means used to achieve that result, then that individual is considered to be an independent contractor. Other indications of employee status are payment on a salary or wage basis rather than a per project basis and the furnishing by the employer of the equipment used in the performance of the work. For example, ABC Company hires Jill to construct a fence around its property, and agrees to pay her \$1000. ABC does not supervise Jill's work; it does not tell her how to build the fence or what time to report to work. The company cares only about getting the fence built. Jill's income is based on the profits she makes on the job after subtracting for the cost of buying the fencing materials. Her relationship with ABC ends when she finishes the job. Jill is an independent contractor, not the employee of ABC.

**Q. Does this chapter cover state laws as well as federal laws?**

**A.** While this chapter discusses both federal and state laws, it does not detail the laws of each specific state. There will be references to state law and there will be a general discussion concerning how state law impacts the work relationship. However, no two state's laws are exactly alike, so discussion of state law issues will not provide guidance to how a specific state's laws affect the workplace.

---

## FEDERAL LAWS REGULATING THE WORKPLACE

Throughout this chapter there will be continuous reference to federal law. Many of these laws impact not just one aspect of the employment relationship, but the entire spectrum of rights and responsibilities within the workplace. Thus, as a matter of convenience to the reader, and to avoid unnecessary duplication of information, some of the major federal laws are listed below with a short description of their content.

## **A CHECKLIST OF OTHER FEDERAL LAWS REGULATING PRIVATE SECTOR EMPLOYMENT**

Besides those laws listed in the accompanying questions and answers, there are other federal laws that impact the employment relation. The following provides an introductory checklist of these laws, which will be discussed in more detail later in this chapter.

### **UNIONS**

**RAILWAY LABOR ACT**, 45 U.S.C. Sections 151-188: this law regulates union activity in the workplace and prohibits discrimination in employment based on union activity. The airlines and railways are the only employers subject to the provisions of this law.

### **WAGES AND HOURS**

**DAVIS-BACON ACT**, 40 U.S.C. Section 276a-276a-7; **SERVICE CONTRACT ACT**, 41 U.S.C. Sections 351-358; **WALSH-HEALY PUBLIC CONTRACTS ACT**, 41 U.S.C. Sections 35-45: these statutes require employers with certain types of federal government contracts to pay their employees a minimum wage as determined by the Secretary of Labor.

**EQUAL PAY ACT**, 29 U.S.C. Section 206(d): requires employers to pay equal wages to male and female employees who are performing substantially equivalent work.

### **WORKPLACE SAFETY**

**OCCUPATIONAL SAFETY AND HEALTH ACT**, 29 U.S.C. Sections 651-678: requires employers to furnish a workplace free from hazards likely to cause death or serious injury and to comply with safety and health standards promulgated under the statute.

**MINE SAFETY AND HEALTH ACT**, 30 U.S.C. Sections 8-01-8-78: requires mine operators to comply with safety and health standards promulgated under the statute.

### **PENSIONS**

**EMPLOYEE RETIREMENT INCOME SECURITY ACT**, 29 U.S.C. Sections 1001-1461: establishes eligibility and vesting rights for employees in company pension plans; establishes administrative, fiduciary, funding and termination requirements for pension plans.

### **IMMIGRANT WORKERS**

**IMMIGRATION REFORM AND CONTROL ACT**, 8 U.S.C. Sections 1324a-1324c: prohibits employers from hiring illegal aliens; requires employers to verify the work eligibility status of applicants; prohibits discrimination in employment based on citizenship status against lawfully admitted aliens.

### **OTHER TERMS OF EMPLOYMENT**

**UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT**, 38 U.S.C. Sections 4301-4333: requires employers to reinstate to their former jobs upon completion of their military duty, employees who have served in the armed forces;

prohibits employment discrimination because of an employee's past, current or future military obligations

**WORKER ADJUSTMENT AND RETRAINING NOTIFICATION ACT**, 29 U.S.C. Sections 2102-2109: requires employers to give sixty days' advance notice of plant closing or mass layoff to workers, unions, and state and local governments.

**EMPLOYEE POLYGRAPH PROTECTION ACT**, 29 U.S.C. Sections 2001-2009: prohibits employers from requiring employees or applicants to submit to polygraph examinations.

**FAMILY AND MEDICAL LEAVE ACT**, 29 U.S.C. Sections 2601, 2611-2619, 2651-2654: requires employers to grant employees up to twelve weeks of unpaid leave during any twelve-month period because of the birth or adoption of a child, because the employee has a serious health condition, or because the employees has to care for a parent, spouse or child with a serious health condition.

**JURY SYSTEM IMPROVEMENTS ACT**, 28 U.S.C. Section 1875: prohibits the discipline or discharge of an employee because of federal court jury duty.

**DRUG-FREE WORKPLACE ACT**, 41 U.S.C. Sections 701-707: requires government contractors and grantees to establish a drug-free awareness program for their employees.

**Q. What is Title VII of the Civil Rights Act?**

A. Title VII (29 U.S.C. Section 2000e-2000e-17) is a federal law that prohibits discrimination in employment based on race, color, religion, sex and national origin.

**Q. What types of employers are regulated under Title VII?**

A. Public sector and private sector employers that employ at least fifteen employees are covered by this federal law. Unions and employment agencies are also covered under Title VII. It should be remembered, however, that employers with fewer than fifteen employees may be covered under state law prohibiting discrimination in employment.

**Q. Is there a federal agency responsible for enforcement of Title VII?**

A. Yes. The Equal Employment Opportunity Commission (EEOC) is charged with the responsibility for enforcing Title VII.

**Q. What is 42 U.S.C. Section 1981?**

A. This is a federal statute that prohibits employment discrimination based on race or ethnicity.

**Q. What types of employers are regulated under 42 U.S.C. Section 1981?**

A. All public and private sector employers, regardless of size, are covered by this statute.

**Q. Is there a federal agency responsible for enforcement of 42 U.S.C. Section 1981?**

A. No. This statute is enforced solely by private individuals filing lawsuits.

**Q. What is the Age Discrimination in Employment Act?**

A. The ADEA (29 U.S.C. Sections 621-634) prohibits discrimination in employment based on age. For purposes of this statute, age is defined as at least forty years of age or older. Thus, it would not be a violation of the ADEA for an employer to refuse to hire an individual because that person was twenty-five years old. However, some state laws that prohibit age discrimination have a broader definition of the protected class; for example, Oregon prohibits age discrimination against any individual eighteen years of age or older.

**Q. What types of employers are regulated under the ADEA?**

A. Public and private sector employers employing at least twenty employees are covered by this federal law. Unions and employment agencies are also covered by this law. It should be remembered, however, that employers with fewer than twenty employees may be covered under state law prohibiting age discrimination.

**Q. Is there a federal agency responsible for enforcing the ADEA?**

A. Yes, the EEOC has enforcement authority under the ADEA.

**Q. What is Title I of the Americans with Disabilities Act?**

A. The ADA (42 U.S.C. Sections 12101-12118) prohibits discrimination in employment against persons with disabilities, both physical and mental.

### **THE MEANING OF THE TERM "DISABILITY"**

Both the ADA and the Rehabilitation Act protect individuals with disabilities. The definition of the term "disability" is the same for both laws. An individual with a disability is one who:

1. has a physical or mental impairment that substantially limits a major life activity; or
2. has a record of having such a physical or mental impairment; or
3. is regarded as having such an impairment.

The term is defined broadly to include any physiologically based impairment or any mental or psychological impairment, but it does not include mere physical characteristic or cultural, economic or environmental impairment. For example, an individual with dyslexia

has a disability but an individual who is illiterate does not; an individual who is a dwarf has a disability but a person who is short does not.

The impairment must cause a substantial limitation to a major life activity. Temporary conditions, such as a broken leg or a cold, would not be considered substantial limitations.

The second meaning of the term includes individuals who no longer have a disability but have a record of a disability, such as a person who successfully recovered from tuberculosis, or an individual who was diagnosed as having cancer but in fact did not have or no longer has cancer.

The third meaning of the term includes individuals who have a condition, which does not substantially limit their activity, but which the employer believes substantially limits their activity. For example, a worker who has high blood pressure is denied a promotion because the employer believes that the stress of the job would cause a heart attack.

**Q. What types of employers are regulated under the ADA?**

A. Public and private sector employers employing at least fifteen employees are covered. Unions and employment agencies are also regulated by the ADA. It should be remembered, however, that employers not covered under the ADA may be subject to regulation under state law prohibiting disability discrimination.

**Q. Is there a federal agency responsible for enforcing the ADA?**

A. Yes, the EEOC has enforcement authority under the ADA.

**Q. What is the Rehabilitation Act?**

A. The Rehab Act (29 U.S.C. Sections 706(8), 791, 793-794a) prohibits discrimination in employment against persons with disabilities, both physical and mental.

**Q. How is the Rehabilitation Act different from Title I of the Americans with Disabilities Act?**

A. The main difference between these two statutes is in the types of employers to which the statute applies. Whereas the ADA applies to employers who employ at least fifteen employees, the Rehabilitation Act applies to employers who are contractors or subcontractors of the federal government or who receive federal funds.

**Q. Is there a federal agency responsible for enforcing the Rehabilitation Act?**

A. Yes. The Office of Federal Contract Compliance, Department of Labor, enforces the Rehabilitation Act.

**Q. What is the National Labor Relations Act?**

**A.** The NLRA, also called the Wagner Act and the Labor-Management Relations Act (29 U.S.C. Sections 141-197), deals with the role of unions in the workplace and prohibits discrimination in employment based on union activity.

**Q. What types of employers are covered under the NLRA?**

**A.** The coverage of the NLRA is limited to private sector employers, which have an impact on interstate commerce. Specifically excluded from coverage are public sector employers, railway and airline employers, and individuals who are employed as agricultural laborers. Generally, whether or not an employer has an impact on interstate commerce is determined according to the dollar volume of business generated by the company. For example, a retail or service establishment with annual gross receipts of at least \$500,000 is covered. Manufacturing companies that ship at least \$50,000 worth of goods across state lines, or that purchase at least \$50,000 worth of goods from out of state, are covered. The conduct of labor unions is also regulated under the NLRA. It should be remembered, however, that an employer who is not covered under the NLRA may be covered by a state law that provides similar protections and regulations regarding unions in the workplace.

**Q. Is there a federal agency responsible for enforcing the NLRA?**

**A.** Yes, the National Labor Relations Board is responsible for enforcement of the NLRA.

**Q. What is the Fair Labor Standards Act?**

**A.** The FLSA (29 U.S.C. Sections 201-219) establishes minimum wage and overtime standards for employees and regulates the employment of children.

**Q. What types of employers are covered under the FLSA?**

**A.** As a general rule, a private sector employer is covered by the FLSA if at least two employees are engaged in interstate commerce activities and if the annual volume of business is at least \$500,000. Hospitals, educational institutions and public sector employers are also covered. Moreover, individual employees who are engaged in interstate commerce activities are covered by the FLSA even if their employer does not gross \$500,000 a year. It should be remembered that employers not covered by federal law may be covered by a state law regulating minimum wages, overtime and child labor.

**DETERMINING WHEN INDIVIDUAL EMPLOYEES ARE  
ENGAGED IN INTERSTATE COMMERCE**



The Wage and Hour Division of the Department of Labor has identified five general categories of employees who are considered to be engaged in interstate commerce for purpose of coverage under the FLSA.

1. Employees participating in the actual movement of commerce. For example, employees employed in the telephone, telegraph, television, transportation, banking and insurance industries.
2. Employees doing work related to the instrumentality's of commerce. For example, employees who maintain and repair roads, bridges or telephone lines; or employees who work at warehouses, airports or bus stations.
3. Employees who regularly cross state lines in the performance of their duties. For example, traveling salespersons or traveling service technicians.
4. Employees who produce or work on goods for commerce. For example, assembly workers in an auto plant, coal miners, shipping department employees or clerical and administrative workers who do the support work necessary to produce goods for commerce.
5. Employees who are employed in a closely related process or occupation essential to producing goods for commerce. For example, employees who build tool and dye machines used by auto plants.

As can be seen, the reach of FLSA coverage is extremely broad.

**Q. Is there a federal agency responsible for enforcing the FLSA?**

**A.** Yes, the Wage-Hour Division, Department of Labor, is responsible for enforcing and administering the FLSA.

---

## THE HIRING PROCESS

There are several stages involved in the hiring of employees: solicitation and review of applications, interview of candidates, and selection of a candidate for hiring. The law impacts on each of these stages.

Federal anti-discrimination laws prohibit discrimination in employment, including the hiring process, based on race, color, religion, national origin, sex, age, disability and union affiliation. At the state level, most states have laws duplicating the prohibitions contained in federal law. Moreover, many state laws forbid discrimination based on other types of classifications as well. For example, Wisconsin prohibits discrimination based on arrest and conviction records, sexual orientation, marital status, and the use of lawful products off employer premises during non-work hours.

There are, in addition, some federal and state laws that regulate the use of certain types of tests and screening devices in the hiring process. Also, state common law of torts imposes a duty on employers not to unnecessarily invade employees' privacy.

Finally, public sector employers are subject to additional restrictions imposed by the U.S. Constitution and civil service laws. Because of the constitutional guarantee to citizens of the right to freedom of association, government employers cannot discriminate in hiring based on political affiliation (except for high level, policy-making jobs). Civil service laws generally provide that hiring decisions be based on the "merit" of the applicant, which is usually determined by administering competitive examinations.

The ways in which these laws impact on the hiring process will be developed more fully in the following series of questions and answers.

## **EMPLOYMENT OF DOMESTIC WORKERS**

The first issue to be determined when considering the employment of domestic workers is whether the individuals are employees or independent contractors. (See the question discussing the differences between employees and independent contractors on pp. 770-771). For example, if you contract with a landscaping company to mow your lawn and maintain the flowerbeds, the employees the company sends out to perform the work are not your employees. If, however, you employ a cook/housekeeper whose work you control, then the worker is your employee.

The contractual relationship between an individual and an independent contractor is not governed by employment laws. However, if a domestic worker is an employee, then that relationship is regulated by certain federal employment laws. Examples of domestic workers who may be considered employees are: in-home child care workers, cooks, housekeepers and babysitters.

You must make quarterly social security payments to the IRS for every domestic employee at least 18 years or older who earns more than \$1200 per calendar year. You must also pay federal unemployment taxes for every domestic employee who earns more than \$1000 per calendar quarter. Consult your accountant for rules regarding withholding taxes from an employee's pay.

The FLSA applies to domestic employees, other than babysitters, who earn more than \$50 during a calendar quarter and work for one or more employers for more than eight hours in any workweek. Any employee who meets this definition must be paid the federal minimum wage, and overtime for hours worked in excess of 40 during any one workweek for a single employer. Babysitters are generally covered by the FLSA if they work more than 20 hours per week as babysitters. If a domestic employee resides in your house, then the overtime provisions of the FLSA do not apply, but the minimum wage requirements do. Federal laws governing the employment of aliens are discussed later.

### **Q. What are the elements of a good job advertisement?**

**A.** The main idea is to avoid discrimination while at the same time targeting qualified candidates. Ads should avoid words suggesting a preferred race, sex, religion, national origin or age. For example, use of the term "recent college grad," instead of "college degree required," could indicate a preference for young people and discourage older qualified applicants from applying. Or, using the term "salesman" instead of "salesperson"

suggests only men should apply. The phrase "An Equal Opportunity Employer" in an ad means the employer will judge all applicants based on their qualifications for the job, without regard to race, sex, religion, national origin, age or disability.

### **YOU NEED A LICENSE FOR THESE JOBS**

State rules limit some jobs to people who have licenses. Depending on the state, these might include cosmetologists, barbers, electricians, heating/air conditioning technicians, engineers, nurses, builders, lawyers, accountants, dental hygienists, and physicians. When considering such a career, contact your state licensing authorities to see what requirements apply.

**Q. Can an employer set basic job requirements and work standards?**

**A.** Yes, as long as they do not discriminate. Qualifications listed for a job should be necessary for the performance of the job. Even neutral job requirements can cause discrimination. For example, requiring a college degree for a job on a factory assembly line would disproportionately screen out minority applicants vis-a-vis white applicants, since disproportionately fewer minority students attend college than white students. The minority applicants would be screened out based not on their ability to do the job but based on a factor (college education) unrelated to being a good assembly line worker.

**Q. What are some other examples of neutral job requirements that can cause discrimination?**

**A.** Refusing to hire single custodial parents may discriminate against women, since women are more likely to have physical custody of their children. Requiring applicants to speak fluent English for a job that does not require communication skills may discriminate against applicants whose nation of origin is not the United States. Height and weight standards can discriminate based on sex and national origin. Where neutral requirements have a discriminatory effect, the employer must be able to show that the requirements are related to job performance. Thus, requirements for job-related experience and specific job-related skills are usually valid.

**Q. How does the ADA affect an employer's ability to establish basic job requirements and work standards?**

**A.** Job requirements and work standards that would screen out an individual based on his or her disability must be job-related and consistent with business necessity. Under the ADA, in order to be job-related, a job requirement must be related to the essential functions of the job and not merely an incidental aspect of job performance. For example, a job description for a receptionist position states that typing skills are required; however, the employer has never required the receptionist to type. This requirement, therefore, is

not an essential function of the job, and requiring typing skills could have the effect of screening out an individual with only one arm or an individual who is a paraplegic.

