Summaries of Primary Employment Laws

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Introduction

There are numerous employment laws administered by federal and state agencies. The employment attorneys at Margolis Edelstein have considerable experience representing management before these agencies and the courts.

These employment laws are complex and subject to continuing changes and reinterpretations by Congress, the agencies that administer them, and the courts.

The agencies that administer these laws have developed and summarized their current interpretations of these laws. These summaries can assist the layperson and counsel in understanding these laws, staying in compliance with these laws, taking prophylactic measures to prevent and protect against suits alleging violations of these laws, and defending against employment-related suits.

We have assembled into one convenient, searchable document the summaries of the primary employment laws that these agencies, themselves, have prepared. It is cautioned that these summaries represent the proverbial "tip of the iceberg" in terms of a full understanding of these laws, which would include referring to and understanding the agencies' Regulations, Appendices, Policy Guidances, Memoranda of Understandings, General Counsel Opinion letters, and Manuals, as well, of course, as the laws, themselves, and court decisions.

The below summaries represent the opinions and interpretations of the agencies and are not guarantied by Margolis Edelstein or the agencies to be the current state of the law. Consultation with an experienced employment attorney is highly recommended for compliance with these laws and the defense of legal actions alleging violations of these laws. Also, there are other employment laws that have not been summarized herein that may be relevant to particular situations.

Age Discrimination (EEOC)

Age discrimination involves treating someone (an applicant or employee) less favorably because of his age.

The Age Discrimination in Employment Act (ADEA) only forbids age discrimination against people who are age 40 or older. It does not protect workers under the age of 40, although some states do have laws that protect younger workers from age discrimination.

It is not illegal for an employer or other covered entity to favor an older worker over a younger one, even if both workers are age 40 or older.

Discrimination can occur when the victim and the person who inflicted the discrimination are both over 40.

Age Discrimination & Work Situations

The law forbids discrimination when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoff, training, fringe benefits, and any other term or condition of employment.

Age Discrimination & Harassment

It is unlawful to harass a person because of his or her age.

Harassment can include, for example, offensive remarks about a person's age. Although the law doesn't prohibit simple teasing, offhand comments, or isolated incidents that aren't very serious, harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted).

The harasser can be the victim's supervisor, a supervisor in another area, a co-worker, or someone who is not an employee of the employer, such as a client or customer.

Age Discrimination & Employment Policies/Practices

An employment policy or practice that applies to everyone, regardless of age, can be illegal if it has a negative impact on applicants or employees age 40 or older and is not based on a reasonable factor other than age (RFOA).

For the EEOC's final Rule of 3/30/12 on "Disparate Impact and Reasonable Factors Other Than Age Under the Age Discrimination in Employment Ac (RFOA)," go to: https://www.federalregister.gov/articles/2012/03/30/2012-5896/disparate-impact-and-reasonable-factors-other-than-age-under-the-age-discrimination-in-employment

Disability Discrimination (EEOC)

Disability discrimination occurs when an employer or other entity covered by the Americans with Disabilities Act, as amended, or the Rehabilitation Act, as amended, treats a qualified individual with a disability who is an employee or applicant unfavorably because she has a disability.

Disability discrimination also occurs when a covered employer or other entity treats an applicant or employee less favorably because she has a history of a disability (such as cancer that is controlled or in remission) or because she is believed to have a physical or mental impairment that is not transitory (lasting or expected to last six months or less) and minor (even if she does not have such an impairment).

The law requires an employer to provide reasonable accommodation to an employee or job applicant with a disability, unless doing so would cause significant difficulty or expense for the employer ("undue hardship").

The law also protects people from discrimination based on their relationship with a person with a disability (even if they do not themselves have a disability). For example, it is illegal to discriminate against an employee because her husband has a disability.

Note: Federal employees and applicants are covered by the Rehabilitation Act of 1973, instead of the Americans with Disabilities Act. The protections are mostly the same.

Disability Discrimination & Work Situations

The law forbids discrimination when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoff, training, fringe benefits, and any other term or condition of employment.

Disability Discrimination & Harassment

It is illegal to harass an applicant or employee because he has a disability, had a disability in the past, or is believed to have a physical or mental impairment that is not transitory (lasting or expected to last six months or less) and minor (even if he does not have such an impairment).
Harassment can include, for example, offensive remarks about a person's disability. Although the law doesn't prohibit simple teasing, offhand comments, or isolated incidents that aren't very serious, harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted).

The harasser can be the victim's supervisor, a supervisor in another area, a co-worker, or someone who is not an employee of the employer, such as a client or customer.

Disability Discrimination & Reasonable Accommodation

The law requires an employer to provide reasonable accommodation to an employee or job applicant with a disability, unless doing so would cause significant difficulty or expense for the employer.

A reasonable accommodation is any change in the work environment (or in the way things are usually done) to help a person with a disability apply for a job, perform the duties of a job, or enjoy the benefits and privileges of employment.

Reasonable accommodation might include, for example, making the workplace accessible for wheelchair users or providing a reader or interpreter for someone who is blind or hearing impaired.

While the federal anti-discrimination laws don't require an employer to accommodate an employee who must care for a disabled family member, the Family and Medical Leave Act (FMLA) may require an employer to take such steps. The Department of Labor enforces the FMLA. For more information, call: 1-866-487-9243.

Disability Discrimination & Reasonable Accommodation & Undue Hardship

An employer doesn't have to provide an accommodation if doing so would cause undue hardship to the employer.

Undue hardship means that the accommodation would be too difficult or too expensive to provide, in light of the employer's size, financial resources, and the needs of the business. An employer may not refuse to provide an accommodation just because it involves some cost. An employer does not have to provide the exact accommodation the employee or job applicant wants. If more than one accommodation works, the employer may choose which one to provide.

Definition Of Disability

Not everyone with a medical condition is protected by the law. In order to be protected, a person must be qualified for the job and have a disability as defined by the law.

A person can show that he or she has a disability in one of three ways:

A person may be disabled if he or she has a physical or mental condition that substantially limits a major life activity (such as walking, talking, seeing, hearing, or learning).

A person may be disabled if he or she has a history of a disability (such as cancer that is in remission).

A person may be disabled if he is believed to have a physical or mental impairment that is not transitory (lasting or expected to last six months or less) and minor (even if he does not have

such an impairment).

Disability & Medical Exams During Employment Application & Interview Stage

The law places strict limits on employers when it comes to asking job applicants to answer medical questions, take a medical exam, or identify a disability.

For example, an employer may not ask a job applicant to answer medical questions or take a medical exam before extending a job offer. An employer also may not ask job applicants if they have a disability (or about the nature of an obvious disability). An employer may ask job applicants whether they can perform the job and how they would perform the job, with or without a reasonable accommodation.

Disability & Medical Exams After A Job Offer For Employment

After a job is offered to an applicant, the law allows an employer to condition the job offer on the applicant answering certain medical questions or successfully passing a medical exam, but only if all new employees in the same type of job have to answer the questions or take the exam.

Disability & Medical Exams For Persons Who Have Started Working As Employees

Once a person is hired and has started work, an employer generally can only ask medical questions or require a medical exam if the employer needs medical documentation to support an employee's request for an accommodation or if the employer believes that an employee is not able to perform a job successfully or safely because of a medical condition.

The law also requires that employers keep all medical records and information confidential and in separate medical files.

Disability: Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008

The questions and answers below provide information on the changes made to the regulations as a result of the ADAAA and identify certain regulations that remain the same. The answers below also note where the final regulations differ from what appeared in the Notice of Proposed Rulemaking (NPRM) that was published September 23, 2009. Finally, answers to certain questions provide citations to specific sections of the final regulations and the corresponding section of the Appendix (29 C.F.R. section 1630).

1. Does the ADAAA apply to discriminatory acts that occurred prior to January 1, 2009?

No. The ADAAA does not apply retroactively. For example, the ADAAA would not apply to a situation in which an employer, union, or employment agency allegedly failed to hire, terminated, or denied a reasonable accommodation to someone with a disability in December 2008, even if the person did not file a charge with the EEOC until after January 1, 2009. The original ADA definition of disability would be applied to such a charge. However, the ADAAA

would apply to denials of reasonable accommodation where a request was made (or an earlier request was renewed) or to other alleged discriminatory acts that occurred on or after January 1, 2009.

2. What is the purpose of the ADAAA?

Among the purposes of the ADAAA is the reinstatement of a "broad scope of protection" by expanding the definition of the term "disability." Congress found that persons with many types of impairments – including epilepsy, diabetes, multiple sclerosis, major depression, and bipolar disorder – had been unable to bring ADA claims because they were found not to meet the ADA's definition of "disability." Yet, Congress thought that individuals with these and other impairments should be covered. The ADAAA explicitly rejected certain Supreme Court interpretations of the term "disability" and a portion of the EEOC regulations that it found had inappropriately narrowed the definition of disability. As a result of the ADAAA and EEOC's final regulations, it will be much easier for individuals seeking the law's protection to demonstrate that they meet the definition of "disability." As a result, many more ADA claims will focus on the merits of the case.

3. Do all of the changes in the ADAAA apply to other titles of the ADA and provisions of the Rehabilitation Act prohibiting disability discrimination by federal agencies, federal contractors, and recipients of federal financial assistance?

Yes. The ADAAA specifically states that all of its changes also apply to:

section 501 of the Rehabilitation Act (federal employment),
section 503 of the Rehabilitation Act (federal contractors), and
section 504 of the Rehabilitation Act (recipients of federal financial assistance and services and programs of federal agencies).
The changes to the definition of disability also apply to all of the ADA's titles, including Title II (programs and activities of State and local government entities) and Title III (private entities that are considered places of public accommodation). A few provisions of the ADAAA affect only the portions of the ADA and the Rehabilitation Act concerning employment, such as a provision that requires covered entities to show that qualification standards that screen out individuals based on uncorrected vision are job-related and consistent with business necessity, and changes to the general prohibition of discrimination in § 102 of the ADA.

The EEOC's final regulations apply to Title I of the ADA and section 501 of the Rehabilitation Act, but they do not apply to Titles II and III of the ADA, or sections 503 and 504 of the Rehabilitation Act.

4. Who is required to comply with these regulations?

These regulations apply to all private and state and local government employers with 15 or more employees, employment agencies, labor organizations (unions), and joint labor-management committees. [Section 1630.2(b)] Additionally, section 501 of the Rehabilitation Act applies to federal executive branch agencies regardless of the number of employees they have. The use of the term "covered entity" in this Q&A and the Appendix refers to all such entities.

5. How does the ADAAA define "disability?"

The ADAAA and the final regulations define a disability using a three-pronged approach:

a physical or mental impairment that substantially limits one or more major life activities (sometimes referred to in the regulations as an "actual disability"), or
a record of a physical or mental impairment that substantially limited a major life activity ("record of"), or
when a covered entity takes an action prohibited by the ADA because of an actual or perceived impairment that is not both transitory and minor ("regarded as"). [Section 1630.2(g)]

6. Must individuals use a particular prong of the definition of disability when challenging a covered entity's actions?

Not necessarily. Claims for denial of reasonable accommodation must be brought under one or both of the first two prongs of the definition of disability (i.e., an actual disability and/or a record of a disability) since the ADAAA specifically states that those covered under only the "regarded as" definition are not entitled to reasonable accommodation. While other types of allegations (e.g., failure to hire or promote, termination, harassment) may be brought under any of the definitions, an individual may find it easier to claim coverage under the "regarded as" definition of disability. An individual only has to meet one of the three prongs of the definition of "disability." [Section 1630.2(g)(3) and Appendix Section 1630.2(g)]

7. How do the regulations define the term "physical or mental impairment"?

The regulations define "physical or mental impairment" as any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin and endocrine. They also cover any mental or psychological disorder, such as intellectual disability (formerly termed mental retardation), organic brain syndrome, emotional or mental illness, and specific learning disabilities. [Section 1630.2(h)]

The definition of "impairment" in the new regulations is almost identical to the definition in EEOC's original ADA regulations, except that the immune and circulatory systems have been added to the list of body systems that may be affected by an impairment, because these systems are specifically mentioned in the ADAAA's examples of major bodily functions. (See Question 8.)

8. What are "major life activities?"

The final regulations provide a non-exhaustive list of examples of major life activities: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working. Most of these examples are taken from the ADAAA, which in turn adopted them from the original ADA regulations and EEOC guidances, or from ADA and Rehabilitation Act case law.

The final regulations also state that major life activities include the operation of major bodily functions, including functions of the immune system, special sense organs and skin, normal cell growth, digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. Although not specifically stated in the NPRM, the final regulations state that major bodily functions include the operation of an individual organ within a body system (e.g., the operation of the kidney, liver, or pancreas).

As a result of the ADAAA's recognition of major bodily functions as major life activities, it will be easier to find that individuals with certain types of impairments have a disability. (For examples of impairments affecting major bodily functions that should easily be concluded to meet the first or second part of the definition of "disability," see Question 19.)

9. When does an impairment "substantially limit" a major life activity?

To have an "actual" disability (or to have a "record of" a disability) an individual must be (or have been) substantially limited in performing a major life activity as compared to most people in the general population. Consistent with the ADAAA, the final regulations adopt "rules of construction" to use when determining if an individual is substantially limited in performing a major life activity. These rules of construction include the following:

An impairment need not prevent or severely or significantly limit a major life activity to be considered "substantially limiting." Nonetheless, not every impairment will constitute a disability.

The term "substantially limits" should be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA.

The determination of whether an impairment substantially limits a major life activity requires an individualized assessment.

In keeping with Congress' direction that the primary focus of the ADA is on whether discrimination occurred, the determination of disability should not require extensive analysis.

Although determination of whether an impairment substantially limits a major life activity as compared to most people will not usually require scientific, medical, or statistical evidence, such evidence may be used if appropriate.

An individual need only be substantially limited, or have a record of a substantial limitation, in one major life activity to be covered under the first or second prong of the definition of "disability."

Other rules of construction are discussed in more detail in Questions 10-17. [Section 1630.2(j)(1)(i-v) and (viii)]

10. Do the final regulations require that an impairment last a particular length of time to be considered substantially limiting?

No. As discussed in Question 25, the ADAAA excludes from "regarded as" coverage an actual or perceived impairment that is both transitory (i.e., will last fewer than six months) and minor. However, neither the ADAAA nor the final regulations apply this exception found in the "regarded as" definition of disability to the other two definitions of disability. One of the "rules of construction" states that the effects of an impairment lasting fewer than six months can be substantially limiting. [Section 1630.2(j)(1)(ix)]

11. Can impairments that are episodic or in remission be considered disabilities?

Yes. The ADAAA and the final regulations specifically state that an impairment that is episodic or in remission meets the definition of disability if it would substantially limit a major life activity when active. This means that chronic impairments with symptoms or effects that are episodic rather than present all the time can be a disability even if the symptoms or effects would only substantially limit a major life activity when the impairment is active. The Appendix provides examples of impairments that may be episodic, including epilepsy, hypertension, asthma, diabetes, major depressive disorder, bipolar disorder, and schizophrenia. An impairment such as cancer that is in remission but that may possibly return in a substantially limiting form will also be a disability under the ADAAA and the final regulations. [Section 1630.2(j)(1)(vii) and corresponding Appendix section]

12. What are mitigating measures?

Mitigating measures eliminate or reduce the symptoms or impact of an impairment. The ADAAA and the final regulations provide a non-exhaustive list of examples of mitigating measures. They include medication, medical equipment and devices, prosthetic limbs, low vision devices (e.g., devices that magnify a visual image), hearing aids, mobility devices, oxygen therapy equipment, use of assistive technology, reasonable accommodations, and learned behavioral or adaptive neurological modifications. In addition, the final regulations add psychotherapy, behavioral therapy, and physical therapy to the ADAAA's list of examples. [Section 1630.2(j)(5)]

13. May the positive effects of mitigating measures in limiting the impact of an impairment on performance of a major life activity be considered when determining whether someone has a disability?