**Q. How can an employer identify the essential functions of a job?**

A. The EEOC regulations list several factors to consider in determining the essential functions of a job:

1. The position exists to perform the function, for example a secretarial position exists to type letters and documents;
2. There are a limited number of other employees available to perform the function; for example even though the receptionist's main duty is not typing, there is only one secretarial employee at the company and when he is sick or on vacation the receptionist fills in for him;
3. The amount of time spent performing the function, for example the secretary spends 75% of his time typing documents;
4. The effect of not requiring the person in this job to be able to perform the function; for example a firefighter may be called upon to carry a heavy person from a burning building only rarely, but her failure to be able to perform this function could cost a life;
5. The work experience of employees who have previously performed the job.

**Q. If an individual with a disability cannot perform an essential function of the job, can the employer refuse to hire him?**

A. Not necessarily. The question is whether the inability to perform the essential function of the job is due to lack of qualifications or due to the disability. If the employer is hiring for a secretarial position and the applicant cannot type, then the employer could refuse to hire her even though she suffered from epilepsy. (See sidebar discussion of "The Protected Class Under the ADA.")

If, however, the applicant possesses typing skills, then the question becomes whether, with a reasonable accommodation, she would be able to perform the essential function of the job. For example, an applicant for a secretarial position who is blind may be unable to use the word processor. However, if she is provided with a Braille keyboard she can use the word processor and would thus be able to perform the essential function of the job.

### **THE PROTECTED CLASS UNDER THE ADA**

The ADA protects "qualified individuals with a disability" from discrimination in employment. An individual with a disability is qualified if he "satisfies the requisite skill, experience, education and other job-related requirements." For example, in deciding whether a person with epilepsy is qualified to be a teacher, one would determine if she had a teaching certificate or a college degree in education. If not, then she is not qualified and is not a member of the protected class under the ADA.

**Q. How does an employer know if an applicant or employee needs an accommodation?**

**A.** Generally speaking, it is the responsibility of the applicant or employee to inform the employer of his need for an accommodation. The ADA does not require the employer to provide an accommodation if it is unaware of the need for one.

Also, the employer may ask for documentation of the need for an accommodation where the disability is not an obvious one.

**Q. Is an employer required to provide any accommodation necessary for the otherwise qualified individual with a disability to perform the job?**

**A.** No. The ADA only requires the employer to provide reasonable accommodations that do not cause undue hardship. The law specifically lists what factors should be considered in determining undue hardship:

1. the nature and cost of the accommodation needed;
2. the overall financial resources of the facility involved; the number of persons employed at the facility; the effect on expenses and resources of the facility; the impact on the operation of the facility;
3. the overall financial resources of the employer as a whole; the overall size of the business;
4. the type of operation of the employer, including the composition, structure and function of the workforce and the relationship of the facility in question to the employer as a whole.

Whether or not an accommodation causes an undue hardship is determined on a case-by-case basis.

### **EXAMPLES OF REASONABLE ACCOMMODATIONS**

The following are examples of the types of actions an employer may be required to take to provide a reasonable accommodation:

- making existing facilities readily accessible;
- job restructuring;
- part-time or modified work schedules;
- modifying equipment;
- providing readers or interpreters.

Employers are not required to provide equipment or devices primarily for personal use, such as corrective glasses, hearing aids or wheelchairs. Whether a particular employer is required to provide a specific accommodation will depend on whether providing it will cause undue hardship.

**Q. Is it ever appropriate to indicate a preference for applicants of a specific sex or age?**

**A.** Rarely. Anti-discrimination laws require employers to consider applicants as individuals, not based on stereotypical assumptions. If a factory job requires a worker to lift forty pounds on a regular basis, an employer cannot express a preference for young male applicants based on the stereotyped notion that men are strong and older people and women are weak. Some women and older people can lift forty pounds, just as some young men cannot. Rather, the employer's job ad should state that the job requires "regularly lifting forty pounds."

In some rare circumstances, however, it is an objective fact that individuals who are members of a protected class cannot perform the job in question. For example, a filmmaker may hire only men for male roles, or a kosher deli may hire only Jewish people as butchers. In both of these examples, sex and religion are bona fide occupational qualifications (BFOQ). Both Title VII and the ADEA allow employers to limit a job to applicants of a specific group where the employer can prove that sex, religion, national origin or age is a BFOQ for the job in question. Race and color, however, can never qualify as a BFOQ.

#### **RELIGIOUS INSTITUTIONS EXPRESSING A PREFERENCE FOR EMPLOYEES OF A PARTICULAR RELIGION**

Title VII expressly allows religious corporations and sectarian educational institutions to hire applicants of a particular religion. For example, a Catholic grade school could decide to hire a teacher because he is a Catholic rather than hire an applicant who is a Protestant. This exemption applies only to religion, however, the school may not discriminate in hiring teachers based on race, color, sex, national origin, age or disability.

**Q. Some employers find applicants through word-of-mouth, by talking to their current employees. Is anything wrong with this?**

**A.** That depends on the make-up of the work force. Use of the "old boy" network generally results in applications mainly from other old boys. Where the workers are mainly white people, news about the job vacancy will be limited to their circle of acquaintances, who may be mostly white people as well. This has the effect of closing out minority applicants. An employer can avoid problems by disseminating news of job openings as widely as possible in order to reach a broad pool of applicants. Placing ads in newspapers and magazines with a widespread circulation base, and using employment agencies, can help in reaching a variety of qualified applicants.

#### **BONA FIDE OCCUPATIONAL QUALIFICATIONS**

Title VII allows an employer to make a hiring decision based on sex, religion or national origin if the employer can prove that being a particular sex, religion or national origin is a bona fide occupational qualification (BFOQ) for the job in question. The ADEA also allows the employer to make a hiring decision based on age if the employer can prove age is a BFOQ

The employer must prove that his hiring decision falls within the very narrow limits allowed by the BFOQ defense. The employer must show both:

1. that all persons of the excluded class would be unable to perform the requirements of the job; and
2. the requirements of the job directly relate to the essence of the employer's business.

The evidence that the employer presents must be objective and not based on stereotyped beliefs about persons in the protected class.

Years ago some airlines tried to defend their decision not to hire men as flight attendants on the basis that males were unable to provide reassurance to anxious passengers or give courteous, personalized service. The court held that even if this were true, the ability to reassure and give courteous service did not relate to the essence of the employer's business, which was the safe transport of passengers.

The BFOQ defense applies in very limited circumstances, such as for actors or fashion models.

**Q. What should employers be aware of in conducting job interviews?**

**A.** By their very nature, job interviews are subjective experiences. Employers cannot help but form an assortment of impressions in judging an applicant's ambition, motivation, creativity, dependability, and responsibility. Realizing the inherently subjective nature of the process, employers should strive to make an interview as objective (fact-based) as possible. Concentrating on objective information helps to avoid decisions made on conscious or subconscious prejudice and focuses the hiring process on the issue of an individual's qualifications and employment experience.

Employers should also attempt to make job interviews as uniform as possible. The same set of questions should be addressed to all applicants for the same position. This allows for a better basis for comparison among applicants. It can also prevent discrimination in the content of a job interview. For example, asking an applicant "do you type" but not asking another applicant the same question, could indicate discriminatory stereotyping if the applicant who is asked the question is a woman.

**Q. Does federal law prohibit any specific questions?**

**A.** Yes. The ADA prohibits an employer from asking an applicant whether he or she has a disability or inquiring into the nature or severity of a disability (though the employer

may ask questions about the applicant's ability to do the job). The National Labor Relations Act (NLRA) prohibits employers from questioning employees about union membership or activities. Neither Title VII nor the Age Discrimination in Employment Act (ADEA) prohibit any specific questions. An employer, however, should not ask questions that may imply discrimination. Moreover, some state laws, such as those in West Virginia, expressly prohibit certain types of pre-employment questions, such as questions about marital status or number of dependents.

**Q. What types of questions may imply discrimination?**

**A.** Direct questions relating to an applicant's age, family background or religious affiliation may indicate discrimination. Also questions or comments based on stereotyped notions may also imply discrimination.

Generally speaking, interview questions should relate to the requirements of the job, the applicant's qualifications, work experience and history. Even when the information sought is related to the job, the interviewer must be careful that the way the question is asked does not imply discrimination. For example, an employer trying to determine whether a female applicant is going to stay with the company for the next few years should not ask, "Do you plan to get married?" or "Do you plan to have children?" or "What kind of birth control do you use?" More direct, job-related questions seeking the same information might be:

- We are looking for employees who will make a commitment to the company. Is there any reason you might not stay with us for the next few years?
- What are your career objectives?
- Where do you see yourself in five years?

In the same way, suppose an employer is trying to determine a female job candidate's commitment to living in a particular area of the country. Then it is better to ask, "Do you intend to stay in the area?" rather than "Is your husband's employer likely to transfer him?"

If attendance is the issue, questions like, "Does your husband expect you to be home to cook dinner?" or "What will you do if your children get sick?" are indirect and inefficient. It would be more direct to ask, "How was your attendance record with your prior employer?"

## **HOW EMPLOYERS CAN HIRE WITHOUT DISCRIMINATION**

It helps to use a standard application form that avoids irrelevant questions. Avoid asking about age, height, weight, marital status, education or arrest record unless they relate to the job. For example, questions about height and weight may reject women or members of some ethnic groups who are usually smaller. Asking about marital status may suggest sex discrimination. Asking about disabilities is prohibited.

Employers and prospective employees both benefit when job openings are clearly defined. Employers should prepare a detailed job description for each position, specifying what the



work is and what qualifications the employer requires. If both sides come to the interview with a clear idea of what the job involves, the interview is more likely to focus on the qualifications essential for doing the job or that have predicted successful job performance.

**Q. What is "need-to-know," and how does it apply to job interviews?**

**A.** Whether a question will be viewed as inappropriate often depends on whether there is an objective, job-related reason why the employer wants its applicants to answer it. Questions that would not run afoul of the anti-discrimination laws may still create problems. Some state tort law protects individuals from unwarranted invasions of personal privacy. Offensive inquiries into an applicant's personal life, unrelated to the requirements of the job, may subject an employer to liability for invasion of privacy.

Sometimes employers clearly must have certain information. For example, employers do need to make their job offers dependent on candidates' production of proper documentation of their citizenship or work authorization. However, asking about national origin may be viewed as discriminatory. Similarly, whether an applicant has ever been convicted of a crime may substantially affect the applicant's fitness for a specific job. The key to determining the appropriateness of an interview question is whether there is a legitimate business reason to inquire into the subject.

**Q. What should an applicant do if the interviewer does ask questions that seem inappropriate or discriminatory?**

**A.** The tactful applicant might answer by providing the information the interviewer "really wants to know." For example, "Oh--you're wondering whether I'll be able to work long hours. I can assure you that I will. My current boss can confirm that."

**Q. What should an employer consider in making hiring decisions?**

**A.** If the interview process was as uniform and impartial as possible, and if only job-related questions were asked, the employer should be able to follow a checklist. This should allow the employer to rate applicants in an organized and consistent manner based on their respective qualifications for the job.

## **GOVERNMENT CONTRACTORS AND HIRING POLICIES**

Executive Order 11246 imposes certain obligations on employers with a federal contract or subcontract. If a contract is worth at least \$10,000, the employer is forbidden to discriminate in employment based on race, color, religion, sex or national origin. The nondiscrimination requirement is essentially the same as that imposed under Title VII. If a contract is worth at least \$50,000 and the contractor employs at least fifty employees, the employer must also develop and utilize an affirmative action plan.

The Rehabilitation Act prohibits federal contractors and subcontractors with contracts in excess of \$2500 from discriminating against individuals with disabilities and requires them to take affirmative action to employ individuals with disabilities.

The development and implementation of affirmative action plans will be discussed later in this chapter.

**Q. May an employer use a lie detector to find out if a job applicant or an employee is honest?**

**A.** The Employee Polygraph Protection Act (EPPA) prohibits employers from requiring employees or applicants to take a polygraph test. This federal law covers all private sector employers with at least two employees engaged in interstate commerce activities and an annual volume of business of at least \$500,000. It does not apply to any public sector employer.

The statute provides an exception to the use of a polygraph in two situations. An employer is allowed to use a polygraph in connection with an ongoing investigation into theft. Employers engaged in providing security services can administer a polygraph to certain applicants as can employers engaged in the manufacture of controlled substances.

Most states also have state laws that either prohibit or regulate the use of polygraph tests in employment. A few states, such as Massachusetts and Minnesota, prohibit all tests and devices purporting to determine honesty.

**Q. May an employer run a background check on an applicant?**

**A.** Background checks may be necessary for certain jobs. These include jobs involving security or trade secrets. Checks should be made fairly and without bias. They should concern only issues relating to performance of the specific job. Checks that unnecessarily pry into private information or that employ unreasonable methods of data gathering may subject an employer to tort liability.

**Q. May an employer run a credit check on an applicant?**

**A.** A credit check should be used only where the information is necessary for job-related purposes. Court cases under Title VII have held that requiring good credit as a condition of employment can have a discriminatory result, since disproportionately more non-whites than whites live below the poverty level. Even if a credit check is necessary for the job in question, the Fair Credit Reporting Act (a federal law) requires employers to notify applicants if they are not hired due to the information contained in a credit report. Moreover, some state laws, such as in Maine and New York, require employers to notify applicants when a consumer credit report is requested. See the "[Consumer Credit](#)" chapter for more details on credit reporting.

**Q. May an employer require applicants to undergo a physical examination?**

**A.** Generally speaking, no. The ADA prohibits employers from requiring pre-employment physical examinations. After offering an applicant a job, however, an employer may require the applicant to successfully undergo a physical exam under certain conditions:

1. all employees must be required to take a physical exam;
2. information obtained from the exam must be maintained in a separate medical file and kept confidential;
3. the employer cannot use the information to discriminate against the employee because of a disability.

### **DRUG TESTING REQUIREMENTS FOR CERTAIN OCCUPATIONS**

The U.S. Department of Transportation (DOT) has issued regulations requiring drug testing of railroad employees and motor carriers who operate commercial motor vehicles in interstate commerce. Testing occurs in certain circumstances, such as pre-employment, periodically and for reasonable cause. The U.S. Federal Aviation Administration (FAA) has also issued drug-testing regulations, similar to those issued by the DOT, covering airline flight personnel. The Drug-Free Workplace Act, while not requiring drug testing, does require all federal contractors with contracts worth at least \$25,000 or more, to establish a drug-free awareness program and communicate the program to all its employees. Some states also impose drug-testing requirements for certain jobs--mainly jobs in the transportation industry.

**Q. May an employer require applicants or employees to undergo drug screening tests?**

**A.** There is no federal law that prohibits the use of drug screening tests. Several states, however, have placed certain restrictions on the use of drug testing. Iowa and Rhode Island, for example, require employers to have probable cause before they can test employees. Other states, such as Minnesota and North Carolina, have established guidelines that must be followed in administering drug tests.

Moreover, the method used by an employer in administering a drug test (such as direct observation of urination) could be considered outrageous and make the employer liable under tort law for invasion of privacy or intentional infliction of emotional distress.

### **DRUG TESTING AND THE CONSTITUTION**

The Fourth Amendment of the U.S. Constitution prohibits the government from engaging in unreasonable searches and seizures. This restriction acts as a limit on a public sector employer's ability to use a drug test on its employees. Generally speaking, courts have been reluctant to allow public sector employers to engage in random drug tests; they generally require the employer to show some reasonable suspicion of drug use, or some

compelling evidence showing that public safety would be jeopardized if the employee used drugs.

**Q. May an employer use other types of tests (such as a skills test or an intelligence test) to screen applicants?**

**A.** Yes, but it should be job-related. A test may have an illegal discriminatory result on a protected class, even if it seems fair. This may cause an employer to deny jobs to an unusually high number of minorities. For example, a test of English language skills might disqualify an unusual number of persons for whom English is a "second language." Unless the job requires English, the test may be illegal.

Extensive federal regulations govern the use of employment tests. A test has a discriminatory impact if the pass rate for a protected class is less than 80 percent of the pass rate for white men. If 50 percent of the white males pass the test, then 40 percent or more of black males must pass. If the pass rate is less than 80 percent, the test is considered discriminatory under Title VII unless the employer can prove that the test is directly related in a significant way to successful job performance. If the test is job-related, then the employer is allowed to use it.

**The Americans with Disabilities Act (ADA) and the Administration of Employment Tests**

In administering tests, employers must be careful to ensure that the manner in which the test is administered does not screen out applicants based on a disability. Tests should be administered in a manner that accurately reflects the applicant's job-related skills rather than reflecting an applicant's disability. For example, an applicant with dyslexia or with a visual disability might fail a written test because he could not properly see the material and not because of a lack of knowledge. In such a circumstance, the employer may be required to provide a reader to help the applicant read the test instructions and materials. Similarly, oral tests may screen out applicants with a hearing disability. Usually, it is the responsibility of the applicant to inform the employer that an alternative method for administering the test is needed.