No, except for ordinary eyeglasses or contact lenses (see Question 14). The ADAAA and the final regulations direct that the positive (or ameliorative) effects from an individual's use of one or more mitigating measures be ignored in determining if an impairment substantially limits a major life activity. In other words, if a mitigating measure eliminates or reduces the symptoms or impact of an impairment, that fact cannot be used in determining if a person meets the definition of disability. Instead, the determination of disability must focus on whether the individual would be substantially limited in performing a major life activity without the mitigating measure. This may mean focusing on the extent of limitations prior to use of a mitigating measure or on what would happen if the individual ceased using a mitigating measure. [Section 1630.2(j)(1)(vi) and corresponding Appendix section]

14. Does the rule concerning mitigating measures apply to people whose vision is corrected with ordinary eyeglasses or contact lenses?

No. "Ordinary eyeglasses or contact lenses" – defined in the ADAAA and the final regulations as lenses that are "intended to fully correct visual acuity or to eliminate refractive error" – must be considered when determining whether someone has a disability. For example, a person who wears ordinary eyeglasses for a routine vision impairment is not, for that reason, a person with a disability under the ADA. The regulations do not establish a specific level of visual acuity for determining whether eyeglasses or contact lenses should be considered "ordinary." This determination should be made on a case-by-case basis in light of current and objective medical evidence. [Sections 1630.2(j)(1)(vi) and (j)(6) and corresponding Appendix sections]

15. May the negative effects of a mitigating measure be taken into account in determining whether an individual meets the definition of "disability?"

Yes. The ADAAA allows consideration of the negative effects of a mitigating measure in determining if a disability exists. For example, the side effects that an individual experiences from use of medication for hypertension may be considered in determining whether the individual is substantially limited in a major life activity. However, it will often be unnecessary to consider the non-ameliorative effects of mitigating measures in order to determine whether an individual has a disability. For example, it is unnecessary to consider the burdens associated with receiving dialysis treatment for someone whose kidney function would be substantially limited without this treatment. [Section 1630.2(j)(4)(ii)]

16. May the positive or negative effects of mitigating measures be considered when assessing whether someone is entitled to reasonable accommodation or poses a direct threat?

Yes. The ADAAA's prohibition on assessing the positive effects of mitigating measures applies only to the determination of whether an individual meets the definition of "disability." All other determinations – including the need for a reasonable accommodation and whether an individual poses a direct threat – can take into account both the positive and negative effects of a mitigating measure. The negative effects of mitigating measures may include side effects or burdens that using a mitigating measure might impose. For example, someone with diabetes may need breaks to take insulin and monitor blood sugar levels, and someone with kidney disease may need a modified work schedule to receive dialysis treatments. On the other hand, if an individual with a disability uses a mitigating measure that results in no negative effects and eliminates the need for a reasonable accommodation, a covered entity will have no obligation to provide one.

17. Can a covered entity require that an individual use a mitigating measure?

No. A covered entity cannot require an individual to use a mitigating measure. However, failure to use a mitigating measure may affect whether an individual is qualified for a particular job or poses a direct threat. [Appendix Section 1630.2(j)(1)(vi)]

18. After an individualized assessment is done, are there certain impairments that will

virtually always be found to result in substantial limitation in performing certain major life activities?

Yes. Certain impairments, due to their inherent nature and the extensive changes Congress made to the definitions of "major life activities" and "substantially limits," will virtually always be disabilities. (See Questions 8-11 and 13.) For these impairments, the individualized assessment should be particularly simple and straightforward.

19. Do the regulations give any examples of specific impairments that will be easily concluded to substantially limit a major life activity?

Yes. The regulations identify examples of specific impairments that should easily be concluded to be disabilities and examples of major life activities (including major bodily functions) that the impairments substantially limit. The impairments include: deafness, blindness, intellectual disability (formerly known as mental retardation), partially or completely missing limbs, mobility impairments requiring use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV infection, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive-compulsive disorder, and schizophrenia. [Section 1630.2(j)(3)]

20. May the condition, manner, or duration under which a major life activity can be performed be considered in determining whether an impairment is a disability?

Yes. The Commission did not include the concepts of "condition, manner, or duration" (used in the original ADA regulations published in 1991) in the NPRM, believing that use of the terms might lead to the kind of excessive focus on the definition of "disability" that Congress sought to avoid. In response to comments on behalf of both employers and individuals with disabilities, however, we have included the concepts of condition, manner, or duration (where duration refers to the length of time it takes to perform a major life activity or the amount of time the activity can be performed) in the final regulations as facts that may be considered if relevant. But, with respect to many impairments, including those that should easily be concluded to be disabilities (see Question 19), it may be unnecessary to use these concepts to determine whether the impairment substantially limits a major life activity.

Assessing the condition, manner, or duration under which a major life activity can be performed may include consideration of the difficulty, effort, or time required to perform a major life activity; pain experienced when performing a major life activity; the length of time a major life activity can be performed; and/or the way an impairment affects the operation of a major bodily function. [Section 1630.2(j)(4)(i) and (ii) and corresponding Appendix section]

21. When is someone substantially limited in the major life activity of working?

In certain situations, an impairment may limit someone's ability to perform some aspect of his or her job, but otherwise not substantially limit any other major life activity. In these situations, the individual may be substantially limited in working. However, with all of the changes made by

the ADAAA, in particular the inclusion of major bodily functions as major life activities and revisions to the "regarded as" prong of the definition of "disability," it should generally be unnecessary to determine whether someone is substantially limited in working. [Appendix Section 1630.2(j)]

The final regulations, unlike the NPRM, do not mention the major life activity of working other than by its inclusion in the list of major life activities (see Question 8). However, the Appendix discusses how to determine substantial limitation in a number of major life activities, including working. The Appendix discussion of working, unlike the NPRM, states that substantial limitation in this major life activity will be made with reference to difficulty performing either a "class or broad range of jobs in various classes" rather than a "type of work." The Appendix also notes that a "class" of work may be determined by reference to the nature of the work (e.g., commercial truck driving or assembly line jobs), or by reference to job-related requirements that an individual is limited in meeting (e.g., jobs requiring extensive walking, prolonged standing, and repetitive or heavy lifting). Demonstrating a substantial limitation in performing the unique aspects of a single specific job is not sufficient to establish that a person is substantially limited in the major life activity of working.

22. Does the ADA still exclude from coverage a person who is illegally using drugs?

Yes. The ADAAA did not make changes to the part of the ADA that excludes from coverage a person who currently engages in the illegal use of drugs when a covered entity acts on the basis of such use. However, the ADA also still says that a person who no longer engages in the illegal use of drugs may be an individual with a disability if he or she:

has successfully completed a supervised drug rehabilitation program or has otherwise been rehabilitated successfully, or
is participating in a supervised rehabilitation program (e.g., Alcoholics Anonymous or Narcotics Anonymous). [Section 1630.3(a)-(b)]

23. Is pregnancy a disability under the ADAAA?

No. Pregnancy is not an impairment and therefore cannot be a disability. Certain impairments resulting from pregnancy (e.g., gestational diabetes), however, may be considered a disability if they substantially limit a major life activity, or if they meet one of the other two definitions of disability discussed below. [Appendix Section 1630.2(h)]

24. When does an individual have a "record of" a disability?

An individual who does not currently have a substantially limiting impairment but who had one in the past meets this definition of "disability." An individual also can meet the "record of" definition of disability if she was once misclassified as having a substantially limiting impairment (e.g., someone erroneously deemed to have had a learning disability but who did not).