**Q. Are there laws that govern the hiring of workers under eighteen years of age?**

**A.** Yes. The Fair Labor Standards Act (FLSA) regulates the employment of minors. With few exceptions (such as newspaper delivery) children under fourteen years of age may not be employed. Children under the age of sixteen may only work in non-hazardous jobs and their hours of work are limited. During the school term, work hours are limited to a maximum of three hours a day and eighteen hours a week. Outside the school term, they may work up to eight hours a day and forty hours a week. In either case, children under sixteen years old may work only from seven o'clock a.m. to seven o'clock p.m. (nine o'clock p.m. in the summer). Workers who are sixteen and seventeen years old are not

limited in the amount of hours of work, but are prohibited from working in hazardous jobs.

Many states have their own rules for youth employment. An employer must follow these if they are more restrictive than federal law. For example, many states require all minors to get work permits from school authorities.

**Q. Are there laws that govern the hiring of alien workers?**

**A.** Yes. The Immigration Reform and Control Act (IRCA) prohibits all employers from hiring unauthorized alien workers. As part of the hiring process, employers must complete an eligibility form (Form I9) for each new employee. The purpose of this form is to ensure that the employer has verified the legal eligibility of the applicant to be employed in this country. Employers who hire unauthorized aliens are subject to fines and imprisonment.

Compliance or noncompliance with this law does not affect in any way the immigration or alien status of the employee or applicant. Whether or not an individual immigrant is legally in this country and is entitled to work is determined under other federal laws regulating immigration into the United States. The employment-related provisions of the Immigration Reform and Control Act are aimed solely at what steps an employer must take to ensure that it hires only those individuals eligible to work in the United States.

## **HOW TO VERIFY THE EMPLOYMENT ELIGIBILITY OF AN APPLICANT**

The following documents are considered acceptable verification of authorization to work in the U.S.: a U.S. passport; a birth certificate showing birth in the U.S.; a naturalization certificate; a valid foreign passport with an endorsement authorizing employment in the U.S.; a resident alien card with photograph and authorization for employment in the U.S.; or a Social Security card and driver's license with photograph.

**Q. Must an employer verify the employment status of current workers?**

**A.** The Immigration Reform and Control Act applies only to employees hired after November 6, 1986. An employer is not required to verify the employment eligibility of any workers hired before that date. However, if the employer has reason to believe that a worker hired before November 6, 1986, is an unauthorized alien, then the employer would be subject to penalties under the law if it did not verify the worker's status and, if the employee was not authorized to work, fire that worker.

---

## **DISCRIMINATION IN THE WORKPLACE**

**Q. Besides hiring, what other aspects of the employment relationship are regulated by the anti-discrimination laws?**

**A.** The laws regulate all aspects of work, including hiring, firing, promotions, job duties, wages, benefits, and reviews. Generally speaking, the laws do not require an employer to provide specific benefits or to institute job review procedures or to draw up job descriptions. Rather, the employer is allowed to establish its own policies so long as they are applied to all employees in a non-discriminatory manner and so long as the policies do not have the effect of discriminating against a protected class.

**Q. What are the major federal anti-discrimination laws?**

**A.** Title VII prohibits discrimination based on race, sex, color, national origin or religion. The ADEA prohibits discrimination based on age (if over forty). Title I of the ADA prohibits discrimination based on disability.

Almost every state has anti-discrimination laws that mirror the protections found under federal law. Some states also have more expansive protection than federal law, for example, prohibiting discrimination based on marital status, sexual orientation or weight.

## **SEXUAL ORIENTATION DISCRIMINATION**

The meaning of the term "sex" discrimination as used in Title VII refers to gender and does not include discrimination based on sexual orientation. There are some states, however, such as California, Hawaii and Wisconsin, and some cities, such as Chicago, whose anti-discrimination laws prohibit discrimination based on sexual orientation.

**Q. How do I know if an action is discriminatory in violation of the law?**

**A.** First, not all discriminatory actions are forbidden by law. The law only prohibits discrimination when it is based on a person's protected status--race, color, religion, national origin, sex, age or disability under federal law.

Thus, if an employer makes a decision because of an employee's race, that employer has engaged in prohibited discrimination. Paying a worker lower wages than other employees because that worker is an African-American black violates Title VII. But paying a worker lower wages than other employees because that worker is performing different kinds of job duties does not violate Title VII. The question is whether the reason for the difference in treatment is based on the employee's protected status. Different treatment based on protected status is called intentional discrimination or disparate treatment.

Title VII also prohibits conduct that has the effect of discriminating against individuals in a protected class even if the employer's reason for the different treatment is not based on protected class. For example, an employer may decide to hire only applicants who do not have custody of preschool age children. On its face the reason for the employer's hiring decision is not a protected class reason. However, the effect of this policy is to disproportionately screen out women applicants as compared to male applicants because more women are custodial parents. This policy, therefore, would have

a discriminatory effect, also called adverse impact. Adverse impact discrimination is also forbidden by Title VII unless the employer can prove that the policy is required by business necessity and is significantly related to the requirements of the job.

The ADA defines discrimination not only in terms of disparate treatment and adverse impact but also in terms of a refusal to provide reasonable accommodation to an otherwise qualified individual with a disability. (The section of this chapter on page 9, entitled "[The Hiring Process](#)" discusses this concept in more detail.)

## **SENIORITY SYSTEMS AND ANTI-DISCRIMINATION LAWS**

Bona fide seniority systems are immune from attack under Title VII and the ADEA. A seniority system is bona fide so long as it was not established for the purpose of discriminating against a protected class and is applied equally to all employees covered by the system.

A seniority system that has an adverse impact is considered a bona fide system. Thus, decisions as to who is laid off during a down turn in business based on who has the least seniority are legal, even though all the most recent hires (and therefore all the employees laid off) are female.

**Q. What should I do if I think I have been discriminated against in violation of the law?**

**A.** It is usually a good idea to bring your complaint directly to the attention of the employer and attempt to resolve the problem on an informal basis. The employer may not be aware that there are individuals within its organization who are discriminating, or the employer may want to address your complaint and fix the problem.

If, however, you want to pursue a legal remedy, you should get expert advice and act relatively quickly. Anti-discrimination laws have strict time limits for making a claim. The federal laws require employees to file a complaint first with the EEOC before filing a lawsuit in court. In some circumstances an employee is also required to file a complaint with the state agency charged with enforcing the state anti-discrimination laws.

Lastly, if fired or not hired for discriminatory reasons, you should look for another job. Do so even if it seems that you are entitled to the former job. If you do not actively seek other work, it appears as though you are not seriously interested in employment. This can weaken your claim and may limit any award of back pay.

## **TIME LIMITS UNDER TITLE VII AND THE ADA**

If you have been discriminated against, you must file a charge with the EEOC within 180 days from the date of the discriminatory act. There are regional offices of the EEOC in most major cities in the U.S. There is an exception to this time limit if the discrimination occurred in a state that has a state law prohibiting discrimination. In that case you must

first file a charge with the state agency responsible for enforcing the state law. You must give the state agency at least sixty days to investigate your complaint. After sixty days you can then file a charge with the EEOC, but the charge must be filed within 300 days from the date the discrimination occurred or within thirty days after the state agency terminates its proceedings, whichever occurs first.

When the EEOC completes its investigation of the charge, it sends a letter to the person who filed the charge. The letter states whether the EEOC found reasonable cause to believe the law was violated and informs the charging party that he or she has ninety days within which to file a lawsuit in court. This letter is called a "right to sue" letter.

**Q. Do the anti-discrimination laws protect only women and minorities?**

**A.** No. The anti-discrimination laws protect all workers from employment decisions based on protected status. Thus, if an employer pays a female worker better wages than a male worker performing the same job, that employer has discriminated against the male worker based on his sex in violation of Title VII. Similarly, if an Asian-American worker who misses three days of work is suspended but a Caucasian worker who misses three days of work is fired, then the Caucasian worker has been discriminated against based on his race.

### **DISCRIMINATION BASED ON RACE**

Federal law forbids job discrimination because of race. Executive Order 11246 also requires that employers doing business with the federal government not discriminate because of race and take affirmative steps to hire and promote racial minorities. Most states and many local governments have laws prohibiting racial discrimination in employment. These laws protect all races, including African-Americans, Hispanics, Asians, Native Americans, and Caucasians.

**Q. What is an Affirmative Action Plan (AAP)?**

**A.** An AAP establishes guidelines for recruiting, hiring and promoting women and minorities in order to eliminate the present effects of past employment discrimination. An employer analyzes its current employment practices and the make-up of its workforce for any indications that women and minorities are excluded or disadvantaged. If the employer identifies some problems, it then devises new or different policies and practices aimed at solving the problems. Lastly, the employer develops goals by which it can measure its progress in correcting the problems.

**Q. Are employers required to have Affirmative Action Plans?**



**A.** Neither Title VII, the ADEA, nor the ADA, require Affirmative Action Plans (AAPs). Employers who have contracts with federal, state and local governments, however, are often required to develop AAPs. Executive Order 11246 requires federal contractors with contracts exceeding \$50,000 and that employ at least fifty employees to develop an AAP. Many states, such as Iowa, California and Pennsylvania, require employers who have state contracts to implement AAPs. Governors, mayors and other public bodies may require public sector employers to adopt AAPs.

Some employers voluntarily adopt AAPs in order to eliminate the effects of past discrimination and more effectively utilize qualified workers who in the past may have been overlooked because of their race, sex or national origin.

**Q. If an employer gives preferential treatment to a woman or minority employee pursuant to an AAP, isn't this reverse discrimination in violation of Title VII?**

**A.** Not necessarily. The U.S. Supreme Court has held that voluntary AAPs that remedy an obvious racial or sex imbalance in traditionally segregated job categories are lawful. The question involves balancing the interest of minority employees to be free from the effect of unlawful discrimination with the employment interests of non-minority employees.

**Q. What factors do the courts consider in deciding the validity of an AAP?**

**A.** The state of the law is still developing in this area, but the courts tend to focus on four factors. First, the AAP should be designed to eliminate obvious racial or sex-based imbalances in the work force.

Second, the plan cannot "unnecessarily trammel the interests" of nonminority (white or male) workers. It should not automatically exclude non-minority employees from consideration for the job in question. The minority employee favored by the AAP should be qualified for the job; employers should avoid favoring unqualified workers.

Third, the AAP should not adopt strict quotas. It should strive toward realistic goals, taking into account turnover, layoffs, lateral transfers, new job openings, and retirements. These goals should also take into account the number of qualified minorities in the area work force. Moreover, goals should be temporary in nature, designed to achieve, not maintain, racial balance.

Fourth, courts are more likely to validate AAPs that focus on recruiting, hiring and promotion practices, rather than plans that give special treatment in the event of a layoff. The courts are more willing to protect an incumbent employee's interests in his current job than any speculative expectations an employee might have about a job that he doesn't currently hold.

**Q. Is an employer required to pay workers the same wage when they are performing substantially the same job?**

**A.** No. Differences in wages are prohibited only when the reason for the difference is the race, color, religion, national origin, sex, age or disability of the worker. An employer is allowed to pay workers different wages based on seniority, merit, or piece rate.

## EQUAL WAGES AND THE EQUAL PAY ACT

The Equal Pay Act (EPA) prohibits an employer from discriminating in wages on the basis of sex, where the employees are performing substantially equivalent work. This same type of discrimination is also prohibited under Title VII. Both statutes are enforced by the EEOC but there are some differences between the two. First, the EPA applies to all employers that are subject to the FLSA (at least two workers engaged in interstate commerce and \$500,000 annual volume of business), whereas Title VII covers employers with fifteen or more employees. Second, the EPA prohibits wage discrimination based only on sex, whereas Title VII prohibits wage discrimination based on race, color, religion, national origin and sex. Lastly, an employee who brings a lawsuit under the EPA may be entitled to recover twice the amount of lost wages, whereas under Title VII the employee may recover lost wages, as well as compensatory and punitive damages. In some circumstances, the total amount of damages awarded may be greater under Title VII.

**Q. What is the difference between comparable worth and equal pay for equal work?**

**A.** The basic concept behind comparable worth is to compare the value of different jobs to the employer. Each job is dissected to determine the types of skills the employee uses and the amount of effort and independent judgment involved. Those jobs that require the use of the same skills, etc. are said to be comparable. Thus, an assembly line job and a secretarial job could be comparable in worth to the employer. Proponents of comparable worth argue that where two jobs are comparable, the pay for the two jobs should be the same. Proponents claim that an employer's failure to pay equally for jobs of comparable worth is sex discrimination and violates Title VII. So far, most courts have rejected this legal theory.

The concept of equal pay is based on the Equal Pay Act of 1963. This federal law requires employers to pay the same wage rate to all workers doing jobs that are substantially identical. The focus here is on the actual job being done. If the job is the same, then the employer cannot pay different wages based on sex. However, differences in pay are allowed if they are based on seniority systems, merit systems, systems based on production quantity or quality, or any factor other than sex. Several states also have equal pay laws.

**Q. Some benefits cost more to provide based on an employee's age. Must an employer provide all employees with exactly the same benefits even if it has to pay more for some of the employees?**

**A.** Generally speaking, the employer cannot discriminate in providing benefits based on age. However, the ADEA recognizes that age is actuarially significant in determining the cost of providing some benefits. For example, the cost of providing life insurance for a sixty-year-old employee may be more expensive for the employer than buying the same

insurance for a twenty-year-old employee. So long as the employer pays the same amount in premiums for both the sixty year old and the twenty year old, it will not violate the ADEA even though the effect of paying the same premium is that the sixty year old will have less coverage than the twenty year old. However, where age does not have an actuarially significant effect on the cost of the benefit, the employer cannot discriminate based on age. For example, an employer could not grant three weeks vacation to all employees under fifty but only give two weeks vacation to all employees over fifty.

**Q. If an employer provides health insurance for its employees, must it offer coverage to employees with disabilities?**

**A.** Yes. Under the ADA an employer cannot deny employees with disabilities equal access to health insurance coverage.

**Q. Must health insurance cover all medical expenses of an employee with a disability?**

**A.** Not necessarily. Many insurance policies have pre-existing condition clauses that disallow coverage for medical conditions that an individual had before being employed by his or her current employer. Such clauses are lawful so long as they are not used as a subterfuge to evade the purposes of the ADA. Many health insurance policies also limit coverage for certain procedures or treatments to a specific number per year. For example, some provide reimbursement for only twelve psychiatric treatment sessions per year. Such limitations are generally allowed. It is not clear, however, whether an employer could offer a health insurance policy that puts a cap on the amount of reimbursement for a specific disease, for example, a \$5000 reimbursement limit for cancer, as opposed to a cap on the amount of reimbursement that is available for any type of medical condition, for example a one-million-dollar lifetime limit.

**Q. Since actuary tables show that women live longer than men, can employers provide different retirement and pension plans for each sex?**

**A.** No. The United States Supreme Court has specifically held that pension plans cannot discriminate based on sex. Thus, in defined contribution plans, an employer must contribute the same amount for both males and females. In defined benefit plans, both males and females must receive the same benefits.

### **Discrimination Based on Gender**

**Q. Must an employer provide health insurance coverage for pregnancy?**

**A.** The answer depends on whether the employer provides any health insurance coverage at all. The anti-discrimination laws do not require an employer to provide any benefits, including health insurance coverage. However, if an employer does provide such benefits, they must be available to all employees without regard to sex, race, color,

religion, national origin, age or disability. Thus, if an employer provides health insurance it must include coverage for pregnancy and pregnancy-related conditions.

### **DISCRIMINATION BASED ON PREGNANCY**

In 1978 Congress passed the Pregnancy Discrimination Act, amending Title VII so that the prohibition against sex discrimination includes discrimination because of pregnancy, childbirth and related medical conditions. Thus, an employer cannot base employment decision on the fact that a worker is pregnant. Moreover, the employer must treat pregnancy the same as it would treat any other employee medical condition.

**Q. Must the employer's health insurance pay for abortions?**

**A.** No. The Pregnancy Discrimination Act expressly provides that employers do not have to pay health insurance benefits for abortion, "except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion."

**Q. May employers provide dependent health care coverage to married male workers but deny it to married women workers?**

**A.** No. Title VII prohibits all discrimination in benefits based on sex. Thus, if the employer provides health insurance benefits to the spouses of male workers, it must provide the same coverage to the spouses of female workers. Moreover, the extent of the coverage provided for dependents must be equal. For example, if all medical expenses of female workers' spouses are covered, then all medical expenses of male workers' spouses must be covered, and that would include coverage for pregnancy.

**Q. Is there any exception under Title VII allowing the employer to take sex into account in providing fringe benefits?**

**A.** No.

**Q. May an employer refuse to hire an applicant because she is pregnant, or fire a worker who becomes pregnant?**

**A.** No. The Pregnancy Discrimination Act prohibits employment discrimination based on pregnancy.

**Q. May an employer require a worker to take a leave when she becomes pregnant?**

**A.** No.

**Q. When I take time off to give birth to a child, will I get my old job back?**

**A.** Under Title VII, the employer must treat time off from work due to pregnancy the same as any other medical condition. Thus, if an employer reinstates a worker who was absent from work because he or she had the flu, the employer must reinstate a worker after childbirth.

If your employer is covered under the terms of the Family and Medical Leave Act (see sidebar), then you are entitled to your old job back regardless of how the employer treats other workers.