All of the changes to the first definition of disability discussed in the questions above – including the expanded list of major life activities, the lower threshold for finding a substantial limitation, the clarification that episodic impairments or those in remission may be disabilities, and the requirement to disregard the positive effects of mitigating measures – will apply to evaluating whether an individual meets the "record of" definition of disability. [Section 1630.2(k) and corresponding Appendix section]

25. What does it mean for a covered entity to "regard" an individual as having a disability?

Under the ADAAA and the final regulations, a covered entity "regards" an individual as having a disability if it takes an action prohibited by the ADA (e.g., failure to hire, termination, or demotion) based on an individual's impairment or on an impairment the covered entity believes the individual has, unless the impairment is transitory (lasting or expected to last for six months or less) and minor. This new formulation of "regarded as" having a disability is different from the original ADA formulation, which required an individual seeking coverage under this part of the definition to show that a covered entity believed the individual's impairment (or perceived impairment) substantially limited performance of a major life activity. [Section 1630.2(l)(1)]

A covered entity will regard an individual as having a disability any time it takes a prohibited action against the individual because of an actual or perceived impairment, regardless of whether the covered entity asserts, or even ultimately establishes, a defense for its action. As discussed in Question 26, the legality of the covered entity's actions is a separate inquiry into the merits of the claim. [Section 1630.2(l)(2)]

The final regulations state that a covered entity may challenge a claim under the "regarded as" prong by showing that the impairment in question, whether actual or perceived, is both transitory and minor. In other words, whether the impairment in question is transitory and minor is a defense available to covered entities. However, a covered entity may not defeat a claim by asserting it believed an impairment was transitory and minor when objectively this is not the case. For example, an employer that fires an employee because he has bipolar disorder, or an employment agency that refuses to refer an applicant because he has bipolar disorder, cannot assert that it believed the impairment was transitory and minor because bipolar disorder is not objectively transitory and minor. [Section 1630.15(f) and corresponding Appendix section]

26. If a covered entity regards an individual as having a disability, does that automatically mean the covered entity has discriminated against the individual?

No. The fact that a covered entity's action may have been based on an impairment does not necessarily mean that a covered entity engaged in unlawful discrimination. For example, an individual still needs to be qualified for the job he or she holds or desires. Additionally, in some instances, a covered entity may have a defense to an action taken on the basis of an impairment, such as where a particular individual would pose a direct threat or where the covered entity's action was required by another federal law (e.g., a law that prohibits individuals with certain impairments from holding certain kinds of jobs). As under current law, a covered entity will be held liable only when an individual proves that the entity engaged in unlawful discrimination

under the ADA. [Sections 1630.2(l)(3) and 1630.2(o)(4), and Appendix Sections 1630.2(l) and (o)]

27. Does an individual have to establish coverage under a particular definition of disability to be eligible for a reasonable accommodation?

Yes. Individuals must meet either the "actual" or "record of" definitions of disability to be eligible for a reasonable accommodation. Individuals who only meet the "regarded as" definition are not entitled to receive reasonable accommodation. Of course, coverage under the "actual" or "record of" definitions does not, alone, entitle a person to a reasonable accommodation. An individual must be able to show that the disability, or past disability, requires a reasonable accommodation. [Sections 1630.2(k)(3), 1630.2(o)(4), 1630.9(e)]

28. What do the final regulations say about qualification standards based on uncorrected vision?

The ADAAA and the final regulations require that a covered entity show that a challenged qualification standard based on uncorrected vision is job-related and consistent with business necessity. An individual challenging the legality of an uncorrected vision standard need not be a person with a disability, but the individual must have been adversely affected by the standard. The Appendix notes that individuals who are screened out of a job because they cannot meet an uncorrected vision standard will usually meet the "regarded as" definition of disability. [Section 1630.10(b) and corresponding Appendix section]

29. Does the ADAAA change the definitions of "qualified," "direct threat," "reasonable accommodation," and "undue hardship," or does it change who has the burden of proof in demonstrating any of these requirements?

No. Nearly all of the ADAAA's changes only affect the definition of "disability." None of the key ADA terms listed in this Question, or the burdens of proof applicable to each one, have changed. The only provision in the ADAAA affecting the reasonable accommodation obligation is that a covered entity does not have to provide one to an individual who only meets the "regarded as" definition of disability.

30. Why do the regulations no longer refer to a "qualified individual with a disability"?

Consistent with the ADAAA, the final regulations now refer to "individual with a disability" and "qualified individual" as separate terms. They also now prohibit discrimination "on the basis of disability" rather than "against a qualified individual with a disability because of the disability of such individual." The changes to the regulations reflect changes made by the ADAAA itself, which are intended to make the primary focus of an ADA inquiry whether discrimination occurred, not whether an individual meets the definition of "disability." However, an individual must still establish that he or she is qualified for the job in question. [Section 1630.4 and the Introduction to the Appendix]

31. Do any of the ADAAA's changes affect workers' compensation laws or Federal and State disability benefit programs?

No. The ADAAA and the final regulations specifically state that no changes alter the standards for determining eligibility for benefits under State workers' compensation laws or under Federal and State disability benefit programs. [Section 1630.1(c)(3) and corresponding Appendix section]

32. May a non-disabled individual bring an ADA claim of discrimination for being denied an employment opportunity or a reasonable accommodation because of lack of a disability?

No. The ADA does not protect an individual who is denied an employment opportunity or a reasonable accommodation because she does not have a disability. [Section 1630.4(b) and corresponding Appendix section]

33. Will the EEOC be updating all of the ADA-related publications on its website to be consistent with the final ADAAA regulations?

Yes. When EEOC updates a particular document, we will note this on our website and explain what changes were made to the document. To avoid misunderstanding, all of these documents currently contain notices about the ADAAA indicating that some of the material in the documents may no longer reflect the law. It should be noted that because the ADAAA focused almost exclusively on changing the definition of "disability," content in these documents unrelated to the definition of "disability" – including the meaning of qualified, essential functions, reasonable accommodation, and direct threat – remains unaffected by the ADAAA and the final regulations. Therefore, individuals can continue to rely on these parts of the documents as reflecting current law

Disability: Fact Sheet on the EEOC's Final Regulations Implementing the ADAAA

The ADA Amendments Act of 2008 (ADAAA) was enacted on September 25, 2008, and became effective on January 1, 2009. The law made a number of significant changes to the definition of "disability" under the Americans with Disabilities Act (ADA). It also directed the U.S. Equal Employment Opportunity Commission (EEOC) to amend its ADA regulations to reflect the changes made by the ADAAA. The EEOC issued a Notice of Proposed Rulemaking (NPRM) on September 23, 2009. The final regulations were approved by a bipartisan vote and were published in the Federal Register on March 25, 2011.

In enacting the ADAAA, Congress made it easier for an individual seeking protection under the ADA to establish that he or she has a disability within the meaning of the statute. Congress overturned several Supreme Court decisions that Congress believed had interpreted the definition of "disability" too narrowly, resulting in a denial of protection for many individuals

with impairments such as cancer, diabetes, and epilepsy. The ADAAA states that the definition of disability should be interpreted in favor of broad coverage of individuals.

The EEOC regulations implement the ADAAA -- in particular, Congress's mandate that the definition of disability be construed broadly. Following the ADAAA, the regulations keep the ADA's definition of the term "disability" as a physical or mental impairment that substantially limits one or more major life activities; a record (or past history) of such an impairment; or being regarded as having a disability. But the regulations implement the significant changes that Congress made regarding how those terms should be interpreted.

The regulations implement Congress's intent to set forth predictable, consistent, and workable standards by adopting "rules of construction" to use when determining if an individual is substantially limited in performing a major life activity. These rules of construction are derived directly from the statute and legislative history and include the following:

The term "substantially limits" requires a lower degree of functional limitation than the standard previously applied by the courts . An impairment does not need to prevent or severely or significantly restrict a major life activity to be considered "substantially limiting." Nonetheless, not every impairment will constitute a disability.

The term "substantially limits" is to be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA.

The determination of whether an impairment substantially limits a major life activity requires an individualized assessment, as was true prior to the ADAAA.

With one exception ("ordinary eyeglasses or contact lenses"), the determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures, such as medication or hearing aids.
An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

In keeping with Congress's direction that the primary focus of the ADA is on whether discrimination occurred, the determination of disability should not require extensive analysis.
As required by the ADAAA, the regulations also make it easier for individuals to establish coverage under the "regarded as" part of the definition of "disability." As a result of court interpretations, it had become difficult for individuals to establish coverage under the "regarded as" prong. Under the ADAAA, the focus for establishing coverage is on how a person has been treated because of a physical or mental impairment (that is not transitory and minor), rather than on what an employer may have believed about the nature of the person's impairment.

The regulations clarify, however, that an individual must be covered under the first prong ("actual disability") or second prong ("record of disability") in order to qualify for a reasonable accommodation . The regulations clarify that it is generally not necessary to proceed under the first or second prong if an individual is not challenging an employer's failure to provide a

reasonable accommodation.