### **THE FAMILY AND MEDICAL LEAVE ACT**

The Family and Medical Leave Act is a federal law requiring employers to grant up to twelve weeks of unpaid leave with right to reinstatement to employees under certain conditions. The law applies to private sector employers who employ at least fifty employees and to all public sector employers. Employees are eligible for leave if they have worked at least 1250 hours for their employer for at least one year and if there are at least fifty employees at the employees' work site or there are at least fifty employees within at least seventy-five miles of that worksite.

The law requires employers to grant employees up to twelve weeks of unpaid leave during any twelve-month period for any one of the following reasons:

1. because of the birth of a child and in order to care for the child
2. because of adoption or foster care placement of a child
3. because of a serious health condition that makes the employee unable to perform his duties;
4. in order to care for a spouse, child or parent with a serious medical condition.

If the employer provides health insurance coverage for its employees, it must continue that coverage during the leave of absence with no additional charge to the employee. At the end of the leave period, the employer is required to reinstate the employee to his or her previous position or to an equivalent position.

Employees can enforce their entitlement to the rights granted under the FMLA by filing a lawsuit.

**Q. Is an employer required to give workers maternity/paternity leave?**

**A.** If an employer is covered under the terms of the Family and Medical Leave Act, it is required to give workers maternity and paternity leave.

Title VII requires employers who grant leaves of absence for other types of personal nondisability reasons to grant maternity leave on the same terms. If there is a medical reason for an extended leave after childbirth, then the employer must treat the leave the same as it would treat any other request for medical or disability leave.

Some states, such as Washington and Minnesota, have laws requiring employers to grant parental leave to employees.

**Q. May employers fire female workers who get married?**

**A.** Title VII does not protect workers based on their marital status. However, if the employer fires only female workers who get married but not male workers, the employer has violated Title VII by engaging in disparate treatment sex discrimination--it applies an employment policy only to women.

Some states, however, such as Wisconsin, Oregon and Illinois, have laws that expressly prohibit employment discrimination based on marital status. In those states it would violate the law to fire married workers even if the employer applied its policy to both sexes.

### **Other Protections for Workers**

**Q. I'm in the army reserve and must attend training camp every year. Is my employer required to give me time off?**

**A.** Yes. The Uniformed Services Employment and Re-employment Rights Act requires all employers to grant employees who are in military service unpaid leaves of absence to perform their military obligation. Upon completion of their military duties, employees are entitled to their previous job with such seniority, status, pay and vacation as if they had not been absent. The re-employment rights granted by this law apply to all types of military service--active or reserve armed forces and National Guard--whether the employee is drafted or enlisted.

### **TIME OFF FOR JURY DUTY**

The Jury System Improvements Act is a federal law that prohibits an employer from disciplining or discharging an employee because he or she has been called to serve on a federal jury. Additionally, approximately thirty-seven states have laws that prohibit an employer from firing a worker who is called to perform jury service in the state court system.

### **TIME TO VOTE**

There are approximately thirty states, including New York, Ohio and Maryland, which have state laws requiring employers to grant employees time off from work to vote in elections. The purpose of the laws is to ensure that those employees whose work hours do not allow for sufficient time to vote while the polls are open can take some time off from work to vote. Thus, if an employee's work shift is from three o'clock until eleven o'clock p.m., the employer would not have to give the employee time off to vote. But, if the employee worked from eight a.m. until six p.m., the employer may be required to grant time off. Most of the laws apply to all elections, whether federal, state or local, although a few are limited to particular types of elections. Most of the laws do not allow the employer to deduct wages for the time off.

**Q. My employer wants me to work on Saturdays, but my religion requires me to attend services on Saturdays. Can the employer fire me for refusing to work on Saturdays?**

**A.** Title VII requires employers to accommodate the religious beliefs of their employees unless the accommodation would cause an undue hardship for the business. If another employee is willing to work your shift on Saturdays, and the employer would not have to pay him more than he would pay you, the employer would be required to accommodate you. However, if the accommodation would cost the employer additional money, or would cause a disruption in the business, accommodation would probably be considered unreasonable.

### **Sexual Harassment**

**Q. Is sexual harassment illegal?**

**A.** Yes. The U.S. Supreme Court has held that Title VII's prohibition against sex discrimination includes sexual harassment as a type of illegal sex discrimination. Moreover some states, such as Illinois, Michigan and North Dakota, have laws expressly prohibiting sexual harassment. Most other states interpret their laws prohibiting sex discrimination to include sexual harassment.

### **RACIAL, RELIGIOUS AND ETHNIC HARASSMENT**

Title VII also forbids words and conduct that vilify and denigrate individuals based on their race, religion or national origin. Severe and pervasive racial, religious and ethnic slurs can create a hostile work environment. This concept is very similar to the concept of sexual harassment caused by a hostile work environment, and the employer's liability for this conduct is based on similar principles.

**Q. How is sexual harassment defined?**

A. The EEOC defines sexual harassment as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature...when...submission to or rejection of such conduct is used as the basis for employment decisions...or such conduct has the purpose or effect of...creating an intimidating, hostile or offensive working environment."

Thus, sexual harassment consists of two types of prohibited conduct: 1) quid pro quo--where submission to harassment is used as the basis for employment decisions; and 2) hostile environment--where harassment creates an offensive working environment.

### **WHAT VICTIMS OF SEXUAL HARASSMENT CAN DO**

Employees subjected to sexual harassment should immediately notify their supervisor. If the supervisor is the harasser, the worker should go to the supervisor's superiors. Employers cannot solve the problem if they do not know about it. If there is a grievance procedure, employees should use it.

Victims should keep a written record of all incidents of harassment, detailing the place, time, persons involved and any witnesses. Victims can also express their disapproval of the conduct to the perpetrator and tell him or her to stop.

An employee can file a claim with the EEOC. If the state in which the employee lives prohibits sexual harassment, the worker should contact the proper state agency.

#### **Q. What is quid pro quo harassment?**

A. This occurs when a job benefit is directly tied to an employee submitting to unwelcome sexual advances. For example, a supervisor promises an employee a raise if she will go out on a date with him, or tells an employee she will be fired if she doesn't sleep with him.

Only individuals with supervisory authority over a worker can engage in quid pro quo harassment, since it requires the harasser to have the authority to grant or withhold job benefits.

#### **Q. If a worker "voluntarily" has sex with a supervisor, does this mean that she has not been sexually harassed?**

A. Not necessarily. In order to constitute harassment, sexual advances must be "unwelcome." If an employee by her conduct shows that sexual advances are unwelcome, it does not matter that she eventually "voluntarily" succumbs to the harassment. In deciding whether the sexual advances are "unwelcome," the courts will often allow evidence concerning the employee's dress, behavior and language, as indications of whether the employee "welcomed" the advances.



**Q. Is an employer liable for quid pro quo harassment engaged in by its supervisors?**

**A.** In general, an employer is held to be strictly liable when a supervisor engages in quid pro quo harassment.

### **EXAMPLES OF SEXUAL HARASSMENT**

Sexual harassment can take many forms. It can consist of vulgar or lewd comments, or forcing workers to wear sexually revealing uniforms. It can involve unwanted physical touching or fondling, or suggestions to engage in sexual conduct. Even obscene, or sexually suggestive, cartoons and posters can be sexual harassment. Occasional inappropriate touching, off-color jokes, or repeated sexual references can be sexual harassment. It depends on the circumstances. Courts consider the nature and frequency of the conduct as well as the conditions under which the conduct occurred.

**Q. What is hostile environment harassment?**

**A.** This occurs when an employee is subjected to comments of a sexual nature, offensive sexual materials, or unwelcome physical contact as a regular part of the work environment. Generally speaking, a single isolated incident will not be considered hostile environment harassment unless it is extremely outrageous and egregious conduct. The courts look to see whether the conduct is both serious and frequent.

Supervisors, managers, co-workers and even customers can be responsible for creating a hostile environment.

### **HOW EMPLOYERS CAN PREVENT SEXUAL HARASSMENT**

- Develop a written policy dealing with sexual harassment, indicating that sexual harassment is against the law and also violates company policy. The employer can contact the EEOC in Washington, D.C. for its guidelines on sexual harassment. These will help the employer formulate its policy.
- Develop an effective complaint procedure for workers subjected to sexual harassment. Provide a mechanism for employees to bypass their supervisor when the supervisor participates in the harassment or fails to take proper action. The complaint procedure should encourage a prompt solution to the problem.
- Promptly and effectively respond to sexual harassment complaints. Undertake a complete and confidential investigation of any allegations of harassment and impose appropriate disciplinary action.
- Prevent sexual harassment before it occurs. Circulate or post the company anti-harassment policy and the EEOC rules on sexual harassment. Express strong disapproval of such conduct and tell employees of their right to be free from harassment.

**Q. Is an employer liable for hostile environment harassment?**

**A.** It depends on who has created the hostile environment. The employer is liable when supervisors or managers are responsible for the hostile environment, unless the employer can prove that it exercised reasonable care to prevent and promptly correct sexually harassing behavior and that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.

**Age Discrimination**

**Q. Can employers force workers to retire?**

**A.** Generally speaking, no. The ADEA prohibits mandatory retirement based on age. If an employee can no longer perform his or her job duties, however, the employer is allowed to discharge that person.

There are some exceptions to the general rules against forced retirement. Executives or high-level policy makers can be forced to retire at age sixty-five if they are entitled to receive retirement benefits of at least \$44,000 a year, exclusive of social security. Firefighters, police officers and prison guards employed by state and local governments can also be forced to retire if required to do so by state or local law and pursuant to a bona fide retirement plan.

**FILING A COMPLAINT UNDER THE ADEA**

If you believe you have been the victim of age discrimination, you may file a complaint with the EEOC. There are regional offices of the EEOC in most major cities in the U.S. If you are in a state that has a state law prohibiting age discrimination, you may also file a complaint with the state agency charged with enforcing the state law.

The time limit for filing a charge with the EEOC is 180 days after the discrimination happened; or, if you are in a state with a state age law, 300 days after the discrimination occurred, or thirty days after the state agency terminates proceedings, whichever happens first.

When the EEOC completes its investigation it issues a right to sue letter. The charging party must file any lawsuit within ninety days of receipt of the right to sue letter.

**Q. Can employers offer voluntary retirement incentives?**

**A.** Yes, so long as they are truly voluntary, and the decision whether to accept the incentives and retire is up to the employee.

---

## PRIVACY IN THE WORKPLACE

**Q. Are there any federal laws that protect the confidentiality of workplace records?**

A. The ADA requires employers to keep any medical records regarding employees confidential and separate from employee personnel files. The law states that the only persons who may be informed about an employee's medical conditions are:

- first aid or safety personnel if the medical condition may require emergency treatment; and
- government officials investigating compliance with the ADA.

The employer may also inform supervisors and managers about restrictions on work duties or necessary accommodations required by a disability.

The Privacy Act (5 U.S.C. Section 552a) forbids federal government employers from disclosing any information contained in employee files without the written consent of the employee in question.

**Q. Do state laws protect the confidentiality of workplace records?**

A. Some states have statutes prohibiting the disclosure of certain employee information. Several states, including California, Florida and Pennsylvania, prohibit disclosure of employee medical records. At least one state, Connecticut, prohibits disclosure of any employee personnel information without the written consent of the employee in question.

Unnecessary disclosure of information in which the employee has a reasonable expectation of privacy may result in employer liability in tort for invasion of privacy or intentional infliction of emotional distress.

**Q. Do employees have a right of access to their personnel files?**

A. The Privacy Act allows federal government employees to have access to their records and to make a copy of any portion of the documents. It also provides for a procedure by which federal employees can challenge the information contained in their files.

Several other laws apply to the private sector. OSHA requires private-sector employers to give employees access to medical records that the law requires employers to maintain when employees are exposed to potentially toxic materials at work.

The NLRA imposes on the private-sector employer a duty to disclose to unions information that is necessary and relevant for collective bargaining purposes, which can include access to employee personnel files. There is, however, no duty to disclose such information directly to the employee.

Approximately fifteen states, including California, Massachusetts, Michigan and Wisconsin, grant employees access to their personnel files. Some of the statutes also provide for procedures by which employees can challenge information in their files.

**Q. Can employers listen to employee telephone calls?**

**A.** Title III of the Omnibus Crime Control and Safe Streets Act (18 U.S.C. Sections 2510-2520) prohibits employers from eavesdropping on, or wiretapping, telephone calls. There is a large exception allowing employers to listen in on an extension telephone used in the ordinary course of business. A second big exception allows employers to monitor telephone calls where employees have been expressly notified that their telephone conversations will be monitored. Some courts have indicated, however, that once the private nature of a telephone conversation is determined, any continued eavesdropping would not be in the ordinary course of business and may subject the employer to liability.

An employer violating the law can be sued for money damages.

**Q. Can employers use video cameras to monitor workers?**

**A.** The NLRA prohibits employer surveillance of employee union activity, discussions about unions or union meetings. Some state laws regulate the extent to which an employer can monitor workers. For example, Connecticut prohibits surveillance or monitoring "in areas designed for the health or personal comfort of the employees or for the safeguarding of their possessions, such as rest rooms, locker rooms or lounges." Moreover, state tort law may protect employees against highly offensive intrusions upon privacy in a place where a person has a reasonable expectation of privacy. For example, monitoring an employee bathroom may be considered an invasion of privacy.

**Q. Can employers search workers or their possessions?**

**A.** Within limits, such searches are usually allowed by law. However, a collective bargaining agreement might restrict or prohibit such conduct. (For a discussion of the constitutional restrictions on public employers see section in this chapter titled "[Special Rights of Public Sector Employees](#)" on page 40.)

It is extremely important, however, that employers are careful about the manner in which they conduct searches so as to avoid tort liability for assault, battery, false arrest, intentional infliction of emotional harm or invasion of privacy.

First, employers should have a work-related reason for the search, although they do not have to prove probable cause to conduct a search. Second, any search should be conducted by the least intrusive means possible. Third, employers should inform employees that searches might be conducted. Fourth, employers should not physically harm employees in the course of the search or threaten employees with physical harm. Fifth, the employer should not attempt to prevent employees from leaving the premises by threat of harm or other coercive means, although they are usually allowed to tell employees that they will be disciplined or discharged if they leave.

**Q. Can employers impose dress and grooming codes?**

**A.** Generally speaking, employer dress and grooming policies are allowed. There are a few instances, however, in which such policies may run afoul of Title VII. Some employers, for example, impose a dress code on female employees but not male employees. This could be a violation of Title VII for disparate treatment based on sex. Or a grooming code may impact more severely on members of a particular protected class, thus having an adverse impact under Title VII. For example, a rule requiring employees to be clean-shaven may adversely impact on members of certain religious groups. In that case, the employer would have to show a business necessity in order to enforce the policy.

**Q. Can employers require employees to speak only English while at work?**

**A.** The EEOC has interpreted Title VII to prohibit the promulgation of an English-only rule unless it can be justified by business necessity. Requiring employees to speak only English may have an adverse impact on persons of certain ethnic or national origin. Thus, an employer may be able to justify an English-only rule when its employees are dealing with customers but could not enforce such a rule in the employee lunchroom.

**Q. Can employers prohibit smoking in the workplace?**

**A.** Yes, unless there is a collective bargaining agreement that allows for smoking in the workplace.

**Q. Can employers base employment decisions on employee off-duty conduct?**

**A.** It depends. There are several states--such as Illinois, Minnesota, Montana and Nevada--that prohibit an employer from taking adverse action against an employee because that employee uses lawful products off employer premises during non-working time. Thus, in those states an employer could not refuse to hire, or fire, a worker who smoked off duty or drank alcohol. Moreover, a majority of states prohibit employers from refusing to hire, or firing, employees because they use tobacco products off employer premises during non-working time.

A collective bargaining agreement may require the employer to justify employment decisions based on just cause. As a general rule, in order to satisfy a just cause requirement, the employer would have to show that the employee's off-duty conduct somehow implicates the employer's legitimate business interests.

Some state anti-discrimination laws prohibit employers from discriminating in terms and conditions of employment based on marital status, arrest and conviction records, or sexual orientation. The federal bankruptcy law prohibits an employer from discriminating against an individual solely because that individual has filed for bankruptcy.

**Q. What are the legal implications of providing employee references to prospective employers?**

**A.** Approximately twenty states prohibit employers from engaging in blacklisting. Blacklisting consists of intentionally taking action aimed at preventing an individual from obtaining employment. Truthful statements concerning an individual's ability to perform the job in question are not considered to be blacklisting.

The manner in which a reference is made and its content can give rise to employer liability under state tort law relating to defamation, intentional interference with a prospective employment contract, intentional infliction of emotional distress, or negligent misrepresentation.

Defamation occurs when one person's false statement injures the reputation of another person. However, most states recognize a qualified privilege defense to defamation for references to prospective employers given in good faith. Providing false information to a prospective employer with the intent of causing an applicant to lose the job constitutes intentional interference with prospective employment contract. Disclosure of private personal matters unrelated to work can result in an invasion of privacy or intentional infliction of emotional distress claim. Lastly, a false statement that causes a loss of money can be grounds for negligent misrepresentation.

To be safe, an employer should limit the number of individuals authorized to provide references on its behalf. Second, statements based on hearsay or gossip should be avoided. Third, only items that have a direct bearing on an individual's work performance should be discussed.

**Q. Must an employer provide an employee with a reference?**

**A.** Generally speaking, no. There are, however, at least four states--Indiana, Missouri, Texas and Washington--that require an employer to provide, upon request, a service letter to the employee. A service letter contains the nature of the employee's job while employed by the employer, the duration of the employment, and the reason for the separation.

---

## **AIDS IN THE WORKPLACE**

The medical information in this section comes from a report by the New York State Department of Health entitled 100 Questions and Answers, AIDS. You can get a copy by calling their AIDS hotline at (212) 447-8200. The U.S. Centers for Disease Control (CDC) in Atlanta, GA, also has information for employers and employees. Guidelines for the workplace are of particular value. They are available by calling (404) 639-3534 or by writing to the Centers for Disease Control, Public Inquiries Office, Building 1, Room B46, 1600 Clifton Road NE, Atlanta, GA 30333

**Q. What is AIDS?**

**A.** Acquired immune deficiency syndrome (AIDS) is a disease complex characterized by a collapse of the body's immune system. This makes AIDS patients vulnerable to one or more unusual infections or cancers. These infections or cancers are not a threat to anyone whose immune system works normally. The cause of AIDS appears to be a specific virus.

**Q. How contagious is AIDS?**

**A.** AIDS is unlike most communicable diseases, such as colds and the flu. Sneezing, coughing, or eating or drinking from common utensils cannot spread AIDS. Merely being around infected people for a long time cannot transmit AIDS. The vast majority of scientific evidence appears to indicate that AIDS can be spread only by sexual contact or any exchange of infected blood, semen, or vaginal fluids.

Medical experts have studied AIDS for over twenty years. It is evident that casual contact with AIDS patients does not threaten others. Scientists have not found any AIDS cases due to casual (nonsexual) contact with a household member, relative, co-worker, or friend. Health workers and others who care for AIDS patients have contracted AIDS only when they have pricked themselves with contaminated needles or in other ways been directly contaminated by the patient's blood, semen or vaginal fluids. No health worker has ever contracted AIDS from casual contact with an AIDS patient.

**Q. May employers fire workers because they have AIDS?**

**A.** No. The ADA prohibits employment discrimination against individuals with AIDS, or because an individual is HIV positive. Moreover, almost every state has a law prohibiting discrimination against individuals with a disability, and most of those laws interpret disability to include AIDS.

Some laws target the AIDS problem directly. For example, laws in California, Wisconsin, and Florida prohibit using the results of certain blood tests to make employment decisions. Public health laws that encourage AIDS testing usually require that the test results be kept secret.

**Q. What can an employer do about AIDS?**

**A.** First, the employer should make someone responsible for informing management about current events. The Center for Employment Relations and Law (CERL) offers a series of four videotapes entitled, "AIDS and the Workplace". You can order the from CERL, College of Law, Florida State University, Room 218, Tallahassee, FL 32306; telephone (904) 644-4287.

Second, consider hiring a medical consultant familiar with AIDS. As an alternative, get advice from the state or local health officer in charge of AIDS.

Third, consider developing company policies about AIDS. The U.S. Centers for Disease Control (CDC), your state health authority, or other companies or organizations may already have established guidelines. It might help to write to the proper health authorities in New York, California, or Florida.

Fourth, educate your employees. Public health officials and the CDC have materials that you can distribute to your employees.

Fifth, do not overreact if an employee of your company develops an AIDS problem. Seek expert legal and medical advice about the proper action that you should take. Keep the information you obtain on specific employee medical problems confidential. The ADA requires that medical histories be kept confidential. Moreover,

unnecessary disclosure of such information may leave the employer liable to a lawsuit for invasion of privacy or intentional infliction of emotional distress.

---

## **SPECIAL RIGHTS OF PUBLIC SECTOR EMPLOYEES**

Most of the anti-discrimination laws that have been discussed in this chapter apply to public sector employers as well as private sector workers. Moreover, even though the NLRA expressly excludes public sector employers, the federal government and most states have collective bargaining laws patterned after the NLRA that give public sector employees the right to be represented by labor unions and negotiate collective bargaining agreements.

Because public sector workers are employed by the government, they have additional protections not normally available to private sector employees. These protections, found in the civil service laws and the federal and state constitutions, apply only to governmental employers.

**Q. What are civil service laws?**

**A.** Civil service laws establish employment policies for public sector employees based on the merit principle. The purpose behind establishing civil service laws was to eliminate political considerations in the employment process. The elements of a civil service system generally include guidelines for recruiting applicants, testing programs for screening applicants, impartial hiring criteria, job classifications based on duties and responsibilities, and protection against arbitrary discipline and discharge. A commission is usually established to ensure that the public sector employer is following the civil service rules. The particulars of civil service laws and the role and operation of the commission varies from state to state.

**Q. What type of protection does the U.S. Constitution afford public sector employees?**

**A.** The most important protections afforded by the U.S. Constitution (that are not duplicated by anti-discrimination laws already discussed) are the rights to freedom of association, freedom of speech, the right to be free of unreasonable searches and seizures, and due process protections in the event of discharge from a job.

**Q. How does freedom of association protect a public employee?**

**A.** Basically, a public sector employer cannot base employment decisions on the fact that an individual belongs to certain types of clubs or associates with particular people. Thus, a public sector employer can't refuse to hire an applicant just because he is a Republican, or belongs to a motorcycle club, or is a member of the American Civil Liberties Union.

**Q. How does freedom of speech protect a public employee?**



**A.** When a public employee speaks out on issues of public concern, his employer cannot discipline or discharge him for his comments. For example, if a schoolteacher writes a letter to the newspaper criticizing the curriculum developed by the school board, the school board could not discharge that teacher for her criticism. However, if the comments of the employee relate to matters of purely private concern, such as the teacher complaining that she did not get a day off when she requested it, the principle of freedom of speech would not protect her in the employment arena.

**Q. How does freedom from unreasonable search and seizure protect a public employee?**

**A.** An employee may have a reasonable expectation of privacy in certain places at work, such as a desk or filing cabinet that is not shared with other workers. In those areas where the employee has such a reasonable expectation of privacy, an employer may conduct a work-related noninvestigatory search, as well as an investigatory search for work-related misconduct, only if there are "reasonable grounds for suspecting the search will turn up evidence that the employee is guilty of work-related misconduct, or that the search is necessary for a noninvestigatory work-related purpose such as to retrieve a needed file."

Although the law on this point is unsettled, public sector employers would likely need probable cause to suspect workplace misconduct before they could search personal items such as a briefcase, luggage or purse that an employee brings into the workplace.

As for searches relating to drug testing, see sidebar on [Drug Testing and the Constitution](#) in the section of this chapter entitled "The Hiring Process" beginning on page 9.

**Q. How does due process protect a public employee?**

**A.** Where an employee has a property interest in his job, he or she cannot be discharged without due process. In determining if a property interest exists, the courts look to whether there is a written or implied contract granting the employee a property interest in his job; whether past practice of the employer shows that the employee has a property interest in his job; or if a statute gives the employee a property interest in his job. For example, a teacher with tenure is considered to have a property interest in his or her job, because there is the express or implied understanding that a teacher cannot lose that job without just cause

Due process requires that the employee be given notice of the reason for being discharged, a hearing at which to contest the decision, and a decision by an impartial third-party decision-maker.

---

## UNIONS IN THE WORKPLACE

The role of unions in the workplace is to act as the representative of the employees in dealing with the employer concerning workplace issues. Thus, instead of each worker negotiating separately with the employer regarding wages, health insurance coverage, etc., the union bargains with the employer on behalf of all the workers. The NLRA, which regulates union- employer relations at work, is premised on the notion that individual

employees have very little leverage in bargaining with their employer, and that in practice the employer unilaterally sets wage and benefit levels without any discussion with the workers. If the workers pool their individual bargaining power, however, and negotiate collectively through a union, the result will more likely be a product of true give-and-take where the workers will have an effective voice concerning workplace issues.

## **UNION-MANAGEMENT RELATIONS IN THE AIRLINE AND RAILWAY INDUSTRIES**

The Railway Labor Act regulates union-management relations in the airline and railway industries. It is very similar to the NLRA regarding the types of employee activities protected and the types of employer conduct regulated. One of the major differences between the two statutes is in the enforcement mechanisms provided. The Railway Labor Act is enforced by the National Mediation Board and the National Railroad Adjustment Board.

### **Q. What kinds of employees are covered by the NLRA?**

**A.** Initially, an employee must be employed by an employer subject to the jurisdiction of the NLRA, which includes private sector employers engaged in interstate commerce, but excludes railroad, airlines and public sector employers. (For more details see section in this chapter entitled "[Federal Laws Regulating the Workplace](#)" on page 3.)

Secondly, even if one is employed by a covered employer, there are certain categories of workers who are not protected by the statute: domestic employees of a family, farm workers, persons employed by a parent or spouse, independent contractors, supervisors and managers.

## **UNION-MANAGEMENT RELATIONS IN THE PUBLIC SECTOR**

Although the NLRA does not apply to public sector employees, there are separate federal and state laws that regulate the role of unions in government employment. Title VII of the Civil Service Reform Act (5 U.S.C. Sections 7101-7135) grants federal employees the right to be represented by a union for purposes of collective bargaining and prohibits discrimination in employment based on union activity. This statute also sets up the Federal Labor Relations Authority and the Federal Services Impasse Panel to enforce the rights and duties contained in the law

As of 1990 there were forty-one states with statutes covering collective bargaining and union representation of public sector employees. These statutes are generally modeled after the provisions of the NLRA with one significant difference--there is usually some type of restriction or modification on the right of public sector employees to engage in a work stoppage.

**Q. Who is a supervisor or manager?**

A. Supervisors are defined as individuals who have the authority to hire, fire, discipline, promote or adjust the grievances of other employees or to effectively recommend such action. Managers are generally high level employees who use independent judgment in formulating and effectuating company policies.

**Q. How does the NLRA regulate the union-employer relationship?**

A. First, the NLRA gives employees certain rights and prohibits employers and unions from interfering with those rights. Second, the NLRA sets up a mechanism by which employees can vote on whether or not they want a union to represent them in the workplace. Third, it requires employers and unions to engage in collective bargaining and regulates certain types of employer and union tactics that may occur during the course of collective bargaining.

**Q. What rights do employees have under the NLRA?**

A. The NLRA gives employees the rights to: join unions; engage in conduct aimed at promoting or helping unions; choose a union to represent them in collective bargaining with their employer; and engage in group conduct that has as its purpose collective bargaining or helping each other regarding workplace issues (this includes the right to strike). The law also says that employees have the right not to do these things if that is their desire.

**Q. What are some examples of how employees might use these rights?**

A. Attending union meetings, talking to co-employees about unions or other workplace issues, passing out union literature, wearing union buttons, campaigning for union office, circulating petitions advocating workplace improvements, or engaging in a work stoppage or picketing are some examples of exercising NLRA rights.

### **EMPLOYEE ACTIVITY ON COMPANY PROPERTY**

While employees have the right to discuss work issues and union issues with their co-employees and to distribute leaflets and pamphlets talking about unions, these rights can be limited when the employees are on company property.

As a general rule, employers can prohibit discussions during working time, that is, during those periods of the workday when employees are required to work. Thus an employer could prohibit discussions while employees are working at their machines, but could not prohibit discussion while employees are taking their rest breaks or lunch break

As for the distribution of literature, employers are allowed to prohibit it during working time and in work areas at all times. Thus, employees can be prohibited from passing out leaflets on the shop floor but not in the lunchroom.

**Q. Must there be a union in the workplace in order for employees to be able to use their rights?**

**A.** No. Employees have these rights regardless of whether or not a union represents them in the workplace. For example, a group of workers in a non-union workplace can circulate a petition asking the employer for a wage increase.

### **SOME EXAMPLES OF EMPLOYEE ACTIVITIES THAT ARE NOT PROTECTED BY THE NLRA**

Even if employees are exercising a right under the NLRA, the manner in which they conduct themselves may remove them from the protection of the law. Slowdowns, violence, sabotage or vandalism of company property are not protected by the law.

Also, the NLRA generally protects activities only if they involve a group. For example, one worker asking the employer to institute health insurance coverage is not engaged in protected conduct. However, if the worker was acting as a spokesperson for other employees, or if the employees went as a group to ask the employer for health insurance coverage, then the law would protect that group. A single employee attempting to organize colleagues would also be protected.

**Q. Can an employer fire workers who engage in one of their rights under the NLRA?**

**A.** No. The NLRA prohibits an employer from discharging, disciplining or otherwise discriminating against employees who exercise their rights. Prohibited discrimination includes demotion, lay off, wage cuts and denying a promotion.

### **SOME EXAMPLES OF EMPLOYER CONDUCT PROHIBITED BY THE NLRA**

If a group of employees asks the employer for a raise and the employer fires them for asking, the employer has violated the NLRA--the employees were engaged in group conduct for the purpose of dealing with a workplace issue. An employer who refuses to promote an employee because that employee had spoken with her co-workers about union representation has also violated the NLRA. Similarly, an employer who suspends a worker for handing out union leaflets in the locker room during lunch has violated the NLRA.

**Q. What other types of restrictions does the NLRA place on employer conduct?**

**A.** The NLRA prohibits an employer from interfering, restraining or coercing employees in the exercise of their rights. Employers cannot threaten employees with discipline or other adverse actions because they have used their rights. For example, an employer who tells employees they will lose their jobs or have their wages reduced if they vote for a union has violated the NLRA.

Neither can an employer promise employees benefits in order to get them to vote against a union, such as promising a wage increase if the employees reject the union.

As a general rule, employers cannot question employees about their union activities, ask them whether other employees support a union, or ask them what happened at a union meeting.

### **FILING A COMPLAINT UNDER THE NLRA**

If workers believe their rights under the NLRA have been violated, they can file a charge with the National Labor Relations Board (NLRB). There are regional offices of the NLRB in most major cities in the U.S. The time limit for filing a charge is 180 days from the date of the unlawful action. The NLRB will investigate the charge and decide whether or not the law has been violated. If it decides there was no violation, it will dismiss the charge. A worker whose charge has been dismissed does not have the right to file a lawsuit in court.

If the NLRB decides the charge has merit, it will hold a hearing at which evidence is taken and arguments are made. An administrative law judge will then decide whether or not the law was violated. The decision of the administrative law judge can be appealed to the NLRB in Washington D.C. The decision of the NLRB can be appealed to the federal circuit courts of appeal.

**Q. How does a union come to represent a group of workers?**

**A.** A union organizing campaign can start either because the employees in the workplace have contacted the union or the union on its own seeks to organize the workers.

The first step in an organizing campaign is to determine whether the employees have any interest in having a union represent them. The union asks the employees to show their interest by signing an authorization card. This card indicates that the employee is interested in union representation. If at least 30 percent of the workers sign cards, then the union can ask the NLRB to hold a secret ballot election.

Before the election is held, there is usually time for both the union and employer to campaign among the workers, discussing the pros and cons of union representation. The election itself is usually held at the employer's place of business so that it is easy for the workers to vote. The NLRB monitors the election.

If the union wins the election it becomes the bargaining agent for the employees and negotiates a collective bargaining agreement with the employer. If the union loses the election the status quo prevails.

The key point is that it is up to the employees to decide whether or not they want a union; it is their choice to make.

**Q. If the union wins the election, which workers does the union represent?**

A. If a union is voted in to represent the workers, it doesn't necessarily represent every worker employed by the company. The union election is held among those employees who are considered to have a "community of interest" at the workplace. These employees form a bargaining unit, which will be the group of workers who will be represented by the union in the event the union wins the election.

Employees have a community of interest where they share similar working conditions, jobs, hours of work and supervision. For example, employees who work on an assembly line probably do not have a community of interest with office workers, whereas salespersons in a department store would probably share a community of interest even though they worked in different departments and sold different types of goods.

**Q. If a worker voted against the union in the election and the union wins, does the union represent that worker?**

A. Yes. The law requires the union to represent all employees in the bargaining unit, fairly and nondiscriminatorily, regardless of whether or not they supported the union.

**Q. If a union wins the election, must the workers join the union?**

A. No. Just as the NLRA gives employees the right to join unions, it also gives employees the right to refuse to join a union. The NLRA prohibits both employers and unions from forcing employees to join a union.

However, employees can be forced to pay for the work that the union performs on their behalf. Most collective bargaining agreements contain a "union security clause." In effect, this clause requires workers to pay the dues and fees that union members are required to pay. If a worker refuses to pay dues, he or she can be fired.

Because the law requires the union to represent all the workers in the bargaining unit, regardless of whether or not they are members of the union, the law allows the union to "tax" the workers for the benefits they receive from union representation. Some states, however (mostly located in the South and Western mountain regions), do not allow contracts to have union security clauses.

## **RELIGIOUS AND OTHER OBJECTIONS TO UNIONS**

An individual whose religion prohibits him from supporting a labor union is exempt from the requirement of paying dues and fees to a union pursuant to a union security clause. An alternative requirement can be imposed on such an individual--he or

she must pay an amount equivalent to union fees and dues to a non-religious, non-labor charitable organization. Both the NLRA and Title VII require that such an accommodation be made to employee religious beliefs.

Individuals whose personal views conflict with those of the union that represents them can object to the payment of dues or fees that are used for purposes unrelated to collective bargaining. The objector is entitled to have the financial obligation imposed by the union security clause reduced by that proportion of union dues money spent on activities unrelated to collective bargaining and representation of workers. The burden is on objectors to notify the union of their objection.