The final regulations differ from the NPRM in a number of ways. The final regulations modify or remove language that groups representing employer or disability interests had found confusing or had interpreted in a manner not intended by the EEOC. For example:

Instead of providing a list of impairments that would "consistently," "sometimes," or "usually not" be disabilities (as had been done in the NPRM), the final regulations provide the nine rules of construction to guide the analysis and explain that by applying those principles, there will be some impairments that virtually always constitute a disability. The regulations also provide examples of impairments that should easily be concluded to be disabilities, including epilepsy, diabetes, cancer, HIV infection, and bipolar disorder.

Language in the NPRM describing how to demonstrate that an individual is substantially limited in "working" has been deleted from the final regulations and moved to the appendix (consistent with how other major life activities are addressed). The final regulations also retain the existing familiar language of "class or broad range of jobs" rather than introducing a new term, and they provide examples of individuals who could be considered substantially limited in working.
The final regulations retain the concepts of "condition, manner, or duration" that the NPRM had proposed to delete and explain that while consideration of these factors may be unnecessary to determine whether an impairment substantially limits a major life activity, they may be relevant in certain cases.

Equal Pay/Compensation Discrimination (EEOC)

The Equal Pay Act requires that men and women in the same workplace be given equal pay for equal work. The jobs need not be identical, but they must be substantially equal. Job content (not job titles) determines whether jobs are substantially equal. All forms of pay are covered by this law, including salary, overtime pay, bonuses, stock options, profit sharing and bonus plans, life insurance, vacation and holiday pay, cleaning or gasoline allowances, hotel accommodations, reimbursement for travel expenses, and benefits. If there is an inequality in wages between men and women, employers may not reduce the wages of either sex to equalize their pay.

An individual alleging a violation of the EPA may go directly to court and is not required to file an EEOC charge beforehand. The time limit for filing an EPA charge with the EEOC and the time limit for going to court are the same: within two years of the alleged unlawful compensation practice or, in the case of a willful violation, within three years. The filing of an EEOC charge under the EPA does not extend the time frame for going to court.

Equal Pay/Compensation and Sex Discrimination

Title VII also makes it illegal to discriminate based on sex in pay and benefits. Therefore, someone who has an Equal Pay Act claim may also have a claim under Title VII.

Other Types of Discrimination

Title VII, the ADEA, and the ADA prohibit compensation discrimination on the basis of race, color, religion, sex, national origin, age, or disability. Unlike the EPA, there is no requirement under Title VII, the ADEA, or the ADA that the jobs must be substantially equal.

Genetic Information Discrimination (EEOC)

Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA), which prohibits genetic information discrimination in employment, took effect on November 21, 2009.

Under Title II of GINA, it is illegal to discriminate against employees or applicants because of genetic information. Title II of GINA prohibits the use of genetic information in making employment decisions, restricts employers and other entities covered by Title II (employment agencies, labor organizations and joint labor-management training and apprenticeship programs - referred to as "covered entities") from requesting, requiring or purchasing genetic information, and strictly limits the disclosure of genetic information.

The EEOC enforces Title II of GINA (dealing with genetic discrimination in employment). The Departments of Labor, Health and Human Services and the Treasury have responsibility for issuing regulations for Title I of GINA, which addresses the use of genetic information in health insurance.

Definition of "Genetic Information"

Genetic information includes information about an individual's genetic tests and the genetic tests of an individual's family members, as well as information about the manifestation of a disease or disorder in an individual's family members (i.e. family medical history). Family medical history is included in the definition of genetic information because it is often used to determine whether someone has an increased risk of getting a disease, disorder, or condition in the future. Genetic information also includes an individual's request for, or receipt of, genetic services, or the participation in clinical research that includes genetic services by the individual or a family member of the individual, and the genetic information of a fetus carried by an individual or by a pregnant woman who is a family member of the individual and the genetic information of any embryo legally held by the individual or family member using an assisted reproductive technology.

Discrimination Because of Genetic Information

The law forbids discrimination on the basis of genetic information when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoffs, training, fringe benefits, or any other term or condition of employment. An employer may never use genetic information to make an employment decision because genetic information is not relevant to an individual's current ability to work.

Harassment Because of Genetic Information

Under GINA, it is also illegal to harass a person because of his or her genetic information. Harassment can include, for example, making offensive or derogatory remarks about an applicant or employee's genetic information, or about the genetic information of a relative of the applicant or employee. Although the law doesn't prohibit simple teasing, offhand comments, or isolated incidents that are not very serious, harassment is illegal when it is so severe or pervasive that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted). The harasser can be the victim's supervisor, a supervisor in another area of the workplace, a co-worker, or someone who is not an employee, such as a client or customer.

Retaliation

Under GINA, it is illegal to fire, demote, harass, or otherwise "retaliate" against an applicant or employee for filing a charge of discrimination, participating in a discrimination proceeding (such as a discrimination investigation or lawsuit), or otherwise opposing discrimination.

Rules Against Acquiring Genetic Information

It will usually be unlawful for a covered entity to get genetic information. There are six narrow exceptions to this prohibition:

Inadvertent acquisitions of genetic information do not violate GINA, such as in situations where a manager or supervisor overhears someone talking about a family member's illness.

Genetic information (such as family medical history) may be obtained as part of health or genetic services, including wellness programs, offered by the employer on a voluntary basis, if certain specific requirements are met.

Family medical history may be acquired as part of the certification process for FMLA leave (or leave under similar state or local laws or pursuant to an employer policy), where an employee is asking for leave to care for a family member with a serious health condition.

Genetic information may be acquired through commercially and publicly available documents like newspapers, as long as the employer is not searching those sources with the intent of finding genetic information or accessing sources from which they are likely to acquire genetic information (such as websites and on-line discussion groups that focus on issues such as genetic testing of individuals and genetic discrimination).

Genetic information may be acquired through a genetic monitoring program that monitors the biological effects of toxic substances in the workplace where the monitoring is required by law or, under carefully defined conditions, where the program is voluntary.

Acquisition of genetic information of employees by employers who engage in DNA testing for

law enforcement purposes as a forensic lab or for purposes of human remains identification is permitted, but the genetic information may only be used for analysis of DNA markers for quality control to detect sample contamination.

Confidentiality of Genetic Information

It is also unlawful for a covered entity to disclose genetic information about applicants, employees or members. Covered entities must keep genetic information confidential and in a separate medical file. (Genetic information may be kept in the same file as other medical information in compliance with the Americans with Disabilities Act.) There are limited exceptions to this non-disclosure rule, such as exceptions that provide for the disclosure of relevant genetic information to government officials investigating compliance with Title II of GINA and for disclosures made pursuant to a court order.

Harassment (EEOC)

Harassment is a form of employment discrimination that violates Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, (ADEA), and the Americans with Disabilities Act of 1990, (ADA).

Harassment is unwelcome conduct that is based on race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. Harassment becomes unlawful where 1) enduring the offensive conduct becomes a condition of continued employment, or 2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive. Anti-discrimination laws also prohibit harassment against individuals in retaliation for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or lawsuit under these laws; or opposing employment practices that they reasonably believe discriminate against individuals, in violation of these laws.

Petty slights, annoyances, and isolated incidents (unless extremely serious) will not rise to the level of illegality. To be unlawful, the conduct must create a work environment that would be intimidating, hostile, or offensive to reasonable people.

Offensive conduct may include, but is not limited to, offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures, and interference with work performance. Harassment can occur in a variety of circumstances, including, but not limited to, the following:

The harasser can be the victim's supervisor, a supervisor in another area, an agent of the employer, a co-worker, or a non-employee.

The victim does not have to be the person harassed, but can be anyone affected by the offensive conduct.

Unlawful harassment may occur without economic injury to, or discharge of, the victim.

Prevention is the best tool to eliminate harassment in the workplace. Employers are encouraged to take appropriate steps to prevent and correct unlawful harassment. They should clearly communicate to employees that unwelcome harassing conduct will not be tolerated. They can do this by establishing an effective complaint or grievance process, providing anti-harassment training to their managers and employees, and taking immediate and appropriate action when an employee complains. Employers should strive to create an environment in which employees feel free to raise concerns and are confident that those concerns will be addressed.

Employees are encouraged to inform the harasser directly that the conduct is unwelcome and must stop. Employees should also report harassment to management at an early stage to prevent its escalation.