**Q. What is a collective bargaining agreement?**

A. A collective bargaining agreement is the contract that the employer and the union negotiate. When a union wins an NLRB election, the law requires the employer to sit down and bargain in good faith with the union in an attempt to agree on the terms of a contract. This contract will cover the wages, hours, terms and conditions of employment that govern the employees in the bargaining unit. While this contract is in effect (usually a term of three years) the employer must live up to its terms and cannot make any changes in working conditions unless those changes are agreed to by the union.

**Q. What is covered in a collective bargaining agreement?**

A. Most collective bargaining agreements cover the basic terms and conditions of employment. These include rates of pay, hours of work, health insurance, pension benefits, vacations, seniority rights, job assignments, work rules, and procedures for promotions, layoffs, recalls and transfers. Most contracts also contain a provision allowing the employer to discipline or discharge employees only if there is "just cause."

**Q. What happens if the employer fails to live up to the terms of the collective bargaining agreement?**

A. Most union contracts contain grievance procedures. If the union believes that the employer has violated the contract it can file a complaint through the grievance procedure. This procedure has several steps during which the union and employer can attempt to settle the dispute between themselves. If they are unsuccessful, the complaint may be submitted to an arbitrator for an impartial decision. At a hearing, the arbitrator will listen to evidence and arguments from both sides and decide whether or not the contract was violated. In most instances the decision of the arbitrator is final.

**Q. What is the union's responsibility in representing the workers?**

A. The union has two major duties toward the employees. First, the union is required to represent the workers in bargaining with the employer. Second, the union has a duty to fairly represent all workers in its dealings with the employer.

**Q. What does the duty to fairly represent the workers entail?**

**A.** In carrying out its responsibilities, the union has to make many decisions. It has to decide whether to ask the employer for better wages or better pension benefits. It has to decide whether an employer's decision to discharge a worker violated the contract or was based on just cause. The basis on which the union makes its decision on these and other issues affecting the workers cannot be arbitrary, discriminatory or in bad faith.

For example, a worker is discharged for tardiness and he complains to the union. The union has to decide whether it should file a complaint under the contract's grievance procedure to protest the discharge or whether the employer was within its rights to discharge the worker. If the union decides not to file a grievance because the worker is not a union member, or because he is African-American, it has violated its duty to fairly represent the worker. That decision is based on a discriminatory reason. If, however, the union decides not to file the grievance because the worker was tardy for fourteen days in a row and this violated a known company rule, then the union has not violated its duty to fairly represent the worker.

**Q. What are the legal consequences of engaging in a strike?**

**A.** That depends on what caused the strike. If the reason for the strike is to protest workplace conditions or to support union bargaining demands, it is called an economic strike. Economic strikers can be permanently replaced by the employer. If the employer replaces the strikers, it is similar to being laid off. When the strike ends, if the replacement worker is still employed, then the striker is not entitled to be reinstated to his job. However, as soon as a vacancy occurs, the striking employees have the right to be reinstated to their jobs.

If the reason for the strike is to protest the fact that the employer has violated the NLRA, it is called an unfair labor practice strike. Unfair labor practice strikers cannot be permanently replaced and they have the right to be immediately reinstated to their jobs when the strike ends.

In neither event is an employer allowed to discharge, discipline or otherwise discriminate in terms or conditions of employment because an employee engaged in a strike.

**Q. Are all strikes legal?**

**A.** No. Although the NLRA grants employees the right to strike, not all strikes are protected. If a collective bargaining agreement contains a no-strike clause (the union agrees not to go on strike while the contract is in effect), a strike during the life of the contract would not be protected. The strikers could be fired.

The NLRA requires health care workers to give ten days notice before they go on strike. If these workers strike without giving notice, then they are not protected and can be fired.

Sitdown strikes and intermittent strikes are also unprotected. An example of an intermittent strike is when employees engage in a five-hour work stoppage one day, then



two days later engage in another five-hour work stoppage, and then two days later do it again.

---

## **WAGES AND HOURS**

The FLSA sets the minimum wage that a covered employer must pay all its workers; it also establishes overtime payment requirements. Even if the employer itself is not covered (because, for example, it does not gross \$500,000 annually) it will still be required to pay the minimum wage and overtime to all of its employees who are engaged in the interstate commerce. ([See discussion of coverage under the FLSA](#) in earlier section of this chapter titled "Federal Laws Regulating the Workplace.") Finally, even if an employer and its employees are not subject to the FLSA, many states also have minimum wage and overtime laws that will apply to all employers doing business within the state.

The minimum wage laws deal solely with wage rate issues; they do not require employers to provide any other type of employment benefit, such as health or life insurance.

### **GOVERNMENT CONTRACTORS AND FEDERAL WAGE LAWS**

An employer performing a contract for the federal government involving the manufacture or furnishing of materials, supplies, articles or equipment in excess of \$10,000 is covered by the Walsh-Healy Act. This statute requires that the employer pay all employees the prevailing minimum rate for similar work performed in the locality. This prevailing minimum rate is determined by the Secretary of Labor. Employers are also required to pay all employees who work in excess of forty hours a week "time and a half" pay for overtime.

The Davis Bacon Act requires that federal contractors performing work valued in excess of \$2000 on federal construction projects pay their employees the prevailing area wage and fringe benefit rate. The prevailing area wage is determined by the Secretary of Labor.

#### **Q. What is the minimum wage?**

**A.** The federal minimum wage under the FLSA is \$5.15 an hour. The majority of states that have minimum wage laws peg their minimum wage to the federal minimum. There are approximately six states, including Colorado, Georgia and Kansas, which have set their state minimum wage below the federal limit. About ten states have set minimum wage rates that are higher than the federal rate. For example, Oregon's minimum wage is \$6.50, and Hawaii's is \$5.25.

In those states that have a minimum wage above the federal rate, all employers, even those covered by the FLSA, must pay the higher state rate. In those states where the

state minimum rate is below the federal level, those employers covered by the FLSA must pay the higher federal rate.

**Q. How is an employee's minimum wage rate determined?**

A. The minimum wage is paid for every hour worked in any workweek. Thus, an employee covered under the federal minimum wage of \$5.15 who works twenty hours a week must be paid at least one hundred and three dollars for that week's work.

**Q. What does the law consider as an "hour worked?"**

A. Generally speaking, hours worked include all the time spent by employees performing their job duties during the workday. When a worker's job requires him to travel during his workday, such as a service technician who repairs furnaces at customer's homes, the time spent traveling is considered "hours worked." Preparatory time spent prior to the start of the workday that is required in order to perform the job is considered hours worked. For example, workers who have to sharpen their knives at a meat processing plant, or workers required to wear special protective clothing at a chemical plant would have to be compensated for the time spent sharpening their knives or changing their clothes. Mandatory attendance at lectures, meetings and training programs is considered hours worked. Also included in hours worked are rest periods and coffee breaks shorter than twenty minutes.

The following are examples of activities that are generally not considered hours worked for purposes of minimum wage compensation:

- commuting time to work;
- lunch or dinner breaks of at least thirty minutes;
- changing clothes when done for the benefit of the employee;
- on-call time away from the employer's premises that the employee can use for his or her own purposes.

**EMPLOYER RECORD-KEEPING REQUIREMENTS UNDER THE FLSA**

Employers are required to maintain and preserve certain wage records in order to show their compliance with the FLSA. Employers must maintain employee payroll records for three years containing such information as employee names, hours worked each workday and workweek, wages paid, deductions from wages, straight-time wages and overtime paid. The employer must also retain for a two-year period records that provide documentation in support of the payroll records, such as time cards, work schedules, and order and billing records.

**Q. Must the minimum wage be paid in money, rather than benefits?**

**A.** Yes, but an employer is allowed to take a credit for the cost of providing certain non-cash benefits to employees from the minimum wage owed.

**Q. What types of credits is an employer allowed to take for the minimum wage owed?**

**A.** The employer can credit the reasonable cost of board, lodging and other facilities customarily provided to employees. In order to credit the cost of such non-cash benefits, they must be furnished for the employee's convenience and they must be voluntarily accepted by the employee. Examples of non-cash items whose fair value can be credited to the minimum wage owed are: meals furnished at the company cafeteria, housing furnished by the company for residential purposes, and fuel or electricity used by the employee for non-business purposes.

Employers who have a policy of requiring employees to pay for breakage or cash shortages cannot take such amounts as credit toward the minimum wage owed. Neither are employee discounts allowed as credits toward minimum wage.

### **TIPPED EMPLOYEES AND THE FLSA**

Employers are allowed to credit tips received by tipped employees against the minimum wage owed to those employees under certain circumstances. In order to qualify for the credit, the tipped employee must be engaged in an occupation in which he or she customarily receives more than thirty dollars per a month in tips, for example a waiter or a beautician. The employer must pay a tipped employee at least \$2.13 an hour. The employer is then allowed to credit all tips received by the employee for the amount of minimum wage owed above \$2.13 an hour.

Of course, the employer is allowed to credit only that amount the employee actually receives in tips. Thus, if the employee receives only \$2 an hour in tips, the employer would be required to pay the additional amount necessary to ensure the employee received the minimum wage. The employee must always receive at least the minimum wage when wages and tips are combined.

For example, a waitress works 40 hours in a week during which time she earned \$80 in tips, which is \$2 per hour in tips. The employer is allowed to take \$2 per hour as credit against the \$5.15 minimum wage. Thus, the employer is required to pay the waitress at least \$126 for that week's work ( $\$5.15 - \$2.00$  tip credit =  $\$3.15 \times 40$  hours).

Employers may not take the tip credit unless the employer informs the workers about it. Employers must also be able to prove that the employee actually receives tips equal to the tip credit taken by the employer.

**Q. Can the employer take deductions from an employee's paycheck?**

**A.** The employer is required to deduct taxes and amounts that have been garnished from an employee's paycheck. (See sidebar discussion of garnishment).

An employer is allowed to deduct certain items from an employee's paycheck if the employee has authorized the deduction. Examples of such deductible items are union dues, charitable contributions, or insurance premiums. These deductions are allowed even if the amount received by the employee after deduction falls below the minimum wage.

Certain types of items cannot be deducted from employee paychecks if the deduction would cause the amount received by the employee after the deduction to fall below the minimum wage. Examples of such items are: cost of uniforms used for work, cost of cleaning uniforms used for work or employee breakage or cash shortage debts.

## **GARNISHMENT OF WAGES**

A garnishment is an order issued by a court requiring that the earnings of a worker be withheld from the worker's paycheck and paid to a third party to whom the worker owes a debt. The Consumer Credit Protection Act (15 U.S.C. Sections 1671-1677) is a federal law that limits the amount of money that may be withheld from a paycheck pursuant to a garnishment order. The general rule is that the maximum amount that can be garnished from a paycheck is the lesser of 25 percent of an employee's take-home pay or that part of take-home pay exceeding thirty times the federal minimum wage. The law permits a larger amount to be deducted where the debt owed is for child-support payments, bankruptcy, or back taxes.

The Consumer Credit Protection Act also prohibits an employer from discharging an employee because his or her wages have been garnished once.

**Q. When is a worker eligible for overtime pay?**

**A.** The general rule is that employees must be paid overtime for all hours worked over forty hours in any workweek.

**Q. Are all employees entitled to overtime pay?**

**A.** No. There are several categories of workers who are exempt from the overtime requirements. The most common employee exemptions are:

- executive, administrative and professional employees who are paid at least \$250 a week;
- retail commission salespeople whose regular rate of pay is more than one and a half time the minimum rate and more than half of their wages comes from commissions;
- taxicab drivers
- computer system analyst, computer programmer or software engineers who are paid at least \$27.63 an hour.

**Q. What is the overtime pay rate?**

**A.** The FLSA requires employers to pay employees one and a half times (150 percent) their regular rate of pay for each hour, or fraction of an hour, over forty hours in any workweek.

**Q. How is the overtime pay rate computed?**

**A.** The main issue is to determine the regular rate for the employee in question. When an employee is paid an hourly rate, the employee's regular rate and hourly rate are the same. For example, an employee who is paid \$6.00 an hour and who worked 43 hours in the last work week, would be owed \$27 in overtime pay.

(\$6.00 regular rate x 1 ½ = \$9.00 overtime rate; \$9.00 x 3 (hours worked in excess of 40) = \$27). The employee's salary for that week would be \$267 (\$6 x 40 hrs. = \$240 + \$27 (overtime) = \$267).

When an employee is paid a salary or commission, the employee's compensation must be converted to an hourly rate. This conversion is accomplished by dividing the employee's compensation for the week by the number of hours worked in that week. For example, an employee who was paid \$250 a week, and worked 45 hours the last week, earned a regular rate of \$5.55. The employer, therefore, would owe the employee an additional \$41.62 for the 5 hours of overtime worked in that last week (\$5.55 x 1 ½ = \$8.32 x 5 (hours worked in excess of 40) = \$41.62). The employee's salary for that week would be \$291.62.

## **ENFORCING EMPLOYEE RIGHTS UNDER THE FLSA**

Employees who believe they are not being paid in accordance with the requirements of the FLSA can file a complaint with the Wage and Hour Division of the U.S. Department of Labor. There are regional offices of the Division in most major cities in the U.S. The Division will investigate to determine whether or not the FLSA has been violated.

Employees can also file a lawsuit themselves in state or federal court to collect double the back wages and overtime pay owed.

---

## **WORKPLACE SAFETY**

The Occupational Safety and Health Act (OSH Act) is a federal law whose purpose is to "assure so far as possible every working man and woman...safe and healthful working conditions." The statute is administered and enforced by the Occupational Safety and Health Administration (OSHA).

The OSH Act applies to all private sector employers engaged in a business affecting commerce. The courts have broadly interpreted the phrase "affecting commerce," such that almost every business in the country with at least one employee is covered by the Act. The OSH Act does not apply to public sector employers.

States may also regulate workplace health and safety in two ways. First, they may have regulations covering workplace conditions that are not dealt with by OSHA standards. Second, they may adopt a state safety and health plan that duplicates the requirements of the OSH Act, and if approved by OSHA, the state would then be responsible for enforcing safety and health regulations within its borders. In the absence of approval by OSHA, however, a state may not regulate any safety and health issue that is already regulated by the OSH Act.

**Q. What obligations are imposed on employers under the OSH Act?**

**A.** The Act imposes three obligations on employers. First, employers are required to furnish a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm" to employees.

Second, employers are required to comply with the safety and health standards promulgated by OSHA. Third, employers are required to keep records of employee injuries, illnesses, deaths, and exposures to toxic substances, and to preserve employee medical records.

There are some exemptions from certain requirements imposed by the law for employers with ten or fewer employees. These small companies do not have to maintain certain types of records, and they are exempt from certain types of penalties and enforcement activities; however, they are still required to provide a safe workplace and comply with OSHA standards.

**Q. What types of workplace conditions do the health and safety standards address?**

**A.** The standards regulate such issues as: the safety of working areas such as ladders, scaffolding, stairs and floors; provision of sufficient entry and exit ways; exposure to noise, carcinogens, radiation and other types of harmful substances; fire protection systems for the workplace; safety devices for machines and equipment used in the workplace; and the provision of medical and first aid services. There are literally hundreds of standards covering all aspects of the workplace.

## **WORKING WITH HAZARDOUS CHEMICALS**

OSHA requires that employees who work with hazardous chemicals be informed of the types of chemicals they are working with and be trained in their handling. Chemical manufacturers and distributors are required to label containers identifying any hazardous chemicals and give appropriate hazard warnings.

Employers who use such hazardous chemicals in the workplace are required to develop a written hazard communication program for their employees. As part of this program the employer must compile a list of all hazardous chemicals used in the workplace; identify the physical and health hazards associated with these chemicals; state precautions to be used in handling the chemicals; and indicate emergency and first aid

procedures to be used in the event of a problem. This information must be made available to the employees.

Employees must also receive training in detecting the presence of chemicals in the workplace and protecting themselves from hazards.

**Q. What should an employee do if he or she thinks there is a safety or health hazard at work?**

**A.** There are two methods of addressing safety and health problems. The employee can notify his or her supervisor or company safety director and discuss the problem. An employee can also contact OSHA and request a safety inspection.

**Q. How does an employee initiate a request for an OSHA inspection?**

**A.** There are OSHA regional and area offices located in cities throughout the U.S. An employee can either make an oral complaint to OSHA or file a formal written complaint. In either case, the employee should indicate what workplace conditions he or she believes constitute a safety or health hazard. OSHA will decide, based on the information received, whether there are reasonable grounds for believing a violation of the law exists. OSHA will then either send the employer a letter regarding the alleged violation and how to correct the problem, or send an inspector to the workplace to conduct an on-site safety inspection.

**EMPLOYEE PROTECTION FOR EXERCISING RIGHTS UNDER THE OSH ACT**

The law expressly protects employees from discharge or discipline under two circumstances. First, the employer cannot discriminate against an employee because that employee has filed a complaint with OSHA, asked OSHA to inspect the workplace, talked to the OSHA inspector during the walk-around or otherwise assisted OSHA in the investigation.

Second, the law also protects the worker who refuses to perform a job that is likely to cause death or serious injury. As a general rule the employee does not have a right to refuse to perform work and normally the employer could discipline or discharge the employee for such a refusal. However, a worker cannot be discharged or disciplined for such a refusal if all the following circumstances apply:

- the reason for the employee's refusal is a good faith belief that there is a real danger of death or serious injury;
- a reasonable person in the employee's position would conclude there is a real danger of death or serious injury;
- there is insufficient time to eliminate the danger through the regular OSHA channels;
- the employee has unsuccessfully asked the employer to fix the problem.

**Q. What happens during an OSHA inspection?**

**A.** The OSHA inspector will meet with the employer and explain the nature of the inspection and review employer documents pertaining to workplace injuries and hazards. Then the inspector will "walk-around" the plant and physically inspect the workplace. The employer and a representative of the employees are allowed to accompany the inspector on the walk-around. The inspector will also talk with employees and ask them questions. At the end of the inspection, the inspector will informally tell the employer of any possible violations that may have been uncovered during the inspection.

**Q. What are the penalties for violating the OSH Act?**

**A.** First, an employer is required to correct any hazards that violate the law. The employer can also be fined a monetary penalty, the amount of which is determined by the seriousness of the violation. An employer can also be subject to criminal liability and imprisonment for willful violation of an OSHA standard that results in an employee's death.

---

## **WORKPLACE INJURIES**

### **Workers' Compensation**

The workers' compensation laws provide monetary compensation to pay for medical expenses and to replace income lost as a result of injuries or illnesses that arise out of employment. The employee is not required to prove that the injuries were caused by some negligence of the employer in order to recover under the workers' compensation laws. These laws impose strict liability on employers for injuries suffered at the workplace.

Each state has its own law providing workers' compensation benefits. While the dollar amounts recoverable and certain procedural or coverage details vary among the states, the general requirements of the laws are similar. There are separate federal workers' compensation laws covering federal government employees, and employees of the railroad and maritime industries.

The cost of providing workers' compensation is borne solely by the employer, usually through the purchase of a workers' compensation insurance policy from an insurance company. The cost of providing this insurance cannot be deducted from the employee's wages.

**Q. Are all employees covered by workers' compensation?**

**A.** Most employees are covered. Some state laws exempt certain categories of workers, such as casual employees, agricultural employees, domestic employees and independent contractors. Moreover, a few states require coverage only if an employer



employs a minimum number of employees, for example Alabama, where coverage is compulsory only if an employer has at least three employees.

**Q. What types of injuries are compensated under workers' compensation?**

**A.** Injuries and illness that "arise out of and in the course of employment" are compensable. This means that there must be some connection between an employment requirement and the cause of the injury. An automobile accident that occurs during the commute to work is not compensable, but a traveling salesperson who is in an accident while on her way to a sales call would be compensated. Some examples of compensable injuries are injuries caused by defective machinery, fires or explosions at work, repeated lifting of heavy equipment, or slipping on an oily floor surface at work.

Illnesses that are caused by working conditions, where the job presents a greater risk of contracting the illness than the normal risks of everyday life, are also compensable. A clerical worker in an office with co-workers who smoke, and who contracts emphysema from second-hand smoke, would probably not be compensated for the illness, because there is nothing peculiar about her job that increased the risk of contracting emphysema. However, a coal miner who contracts black lung disease would be eligible for compensation.

**Q. If a workplace injury causes death, is compensation provided to the worker's survivors?**

**A.** Yes, death benefits are generally provided to the spouse until remarriage, and to the children until they reach majority. Death benefits consist of a burial allowance and a percentage of the deceased worker's weekly wage. There may also be a maximum cap on benefits receivable.

**Q. How much compensation is paid for an injury or illness?**

**A.** Workers receive a fixed weekly benefit based on their regular salary. The percentage of regular salary received varies from state to state but is generally in the 50 to 66 percent range. This wage payment is made for the period during which the employee is temporarily unable to work due to the injury.

Workers' compensation also pays for all medical expenses associated with the injury or illness. Most state laws also provide some compensation for the costs associated with medical and vocational rehabilitation.

Employees who suffer a permanent disability, whether partial or total, are also eligible for a payment to compensate for the decrease in earnings attributable to the permanent nature of the disability. The amount payable may be determined by a schedule (a list that specifies wage loss for specific disabilities, for example, \$8,910 for loss of an index finger), or by percentage of weekly wage.

**Q. What must a worker do to obtain compensation for a work-related injury?**

**A.** First, the worker should notify the employer as soon as possible after an injury occurs. Usually the employer will have claim forms available for the employee to fill out. The documents are then submitted by the employer to the insurance company and the state workers' compensation agency. Should the employer not have claim forms available, the employee should contact the state workers' compensation agency.

If a claim is not challenged by the employer, payment for medical bills and wages will be made by the insurance company to the employee. If the employer contests a claim, a hearing is scheduled and evidence relating to the circumstances of the injury and the extent of the injury is presented. The resulting decision as to whether, and how much, compensation is owed can be appealed by either the employer or the employee

As a general rule, the exclusive means for being compensated for workplace injuries or illness is by filing a claim under workers' compensation. Only where an employee or employer is not covered by workers' compensation can the employee sue in court to collect damages for the injuries suffered. The employer is held liable if the injury was caused by its negligence.

### **Social Security Disability Insurance**

The Social Security Disability Insurance system differs from workers' compensation in that the cause of the injury is irrelevant for purposes of social security. Whereas in order to be compensable under workers' compensation an injury must arise out of employment, the main issue for purposes of compensation under social security is whether the injury prevents a person from being able to work regardless of the cause of the injury. Thus, while the automobile accident on the commute to work is not compensable under workers' compensation, a worker may be eligible for social security benefits if the injuries resulting from the accident prevent the worker from earning a living.

**Q. Can an injured worker receive social security benefits?**

**A.** Yes, if the employee is in a job covered by social security, and if the injury or illness is considered to be "disabling."

**Q. What types of injuries are considered "disabling"?**

**A.** A "disabling" medical condition is one that can be expected to last at least twelve months and causes a worker to be unable to engage in gainful employment anywhere in the country. The Social Security Administration has published a list of impairments that are considered disabling, such as severe epilepsy and loss of vision or hearing. A medical condition that does not appear on the list may still be considered disabling if the worker can show that the condition is the medical equivalent of a listed impairment--that it is equal in severity and duration to a listed impairment.

**Q. What if workers do not suffer from a medical equivalent of a listed impairment?**

**A.** These employees would be eligible for benefits only if they could prove by another means that they had a disabling medical condition. They would have to show that their condition or disease is so severe that it prevented them from doing their former job or other similar work. It is not easy to prove this.

**Q. Can a disabled worker's spouse and children receive social security benefits for a worker's disability?**

**A.** If the spouse and children meet the requirements for the worker's social security retirement benefits, they should qualify for disability benefits.

**Q. Where can workers apply for social security disability benefits?**

**A.** Workers should file a claim at the local Social Security Administration office; there are offices in most large cities in the U.S. The following documents should be submitted with the application: a medical history along with a detailed statement from a doctor concerning the cause of the disability; a detailed work history; and information concerning educational background. These documents help the Social Security Administration decide whether the condition is disabling. Statements from family and friends may also be submitted.

**Q. What happens if the Social Security Administration rejects an application for benefits?**

**A.** There is an appeals process for rejected applications. This process is explained in a section on social security retirement benefits, in the chapter titled "[The Rights of Older Americans](#)."

---

## EMPLOYMENT TERMINATION

In the United States, most employees are considered employees "at will." This means that they have no written contract that governs the length of their employment or the reasons for which they may be terminated from employment. The employer is free to lay off or fire such employees with no notice and with no reason.

Not all employees, however, are employees at will. Those employees who are represented by unions and covered by a collective bargaining agreement usually cannot be fired "at will." Their contracts normally provide that they can be terminated only for "just cause." Moreover, the grievance mechanism contained in most collective bargaining agreements provides a process by which union employees can challenge their firing. (For a fuller discussion of union protections, see the section in this chapter titled "[Unions in the Workplace](#)," page 41.)

Also, public sector workers are protected by civil service laws that normally require the employer to have "just cause" in order to terminate employment. Civil Service Commissions provide a mechanism by which public sector employees can appeal any

decision to discharge them. (For further discussion of civil service laws, see the section in this chapter titled, "[Special Rights of Public Sector Employees](#)," on page 40.)

**Q. Are there any statutory limitations on an employer's ability to fire at-will employees?**

**A.** Yes, the NLRA, Title VII, the ADEA, and the ADA all prohibit an employer from firing an employee where the reason for the decision to fire is based on the employee's union activity or membership in a protected class, that is, race, sex, religion, national origin, color, age or disability. Most of the federal laws regulating the workplace also prohibit employers from retaliating against workers who assert their rights under federal law. (See following sidebar.)

Moreover, many state anti-discrimination laws protect a broader class of workers from discrimination in firing. For example, Wisconsin prohibits firing based on weight, height or sexual orientation. (For further discussion of the anti-discrimination laws, see the section in this chapter titled "[Discrimination in the Workplace](#)," on page 21.)

There is one state, Montana, which expressly requires an employer to have good cause in order to terminate or layoff a worker.

Finally, there are several states, such as New Jersey and California, which have passed laws to protect "whistleblowers" from being fired.

## **ENFORCING RIGHTS AND EMPLOYER RETALIATION**

Effective enforcement of the federal laws regulating employment relies heavily on information and help provided by employees. Employees are in the best position to know whether or not their rights have been violated. Employees can also, however, be subjected to pressure from their employers not to make complaints for fear of adverse employment actions. Because of this potential problem, almost all federal employment laws expressly prohibit employers from taking adverse actions against employees because they have filed a complaint to enforce their rights or cooperated in an investigation conducted by a federal agency enforcing the law. The Worker Adjustment and Retraining Notification Act, the Uniformed Services Employment and Reemployment Rights Act and 42 U.S.C. Section 1981 do not expressly protect against retaliation.

**Q. What is a whistleblower?**

**A.** A whistleblower is an employee who reports to a government agency the fact that he has reasonable cause to believe that there is a violation of state or federal law occurring in his workplace. The "whistleblower" statutes prohibit employers from firing a worker who is a whistleblower and also prohibit employers from firing employees who participate in government investigations and hearings relating to violations of law at the workplace.

**Q. Have the courts recognized any exceptions to an employer's ability to fire at-will employees?**

**A.** Yes. In approximately forty states, such as Oregon, Illinois, Wisconsin and Michigan, the courts have held that an employer cannot fire a worker for reasons that conflict with, or undermine, a state's public policy. This is known as the public policy exception to employment at will.

**Q. In what circumstances would firing a worker conflict with, or undermine, a state's public policy?**

**A.** Generally speaking, public policy of a state can be found in the state statutes and constitution. There are four categories of discharge that have been determined by the courts as undermining public policy.

1. Firing a worker because he refuses to perform an act that state law prohibits. For example, an employer tells the worker to dump toxic waste into the city sewer system. The worker refuses and is fired.
2. Firing a worker for reporting a violation of the law. For example, a worker reports to the state agriculture department that his employer is selling contaminated meat, and is fired.
3. Firing a worker for engaging in acts that public policy encourages. For example, an employee is called to sit on a jury and the employer fires her for missing work.
4. Firing a worker for exercising a statutory right. For example, an injured worker files a claim under the state worker's compensation law and the employer fires him.

**Q. I have no written contract, but my employer told me that as long as I perform my work well I have a job. Can my employer fire me even if I am performing my job well?**

**A.** It depends. A number of state courts, such as those in Michigan, will enforce an oral promise by the employer under certain circumstances. Generally speaking there must be clear, unequivocal evidence that a promise was made; there must be evidence that the employer and employee specifically discussed the issue of job security and reasons for termination; evidence of the employer's past practice that it fires employees only for cause is helpful; and evidence that the employee turned down other job offers or left a job in reliance on the promise made can help to persuade the court to enforce the oral promise.

Other courts, however, will not enforce such an oral promise.

**Q. My employer's handbook states that employees will only be fired for just cause. Can my employer still fire me at will?**

**A.** It depends. Over thirty states, such as Wisconsin, Michigan and California, will enforce specific terms contained in an employment handbook or personnel manual under certain conditions. First, the handbook or manual must have been given to the employee. Second, the language of the manual must be specific. For example, "all employees will be

treated fairly" would be considered too vague to be enforced; whereas "employees will only be fired for just cause" is specific enforceable language.

Handbooks or manuals, however, that contain clear and express disclaimers informing employees that the information contained therein is not meant to create a contract and can be changed or revoked at any time will probably not be viewed as enforceable contracts by the courts.

**Q. Must an employer provide notice to an employee prior to discharge?**

**A.** Generally no. If the employee has a written contract requiring notice, or if there is a collective bargaining agreement with a notice requirement, then the employer must provide notice. The law requires notice only in a very specific situation--if there is a mass layoff or plant closure.

### **PLANT CLOSING AND MASS LAYOFFS**

The Worker Adjustment and Retraining Notification Act is a federal law requiring employers to provide workers, their unions, and state and local government officials sixty days advance notice of any plant closing or mass layoff. The law applies to private sector employers with one hundred or more employees. A mass layoff is defined as a reduction in force that results in the layoff of at least 33 percent of the work force and at least fifty employees, or at least 500 employees. Failure to give the sixty-days notice subjects an employer to liability for back pay and benefits under an employee benefit plan for each day that the notice was not given. Employees can enforce the law by filing a lawsuit in federal court.

**Q. Is an employer required to pay severance pay when it fires a worker?**

**A.** There is no law requiring employers to pay severance pay. If the employee has a written contract guaranteeing severance pay, or if there is a collective bargaining agreement providing for severance pay, then the employer will be required to pay severance. Otherwise, the employer is under no obligation to pay it.

### **LOSING YOUR JOB DOESN'T MEAN LOSING YOUR HEALTH INSURANCE**

The Consolidated Omnibus Budget Reconciliation Act (COBRA) provides that workers who lose their jobs will not automatically lose their health insurance coverage. This federal law requires companies with at least twenty employees carrying group health insurance to offer terminated employees the opportunity to purchase at group rate continued participation in the company's health insurance plan for up to eighteen months. The employee may be required to pay no more than 102 percent of the cost of the premium. Usually 102 percent of the premium cost at group rate will be less than the premium for an individually purchased policy.

**Q. My employer offered me severance pay if I agreed to sign a waiver of my right to sue the company. What is the legal effect of signing such a waiver?**

**A.** Generally speaking, a knowing and voluntary waiver is enforceable and as such would prevent an employee from being able to sue the employer for anything that occurred while he was employed. Whether or not a waiver is knowing and voluntary depends on the circumstances. The courts usually consider several factors in deciding whether a waiver is knowing and voluntary:

- Is the waiver written in a manner so that it can be understood by the employee?
- Did the employee receive a benefit in exchange for the waiver that he or she was not already entitled to receive?
- Did the employee have a reasonable time to consider the offer?

The ADEA specifically contains a list of requirements that must be met in order for a waiver of employee rights under the ADEA to be effective. Included among those requirements is that the employee be advised in writing to consult with an attorney before signing the waiver and that the employee be given at least twenty-one days to consider the waiver before signing.

Lastly, the courts will not enforce a waiver of any claims that arise under the FLSA.

---

## **UNEMPLOYMENT INSURANCE**

The Unemployment Insurance (UI) system is administered by the states for the purpose of providing workers and their families with weekly income during periods of unemployment. When unemployed due to plant closures, layoffs, natural disaster, or others acts or circumstances that are not the worker's fault, an employee may receive UI benefits.

The system is funded by state and federal taxes paid by employers. Subject to certain federal guidelines, each state determines the scope, coverage and eligibility requirements for UI benefits.

**Q. What workers are covered under the UI system?**

**A.** Most workers are covered, but there are some exceptions. Categories of workers generally excluded from coverage are: self- employed individuals, independent contractors, casual employees and agricultural workers.

**Q. If a worker is covered under UI, is he automatically entitled to receive benefits if he is unemployed?**

**A.** No. In order to receive benefits, a covered worker must meet the eligibility requirements and not be otherwise disqualified from receiving benefits.

**Q. What are the eligibility requirements for UI?**

**A.** The eligibility requirements vary from state to state but most states look at four criteria, all of which have to be met:

1. applicant earned a minimum amount of wages within a specified period and/or worked for a minimum period in recent past (for example applicant worked at least twenty weeks at average weekly wage of at least twenty dollars);
2. applicant registered for work with the state unemployment office;
3. applicant is available for work; and
4. applicant is actively seeking employment.

**Q. What will disqualify a worker from receiving UI benefits?**

**A.** As a general rule, a worker is disqualified if he voluntarily quits without good cause or was fired for misconduct. In some states, even if a worker's conduct disqualifies him, the disqualification will last only for a specific length of time, after which the employee will be eligible to receive UI benefits.

The meaning of good cause varies greatly among the states. Some states consider certain types of personal reasons as good cause, such as having to care for a sick relative or following a spouse who has found work in another state. Most states, however, require that good cause be due to the employer's actions. For example, working conditions that are so bad that they would cause a reasonable person to quit would be considered good cause in some states. The "reasonable person" perspective is very important to a determination of good cause. It is not enough that a situation is intolerable to a specific worker; the conditions must be such that a reasonable person, in the same position as the employee, would feel compelled to quit.

The meaning of misconduct also varies by state, but generally incompetence alone is not considered misconduct. Violations of known company rules and insubordination are examples of employee behavior normally deemed to be misconduct.