Employer Liability for Harassment

The employer is automatically liable for harassment by a supervisor that results in a negative employment action such as termination, failure to promote or hire, and loss of wages. If the supervisor's harassment results in a hostile work environment, the employer can avoid liability only if it can prove that: 1) it reasonably tried to prevent and promptly correct the harassing behavior; and 2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.

The employer will be liable for harassment by non-supervisory employees or non-employees over whom it has control (e.g., independent contractors or customers on the premises), if it knew, or should have known about the harassment and failed to take prompt and appropriate corrective action.

When investigating allegations of harassment, the EEOC looks at the entire record: including the nature of the conduct, and the context in which the alleged incidents occurred. A determination of whether harassment is severe or pervasive enough to be illegal is made on a case-by-case basis.

If you believe that the harassment you are experiencing or witnessing is of a specifically sexual nature, you may want to see EEOC's information on sexual harassment. *(See below)*

Sexual Harassment

It is unlawful to harass a person (an applicant or employee) because of that person’s sex. Harassment can include “sexual harassment” or unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature.

Harassment does not have to be of a sexual nature, however, and can include offensive remarks about a person’s sex. For example, it is illegal to harass a woman by making offensive comments about women in general.

Both victim and the harasser can be either a woman or a man, and the victim and harasser can be the same sex.

Although the law doesn't prohibit simple teasing, offhand comments, or isolated incidents that are not very serious, harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted).

The harasser can be the victim's supervisor, a supervisor in another area, a co-worker, or someone who is not an employee of the employer, such as a client or customer.

Harassment: Questions and Answers for Small Employers
on Employer Liability for Harassment by Supervisors (EEOC)

Title VII of the Civil Rights Act (Title VII) prohibits harassment of an employee based on race, color, sex, religion, or national origin. The Age Discrimination in Employment Act (ADEA) prohibits harassment of employees who are 40 or older on the basis of age, the Americans with Disabilities Act (ADA) prohibits harassment based on disability, and the Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits harassment of an employee based on genetic information. All of the anti-discrimination statutes enforced by the EEOC prohibit retaliation for complaining of discrimination or participating in complaint proceedings.

The Supreme Court issued two major decisions in June of 1998 that explained when employers will be held legally responsible for unlawful harassment by supervisors. The EEOC's Guidance on Employer Liability for Harassment by Supervisors examines those decisions and provides practical guidance regarding the duty of employers to prevent and correct harassment and the duty of employees to avoid harassment by using their employers' complaint procedures.

1. When does harassment violate federal law?

Harassment violates federal law if it involves discriminatory treatment based on race, color, sex (with or without sexual conduct), religion, national origin, age, disability, genetic information, or because the employee opposed job discrimination or participated in an investigation or complaint proceeding under the EEO statutes. Federal law does not prohibit simple teasing, offhand comments, or isolated incidents that are not extremely serious. The conduct must be sufficiently frequent or severe to create a hostile work environment or result in a "tangible employment action," such as hiring, firing, promotion, or demotion.

2. Does the guidance apply only to sexual harassment?

No, it applies to all types of unlawful harassment.

3. When is an employer legally responsible for harassment by a supervisor?

An employer is always responsible for harassment by a supervisor that culminated in a tangible employment action. If the harassment did not lead to a tangible employment action, the employer is liable unless it proves that: 1) it exercised reasonable care to prevent and promptly correct any harassment; and 2) the employee unreasonably failed to complain to management or to avoid harm otherwise

4. Who qualifies as a "supervisor" for purposes of employer liability?

An individual qualifies as an employee's "supervisor" if the individual has the authority to recommend tangible employment decisions affecting the employee or if the individual has the authority to direct the employee's daily work activities.

5. What is a "tangible employment action"?

A "tangible employment action" means a significant change in employment status. Examples include hiring, firing, promotion, demotion, undesirable reassignment, a decision causing a significant change in benefits, compensation decisions, and work assignment.

6. How might harassment culminate in a tangible employment action?

This might occur if a supervisor fires or demotes a subordinate because she rejects his sexual demands, or promotes her because she submits to his sexual demands.

7. What should employers do to prevent and correct harassment?

Employers should establish, distribute to all employees, and enforce a policy prohibiting harassment and setting out a procedure for making complaints. In most cases, the policy and procedure should be in writing.

Small businesses may be able to discharge their responsibility to prevent and correct harassment through less formal means. For example, if a business is sufficiently small that the owner maintains regular contact with all employees, the owner can tell the employees at staff meetings that harassment is prohibited, that employees should report such conduct promptly, and that a complaint can be brought "straight to the top." If the business conducts a prompt, thorough, and impartial investigation of any complaint that arises and undertakes swift and appropriate corrective action, it will have fulfilled its responsibility to "effectively prevent and correct harassment."

8. What should an anti-harassment policy say?

An employer's anti-harassment policy should make clear that the employer will not tolerate harassment based on race, sex, religion, national origin, age, disability, or genetic information, or harassment based on opposition to discrimination or participation in complaint proceedings. The policy should also state that the employer will not tolerate retaliation against anyone who complains of harassment or who participates in an investigation.

9. What are important elements of a complaint procedure?

The employer should encourage employees to report harassment to management before it becomes severe or pervasive.

The employer should designate more than one individual to take complaints, and should ensure that these individuals are in accessible locations. The employer also should instruct all of its supervisors to report complaints of harassment to appropriate officials.

The employer should assure employees that it will protect the confidentiality of harassment complaints to the extent possible.

10. Is a complaint procedure adequate if employees are instructed to report harassment to their immediate supervisors?

No, because the supervisor may be the one committing harassment or may not be impartial. It is advisable for an employer to designate at least one official outside an employee's chain of command to take complaints, to assure that the complaint will be handled impartially.

11. How should an employer investigate a harassment complaint?

An employer should conduct a prompt, thorough, and impartial investigation. The alleged harasser should not have any direct or indirect control over the investigation.

The investigator should interview the employee who complained of harassment, the alleged harasser, and others who could reasonably be expected to have relevant information. The Guidance provides examples of specific questions that may be appropriate to ask.

Before completing the investigation, the employer should take steps to make sure that harassment does not continue. If the parties have to be separated, then the separation should not burden the employee who has complained of harassment. An involuntary transfer of the complainant could constitute unlawful retaliation. Other examples of interim measures are making scheduling changes to avoid contact between the parties or placing the alleged harasser on non-disciplinary leave with pay pending the conclusion of the investigation.

12. How should an employer correct harassment?

If an employer determines that harassment occurred, it should take immediate measures to stop the harassment and ensure that it does not recur. Disciplinary measures should be proportional to the seriousness of the offense. The employer also should correct the effects of the harassment by, for example, restoring leave taken because of the harassment and expunging negative evaluations in the employee's personnel file that arose from the harassment.

13. Are there other measures that employers should take to prevent and correct harassment?

An employer should correct harassment that is clearly unwelcome regardless of whether a complaint is filed. For example, if there is graffiti in the workplace containing racial or sexual

epithets, management should not wait for a complaint before erasing it.
An employer should ensure that its supervisors and managers understand their responsibilities under the organization's anti-harassment policy and complaint procedures.
An employer should screen applicants for supervisory jobs to see if they have a history of engaging in harassment. If so, and the employer hires such a candidate, it must take steps to monitor actions taken by that individual in order to prevent harassment.
An employer should keep records of harassment complaints and check those records when a complaint of harassment is made to reveal any patterns of harassment by the same individuals.

14. Does an employee who is harassed by his or her supervisor have any responsibilities?

Yes. The employee must take reasonable steps to avoid harm from the harassment. Usually, the employee will exercise this responsibility by using the employer's complaint procedure.

15. Is an employer legally responsible for its supervisor's harassment if the employee failed to use the employer's complaint procedure?

No, unless the harassment resulted in a tangible employment action or unless it was reasonable for the employee not to complain to management. An employee's failure to complain would be reasonable, for example, if he or she had a legitimate fear of retaliation. The employer must prove that the employee acted unreasonably.

16. If an employee complains to management about harassment, should he or she wait for management to complete the investigation before filing a charge with EEOC?