**Q. Can a worker refuse a job offer and still collect UI benefits?**

**A.** It depends on why the worker refused the job offer. If the job is not suitable work, then the refusal is allowable. A job is not suitable if the worker has no experience in it, if it is more hazardous than the worker's previous job, or if the physical condition of the worker prevents him from accepting it. States also consider travel costs and time, bad working hours, community wage levels, and compelling personal problems in deciding if a job may be rejected. Finally, workers usually cannot lose benefits for refusing a job that is available because the current workforce is on strike.

If the wages and conditions of a new job are below those of the worker's previous employment, he may not have to accept it. For example, a skilled craftsperson is permitted



to refuse a job as a janitor. After a certain period of time, however, most states require the worker to "lower his sights" and accept a lesser job.

**Q. Are workers who are on strike entitled to collect UI benefits?**

**A.** It depends on the specific state law. A few states allow workers to collect UI if the strike is caused by an employer's violation of the NLRA or an employer's breach of the collective bargaining agreement. Some states allow workers to collect UI if the employer has "locked out" the workers.

Most states, however, do not permit workers on strike to collect UI benefits. The period of disqualification varies by state--in some states the disqualification lasts for the duration of the strike; in other states the disqualification lasts for a fixed period of time. If a striker is permanently replaced, however, the worker may then be eligible for UI benefits.

**Q. How does a worker apply for UI benefits?**

**A.** Employees file claims for UI benefits at their local state unemployment office. The claim should be filed as soon as possible after unemployment begins, since benefits will not be paid until all the paperwork is processed and eligibility for benefits is verified.

Employees should take the following documents with them to the unemployment office to help verify their eligibility: social security card, recent pay stubs, and any documentation relating to the reason for the job loss.

After filing the initial claim, employees are usually required to report on a regular basis to the unemployment office to verify their continued eligibility for benefits. Failure to report when required can result in a loss of benefits.

## **MOVING OUT OF STATE AND COLLECTING UNEMPLOYMENT**

If workers move to another state to look for work, they can still collect UI benefits, because all states belong to the Interstate Reciprocal Benefit Payment Plan. This Plan allows workers to register for work and file for UI benefits in a state different from the one in which they previously worked. The law of the state in which the employee previously worked, however, is the applicable law for determining eligibility for benefits. The workers must satisfy that state's requirements in order to receive UI benefits in the new state.

**Q. How is the amount of UI benefits determined?**

**A.** While the amount varies by states, the general formula is 50 percent of the employee's weekly wage, not to exceed a statutory cap on amount paid. The cap is based

on a percentage of the state's average weekly wages for all workers. Because of the cap on maximum benefits, most workers receive much less than 50 percent of their weekly wage.

**Q. How long are UI benefits paid?**

**A.** The usual duration for UI benefits is twenty-six weeks. In times of extended high unemployment, however, benefits may be paid for an additional thirteen weeks and sometimes longer.

**Q. Can an unemployed worker receive other benefits or earn extra money while collecting UI benefits?**

**A.** Some states ignore small amounts of money earned. Usually, however, income received is deducted from UI benefits. Most states reduce or stop UI benefits for weeks in which an unemployed worker received disability benefits, severance pay and other types of income.

---

## **PENSION PLANS**

**Q. Does the law require employers to provide pensions?**

**A.** No, but if an employer does offer a pension plan, the federal Employee Retirement Income Security Act (ERISA) probably covers it. ERISA applies to private sector employers whose plans are "qualified" under the federal tax laws and/or whose business affects interstate commerce. The tax laws provide important advantages to companies whose plans "qualify," so most pension plans are regulated by ERISA. (For further information on pensions, see the chapters titled "[The Rights of Older Americans](#)," "[Estate Planning](#)," and "[Family Law](#)."

## **THE PURPOSE OF ERISA**

ERISA (29 U.S.C. Sections 1001-1461) protects workers who participate in pension plans. It also covers the beneficiaries of such workers. This federal law preempts almost all state laws covering pensions and other types of benefit plans.

ERISA deals with the following aspects of pension plans: 1) participation; 2) benefit accrual, vesting, and breaks-in-service; 3) funding; 4) administration of funds; 5) reporting and disclosure; 6) joint and survivor provisions; and 7) plan termination.

ERISA sets legal minimums that a pension plan must provide. However, an employer may provide more liberal terms in its pension plan.

**Q. What are the participation provisions of pension plans?**

**A.** ERISA provides that where an employer offers a pension plan, most workers must be allowed to participate if they meet the following requirements: they must be at least twenty-one years of age and have completed one year of service to the company. ERISA defines one year of service as a twelve-month period during which an employee has worked 1,000 hours or more.

**Q. How does a worker accrue benefits under a pension plan?**

**A.** Benefit accrual is the process of building up benefits once an employee qualifies for the pension plan. Normally, employees start accumulating benefits as soon as they begin participation in the plan. How benefits accrue depends on the type of pension plan.

A defined contribution plan establishes a separate retirement account for each participant. The employer (and sometimes the employee) makes a contribution to the account. The benefit due to the worker upon retirement depends on the amount of money in the account and the payout method selected. Benefits accrue based on a predetermined amount that the employer at least annually pays into the account.

A defined benefit plan promises a worker a specific level of payment upon retirement. The employer pays money into a fund, whose investment gains are used to pay the retirement benefit. Benefits accrue to the worker based on total years of participation in the plan and usually their final salary or their average salary for their last several years of employment.

**Q. When do benefits vest in the worker?**

**A.** Vesting refers to the point after which the employee's accrued benefits cannot be taken away; they must be paid to the worker upon retirement. If a worker leaves his place of employment before his pension vests, he loses any benefits that he accrued under the pension plan. Once the benefits vest, however, the worker is entitled to a retirement benefit even if he subsequently quits that job.

ERISA provides two different methods for vesting. One method requires that after five years of service employees are eligible for 100 percent of their retirement benefit. A second method provides for a graduated system of vesting: after three years of service employees are eligible for 20 percent of their pension benefit; after four years, 40 percent; after five years, 60 percent; after six years, 80 percent; and after seven years, 100 percent.

### **FIRING WORKERS TO AVOID PAYING PENSIONS**

Employers may not fire employees to avoid making benefit payments or to prevent benefits from vesting. Neither may employers force workers to quit for these reasons. However, a worker can lose nonvested benefits if fired for other reasons, or if he or she voluntarily quits.

**Q. What happens if there is a break-in-service before pension benefits become vested?**

**A.** A break-in-service occurs when employment is interrupted. If a break-in-service occurs before benefits become vested, the worker loses any entitlement to those benefits. When an employee works less than 500 hours in a year for the employer, a break-in-service has occurred.

## **HOW CHANGING JOBS BEFORE RETIREMENT AFFECTS PENSIONS**

If you change jobs before retiring, ERISA provides that you are entitled to all your vested benefits. Any benefits that are not vested at the time of the job change are forfeit. These vested funds may be put into an individual retirement account or may be transferred to your new employer's pension plan. You can also take the vested funds as a lump sum payment. However, if you do this, the money will most likely be subject to an income tax. You can avoid the tax consequences if you "roll over" (quickly transfer) the vested pension funds into an individual retirement account or another qualified pension plan.

**Q. What are ERISA's funding requirements?**

**A.** Generally, the law requires that the employer (and employee, depending on the type of pension plan) contribute enough money to cover pension payments when they become due, as determined actuarially. Funding provisions aim to strengthen pension funds and prevent abuses. The employer and the fund's administrators are obligated to ensure that the funding requirements are met.

**Q. How does ERISA prevent misuse of pension funds?**

**A.** Those who manage pension funds are considered to be fiduciaries who are obligated to act with "care, skill, prudence, and diligence" in conducting the affairs of the pension plan. This means that the assets of the pension plan must be diversified among a group of investments so as to minimize the risk of large losses. Plan administrators are prohibited from using pension assets to invest in funds or property in which they have a financial interest. ERISA prohibits a plan administrator from borrowing money from the fund for personal use or making loans with pension money to the employer. It also gives pension plan participants the right to sue administrators who breach their duty and violate ERISA.

**Q. How do I file a claim for benefits?**

**A.** Each pension plan specifies the claims procedure. Generally, a vested participant is eligible for payments from a pension fund when he or she reaches the age of sixty-five (or the normal retirement age specified in the plan) or upon leaving the company. Most pension plans require the participant to file a written claim in order for payments to begin.

Within ninety days, the plan administrators must either begin payment to the participant or notify the participant in writing that the claim is denied.

If a claim is denied, the participant is entitled to request a review of the decision. If, upon review, the claim is still denied, the participant can appeal that decision. Some plans provide for arbitration as a means of appeal. When arbitration is required, the participant must use the mechanism. The denial of a claim can eventually be challenged in court by filing a lawsuit under ERISA.

**Q. If a plan participant dies before a spouse, can the spouse still collect the pension?**

**A.** Under ERISA, a pension plan must provide for payment of vested pension benefits to the spouse if a plan participant dies before retirement. This is known as the survivor's benefit. The survivor's benefit is automatically provided unless the spouse consents in writing to waive the benefit.

ERISA also provides that a plan must provide for continuation of retirement benefits to a spouse when a plan participant dies after he begins to receive retirement benefits. This is called the qualified joint and survivor annuity benefit. It is automatically provided under the terms of the pension plan unless the spouse consents in writing to waive the benefit.

**Q. If a plan participant gets divorced, is the ex-spouse entitled to a share of the pension?**

**A.** This depends on state law. Most states consider a pension to belong jointly to a participant and the participant's spouse. If a state court decree orders that part of a participant's vested benefits be paid to an ex-spouse or child, ERISA requires the plan administrator to honor the court decree.

**Q. How can I find out about the specific terms of my pension plan?**

**A.** ERISA requires the employer to give a summary plan description (SPD) and a summary of the annual financial report to every participant in the pension plan. The SPD is a non-technical explanation of how the plan works and how benefits are paid out. It explains the benefit accrual rules, vesting requirements and procedures for filing a claim for benefits. The summary of the annual financial report is a non-technical explanation of the financial data relevant to the operation of the plan contained in the annual report. ERISA also requires that the employer make available to the plan participants, upon request, copies of the plan itself and the annual report.

**Q. Does an employer have the right to terminate a pension plan?**

**A.** If the pension plan was instituted pursuant to a collective bargaining agreement, then the employer cannot terminate the plan without bargaining with the union over the issue. ERISA itself does not prohibit an employer from terminating a pension plan.

ERISA does, however, provide some protection if a plan is eliminated. The law established the Pension Benefit Guaranty Corporation (PBGC). ERISA requires defined-benefit pension plans to pay insurance to the PBGC. In return, the PBGC guarantees the vested benefits of participants in the fund, up to a certain limit.

The PBGC provides this protection only for certain benefits in specific types of funds. Thus, the PBGC may not protect your benefits if you do not participate in a defined-benefit plan, if your benefits have not vested, or if your plan provides medical and disability benefits.

## **WHERE TO GET MORE INFORMATION**

This chapter is a basic road map to make you aware of the laws governing employment. If you have questions about your rights and duties, or if you want more details, the agencies listed below can provide additional information. The federal agencies are listed by their main office addresses in Washington, D.C. Most federal agencies, however, have regional offices located in major cities throughout the U.S. To find a federal agency, look in your local telephone directory under "United States Government."

### **Discrimination**

For more information about workplace discrimination and equal employment, contact:

Equal Employment Opportunity Commission (EEOC)  
1400 L Street, NW  
Suite 200  
Washington, DC 20005  
(202) 275-7377  
1-800-669-3362 for publications  
Web address: [www.eeoc.gov](http://www.eeoc.gov)

Your state may also have its own civil rights agency that handles employment discrimination. The EEOC has information on state agencies.

If you work for, or are, a federal contractor, you can receive information about additional legal requirements imposed on contractors and about Affirmative Action Programs from:

Employment Standards Administration (ESA)  
Office of Federal Contract Compliance Programs  
200 Constitution Avenue, NW  
Washington, DC 20210  
(202) 693-0023  
web address: [www.dol.gov/dol/esa/public/ofcp\\_org.htm](http://www.dol.gov/dol/esa/public/ofcp_org.htm)

## **Family and Medical Leave Act (FMLA)**

Contact your local U.S. Department of Labor office for information concerning the FMLA. The main office is located at:

Employment Standards Administration  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Washington, DC 20210  
(202) 693-0023

The Department of Labor also maintains a toll-free number for providing information on the FMLA : 1-800-959-FMLA.  
web address:[www.dol.gov/dol/esa/fmla.htm](http://www.dol.gov/dol/esa/fmla.htm)

The Women's Legal Defense Fund has a fact sheet explaining FMLA. Write to 1875 Connecticut Ave., NW, STE 710, Washington, DC 20009.

9 to 5, National Association for Working Women, has a job-problem hot line staffed 10-5 in the Eastern time zone. Information is offered to the public on job counseling and professional advice, and to members there is a legal referral list on jobs and problems. Call 1-800-522-0925.

The National Institute of Business Management has published *The Employer's Guide to the Family and Medical Leave Act*. Call 1-800-762-4924 for information or write at P.O. Box 9070, McLean, VA 22102-0030.

## **Union-Management Relations**

For information regarding rights and responsibilities under the National Labor Relations Act (NLRA), contact:

National Labor Relations Board  
1099 14th Street, NW  
Washington, DC 20570  
(202) 273-1991  
Web address: [www.nlrb.gov](http://www.nlrb.gov)

## **Wages and Hours**

Contact the Wage and Hour Division of your local U.S. Department of Labor office for details on laws affecting wages and working conditions. They offer many publications. The main office is located at:

Wage and Hour Division  
U.S. Department of Labor  
Room S-1302  
200 Constitution Avenue, NW  
Washington, DC 20210  
(202) 693-4650  
web address: [www.dol.gov/dol/esa/public/whd\\_org.htm](http://www.dol.gov/dol/esa/public/whd_org.htm)

### **Workplace Safety**

Inquiries concerning job-related safety issues can be directed to The Occupational Safety and Health Administration (OSHA). They can answer your questions and send literature about the OSH Act.

U.S. Department of Labor  
(OSHA) Office of Public Affairs  
Room N-3649  
200 Constitution Avenue, NW  
Washington, DC, 20210  
(202) 693-1999  
web address: [www.osha.gov/index.html](http://www.osha.gov/index.html)

### **Workers' Compensation**

Since the individual states manage these programs, write to your state department of labor for additional information. The website [www.complink.com/complink.htm](http://www.complink.com/complink.htm) links to state agencies that maintain internet sites relating to their state's workers' compensation program.

### **Social Security Disability Insurance**

The local Social Security Administration can provide details and literature on your benefits. The main office for the Social Security Administration is located at:

Social Security Administration  
Baltimore, MD 21235  
1-800-772-1213  
web address: [www.ssa.gov/](http://www.ssa.gov/)

### **Unemployment Compensation**

Contact the local office of your state's employment security or unemployment department or the state job service. The Legal Information Institute at Cornell University maintains a website at [www.law.cornell.edu/topics/unemployment\\_compensation.html](http://www.law.cornell.edu/topics/unemployment_compensation.html) that provides an



overview of unemployment compensation and has links to source materials and references discussing unemployment compensation issues.

## **Pensions**

For information about ERISA and your rights under a pension plan, write to:

Pension and Welfare Benefits Administration  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Washington, DC 20210  
(202) 219-8776  
(800) 998-7542 (to order publications toll free)  
web address: [www.dol.gov/dol/pwba/](http://www.dol.gov/dol/pwba/)

## **Government Publications**

The federal government publishes hundreds of pamphlets about employment. These range from "how to" books for teenagers looking for jobs to statistics on the number of OSHA claims in a specific year. To find out if there is a pamphlet about your specific problem, check the government bibliographies. They cover subjects such as employment and occupations, retirement, and civil rights, listing all the government publications available under that heading. See [www.access.gpo.gov/su\\_docs/index.html](http://www.access.gpo.gov/su_docs/index.html) for up-to-date information.

The following is a list of the bibliographies about employment issues:

Handicapped--SB37  
Employment and Occupations--SB-4  
Labor-Management Relations--SB-4  
Women--SB-11  
Workers' Compensation--SB-08  
Veterans Affairs & Benefits--SB-0  
Personnel Management, Guidance, and Counseling--SB-02  
Civil Rights and Equal Opportunity--SB-07  
Occupational Safety and Health--SB-13

The bibliographies listed above are available without charge from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402. The telephone number is (202) 512-1119.

The federal government's Consumer Information Center also distributes free or inexpensive booklets. For a free listing of available publications write to: Consumer Information Catalog, Pueblo, CO 81009 or call toll free 1 (888) 878-3256. Their Web address is [www.pueblo.gsa.gov](http://www.pueblo.gsa.gov).

## **Still Have Questions?**

The law of the workplace is complex. Your decisions and actions may have far-reaching consequences. It is often worthwhile to consult with a lawyer trained to deal with these matters. Government agencies often advise people with questions to retain a lawyer to represent their unique interests. Contact your state or local bar association for details on lawyers in your area. Many of these organizations have a lawyer referral service. The first chapter in this publication ("[When and How to Use a Lawyer](#)") can help you find a lawyer.

[Click here to go to Chapter 12](#)