It may make sense to wait to see if management corrects the harassment before filing a charge. However, if management does not act promptly to investigate the complaint and undertake corrective action, then it may be appropriate to file a charge. The deadline for filing an EEOC charge is either 180 or 300 days after the last date of alleged harassment, depending on the state in which the allegation arises. This deadline is not extended because of an employer's internal investigation of the complaint.

National Origin Discrimination (EEOC)

National origin discrimination involves treating people (applicants or employees) unfavorably because they are from a particular country or part of the world, because of ethnicity or accent, or because they appear to be of a certain ethnic background (even if they are not).

National origin discrimination also can involve treating people unfavorably because they are married to (or associated with) a person of a certain national origin or because of their connection with an ethnic organization or group.

Discrimination can occur when the victim and the person who inflicted the discrimination are the same national origin.

National Origin Discrimination & Work Situations

The law forbids discrimination when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoff, training, fringe benefits, and any other term or condition of employment.

National Origin & Harassment

It is unlawful to harass a person because of his or her national origin. Harassment can include, for example, offensive or derogatory remarks about a person's national origin, accent or ethnicity. Although the law doesn't prohibit simple teasing, offhand comments, or isolated incidents that are not very serious, harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted).

The harasser can be the victim's supervisor, a supervisor in another area, a co-worker, or someone who is not an employee of the employer, such as a client or customer.

National Origin & Employment Policies/Practices

The law makes it illegal for an employer or other covered entity to use an employment policy or practice that applies to everyone, regardless of national origin, if it has a negative impact on people of a certain national origin and is not job-related or necessary to the operation of the business.

An employer can only require an employee to speak fluent English if fluency in English is necessary to perform the job effectively. An "English-only rule", which requires employees to speak only English on the job, is only allowed if it is needed to ensure the safe or efficient operation of the employer's business and is put in place for nondiscriminatory reasons.

An employer may not base an employment decision on an employee's foreign accent, unless the accent seriously interferes with the employee's job performance.

Citizenship Discrimination & Workplace Laws

The Immigration Reform and Control Act of 1986 (IRCA) makes it illegal for an employer to discriminate with respect to hiring, firing, or recruitment or referral for a fee, based upon an individual's citizenship or immigration status. The law prohibits employers from hiring only U.S. citizens or lawful permanent residents unless required to do so by law, regulation or government contract. Employers may not refuse to accept lawful documentation that establishes the employment eligibility of an employee, or demand additional documentation beyond what is legally required, when verifying employment eligibility (i.e., completing the Department of Homeland Security (DHS) Form I-9), based on the employee's national origin or citizenship status. It is the employee's choice which of the acceptable Form I-9 documents to show to verify employment eligibility.

IRCA also prohibits retaliation against individuals for asserting their rights under the Act, or for filing a charge or assisting in an investigation or proceeding under IRCA.

Race/Color Discrimination (EEOC)

Race discrimination involves treating someone (an applicant or employee) unfavorably because he/she is of a certain race or because of personal characteristics associated with race (such as hair texture, skin color, or certain facial features). Color discrimination involves treating someone unfavorably because of skin color complexion.

Race/color discrimination also can involve treating someone unfavorably because the person is married to (or associated with) a person of a certain race or color or because of a person's connection with a race-based organization or group, or an organization or group that is generally associated with people of a certain color.

Discrimination can occur when the victim and the person who inflicted the discrimination are the same race or color.

Race/Color Discrimination & Work Situations

The law forbids discrimination when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoff, training, fringe benefits, and any other term or condition of employment.

Race/Color Discrimination & Harassment

It is unlawful to harass a person because of that person's race or color.

Harassment can include, for example, racial slurs, offensive or derogatory remarks about a person's race or color, or the display of racially-offensive symbols. Although the law doesn't prohibit simple teasing, offhand comments, or isolated incidents that are not very serious, harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted).

The harasser can be the victim's supervisor, a supervisor in another area, a co-worker, or someone who is not an employee of the employer, such as a client or customer.

Race/Color Discrimination & Employment Policies/Practices

An employment policy or practice that applies to everyone, regardless of race or color, can be illegal if it has a negative impact on the employment of people of a particular race or color and is not job-related and necessary to the operation of the business. For example, a "no-beard" employment policy that applies to all workers without regard to race may still be unlawful if it is

not job-related and has a negative impact on the employment of African-American men (who have a predisposition to a skin condition that causes severe shaving bumps).

Religious Discrimination (EEOC)

Religious discrimination involves treating a person (an applicant or employee) unfavorably because of his or her religious beliefs. The law protects not only people who belong to traditional, organized religions, such as Buddhism, Christianity, Hinduism, Islam, and Judaism, but also others who have sincerely held religious, ethical or moral beliefs.

Religious discrimination can also involve treating someone differently because that person is married to (or associated with) an individual of a particular religion or because of his or her connection with a religious organization or group.

Religious Discrimination & Work Situations

The law forbids discrimination when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoff, training, fringe benefits, and any other term or condition of employment.

Religious Discrimination & Harassment

It is illegal to harass a person because of his or her religion.

Harassment can include, for example, offensive remarks about a person's religious beliefs or practices. Although the law doesn't prohibit simple teasing, offhand comments, or isolated incidents that aren't very serious, harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted).

The harasser can be the victim's supervisor, a supervisor in another area, a co-worker, or someone who is not an employee of the employer, such as a client or customer.

Religious Discrimination and Segregation

Title VII also prohibits workplace or job segregation based on religion (including religious garb and grooming practices), such as assigning an employee to a non-customer contact position because of actual or feared customer preference.

Religious Discrimination & Reasonable Accommodation

The law requires an employer or other covered entity to reasonably accommodate an employee's religious beliefs or practices, unless doing so would cause more than a minimal burden on the operations of the employer's business. This means an employer may be required to make

reasonable adjustments to the work environment that will allow an employee to practice his or her religion.

Examples of some common religious accommodations include flexible scheduling, voluntary shift substitutions or swaps, job reassignments, and modifications to workplace policies or practices.

Religious Accommodation/Dress & Grooming Policies

Unless it would be an undue hardship on the employer's operation of its business, an employer must reasonably accommodate an employee's religious beliefs or practices. This applies not only to schedule changes or leave for religious observances, but also to such things as dress or grooming practices that an employee has for religious reasons. These might include, for example, wearing particular head coverings or other religious dress (such as a Jewish yarmulke or a Muslim headscarf), or wearing certain hairstyles or facial hair (such as Rastafarian dreadlocks or Sikh uncut hair and beard). It also includes an employee's observance of a religious prohibition against wearing certain garments (such as pants or miniskirts).

When an employee or applicant needs a dress or grooming accommodation for religious reasons, he should notify the employer that he needs such an accommodation for religious reasons. If the employer reasonably needs more information, the employer and the employee should engage in an interactive process to discuss the request. If it would not pose an undue hardship, the employer must grant the accommodation.

Religious Discrimination & Reasonable Accommodation & Undue Hardship

An employer does not have to accommodate an employee's religious beliefs or practices if doing so would cause undue hardship to the employer. An accommodation may cause undue hardship if it is costly, compromises workplace safety, decreases workplace efficiency, infringes on the rights of other employees, or requires other employees to do more than their share of potentially hazardous or burdensome work.

Religious Discrimination And Employment Policies/Practices

An employee cannot be forced to participate (or not participate) in a religious activity as a condition of employment.

Retaliation (EEOC)

An employer may not fire, demote, harass or otherwise "retaliate" against an individual for filing a charge of discrimination, participating in a discrimination proceeding, or otherwise opposing discrimination. The same laws that prohibit discrimination based on race, color, sex, religion, national origin, age, and disability, as well as wage differences between men and women performing substantially equal work, also prohibit retaliation against individuals who oppose unlawful discrimination or participate in an employment discrimination proceeding.

In addition to the protections against retaliation that are included in all of the laws enforced by EEOC, the Americans with Disabilities Act (ADA) also protects individuals from coercion, intimidation, threat, harassment, or interference in their exercise of their own rights or their encouragement of someone else's exercise of rights granted by the ADA.

There are three main terms that are used to describe retaliation. Retaliation occurs when an employer, employment agency, or labor organization takes an adverse action against a covered individual because he or she engaged in a protected activity. These three terms are described below.

Adverse Action

An adverse action is an action taken to try to keep someone from opposing a discriminatory practice, or from participating in an employment discrimination proceeding. Examples of adverse actions include:

employment actions such as termination, refusal to hire, and denial of promotion,
other actions affecting employment such as threats, unjustified negative evaluations, unjustified negative references, or increased surveillance, and

any other action such as an assault or unfounded civil or criminal charges that are likely to deter reasonable people from pursuing their rights.

Adverse actions do not include petty slights and annoyances, such as stray negative comments in an otherwise positive or neutral evaluation, "snubbing" a colleague, or negative comments that are justified by an employee's poor work performance or history.

Even if the prior protected activity alleged wrongdoing by a different employer, retaliatory adverse actions are unlawful. For example, it is unlawful for a worker's current employer to retaliate against him for pursuing an EEO charge against a former employer.

Of course, employees are not excused from continuing to perform their jobs or follow their company's legitimate workplace rules just because they have filed a complaint with the EEOC or opposed discrimination.

For more information about adverse actions, see EEOC's Compliance Manual Section 8, Chapter

II, Part D.

Covered Individuals

Covered individuals are people who have opposed unlawful practices, participated in proceedings, or requested accommodations related to employment discrimination based on race, color, sex, religion, national origin, age, or disability. Individuals who have a close association with someone who has engaged in such protected activity also are covered individuals. For example, it is illegal to terminate an employee because his spouse participated in employment discrimination litigation.

Individuals who have brought attention to violations of law other than employment discrimination are NOT covered individuals for purposes of anti-discrimination retaliation laws. For example,"whistleblowers" who raise ethical, financial, or other concerns unrelated to employment discrimination are not protected by the EEOC enforced laws.

Protected Activity

Protected activity includes:

Opposition to a practice believed to be unlawful discrimination

Opposition is informing an employer that you believe that he/she is engaging in prohibited discrimination. Opposition is protected from retaliation as long as it is based on a reasonable, good-faith belief that the complained of practice violates anti-discrimination law; and the manner of the opposition is reasonable.

Examples of protected opposition include:

Complaining to anyone about alleged discrimination against oneself or others;
Threatening to file a charge of discrimination;
Picketing in opposition to discrimination; or
Refusing to obey an order reasonably believed to be discriminatory.
Examples of activities that are NOT protected opposition include:

Actions that interfere with job performance so as to render the employee ineffective; or
Unlawful activities such as acts or threats of violence.

Participation in an employment discrimination proceeding.

Participation means taking part in an employment discrimination proceeding. Participation is protected activity even if the proceeding involved claims that ultimately were found to be invalid. Examples of participation include:

Filing a charge of employment discrimination;

Cooperating with an internal investigation of alleged discriminatory practices; or
Serving as a witness in an EEO investigation or litigation.

A protected activity can also include requesting a reasonable accommodation based on religion or disability.

For more information about Protected Activities, see EEOC's Compliance Manual, Section 8, Chapter II, Part B - Opposition and Part C - Participation.

Sex-Based Discrimination (EEOC)

Sex discrimination involves treating someone (an applicant or employee) unfavorably because of that person's sex.

Sex discrimination also can involve treating someone less favorably because of his or her connection with an organization or group that is generally associated with people of a certain sex.

Discrimination against an individual because that person is transgender is discrimination because of sex in violation of Title VII. This is also known as gender identity discrimination. In addition, lesbian, gay, and bisexual individuals may bring sex discrimination claims. These may include, for example, allegations of sexual harassment or other kinds of sex discrimination, such as adverse actions taken because of the person's non-conformance with sex-stereotypes.

Sex Discrimination & Work Situations

The law forbids discrimination when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoff, training, fringe benefits, and any other term or condition of employment.

Sex Discrimination Harassment

It is unlawful to harass a person because of that person's sex. Harassment can include "sexual harassment" or unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature. Harassment does not have to be of a sexual nature, however, and can include offensive remarks about a person's sex. For example, it is illegal to harass a woman by making offensive comments about women in general.

Both victim and the harasser can be either a woman or a man, and the victim and harasser can be the same sex.

Although the law doesn't prohibit simple teasing, offhand comments, or isolated incidents that are not very serious, harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the

victim being fired or demoted).

The harasser can be the victim's supervisor, a supervisor in another area, a co-worker, or someone who is not an employee of the employer, such as a client or customer.

Sex Discrimination & Employment Policies/Practices

An employment policy or practice that applies to everyone, regardless of sex, can be illegal if it has a negative impact on the employment of people of a certain sex and is not job-related or necessary to the operation of the business.

Sexual Harassment (EEOC)

It is unlawful to harass a person (an applicant or employee) because of that person's sex. Harassment can include "sexual harassment" or unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature.

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The harasser can be the victim's supervisor, a supervisor in another area, a co-worker, or someone who is not an employee of the employer, such as a client or customer.

Child Labor (FLSA)

What is the minimum age for work?

The Fair Labor Standards Act (FLSA) sets 14 as the minimum age for most non-agricultural work. However, at any age, youth may deliver newspapers; perform in radio, television, movie, or theatrical productions; work in businesses owned by their parents (except in mining, manufacturing or hazardous jobs); and perform babysitting or perform minor chores around a private home. Also, at any age, youth may be employed as homeworkers to gather evergreens and make evergreen wreaths.

Different age requirements apply to the employment of youth in agriculture.

Many states have enacted child labor laws, some of which may have a minimum age for employment which is higher than the FLSA. Where both the FLSA and state child labor laws apply, the higher minimum standard must be obeyed.

What hours can youth work?

Under the Fair Labor Standards Act (FLSA), the minimum age for employment in non-agricultural employment is 14. Hours worked by 14 and 15-year-olds are limited to:

Non-school hours;
3 hours in a school day;
18 hours in a school week;
8 hours on a non-school day;
40 hours on a non-school week; and
The hours between 7 a.m. and 7 p.m. (except from June 1 through Labor Day, when evening hours are extended to 9 p.m.)
Youth 14 and 15 years old enrolled in an approved Work Experience and Career Exploration Program (WECEP) may be employed for up to 23 hours in school weeks and 3 hours on school days (including during school hours).

The FLSA does not limit the number of hours or times of day for workers 16 years and older.

Many states have enacted child labor laws as well. In situations where both the FLSA child labor provisions and state child labor laws apply, the higher minimum standard must be obeyed.

Must young workers be paid the minimum wage?

The federal minimum wage is $7.25 per hour effective July 24, 2009. However, a youth minimum wage of $4.25 per hour applies to employees under the age of 20 during their first 90 consecutive calendar days of employment with an employer. After 90 days, the Fair Labor Standards Act (FLSA) requires employers to pay the full federal minimum wage.

Other programs that allow for payment of less than the full federal minimum wage apply to workers with disabilities, full-time students, and student-learners employed pursuant to sub-minimum wage certificates. These programs are not limited to the employment of young workers.

Do young workers need a work permit?

The Fair Labor Standards Act (FLSA) does not require that youth get work permits or working papers to get a job. Some states do require work permits prior to getting a job. School counselors may be able to advise if a work permit is needed before getting a job.

What kinds of work can youth perform?

Regulations governing youth employment in non-agricultural jobs differ somewhat from those pertaining to agricultural employment. In non-agricultural work, the permissible jobs, by age, are as follows:

Workers 18 years or older may perform any job, whether hazardous or not;
Workers 16 and 17 years old may perform any jobs not deemed hazardous; and
Workers 14 and 15 years old may work outside school hours in certain specified jobs.
Fourteen is the minimum age for most non-agricultural work. However, at any age, youth may deliver newspapers; perform in radio, television, movie, or theatrical productions; work in businesses owned by their parents (except in mining, manufacturing, or on hazardous jobs); perform babysitting or perform minor chores around a private home. Also, at any age, youth may be employed as homeworkers to gather evergreens and make evergreen wreaths.

Different age requirements apply to the employment of youth in agriculture.

Employee Polygraph Protection Act of 1988 (US DOL)

The Department of Labor administers and enforces the Employee Polygraph Protection Act of 1988 (the Act) through the Wage and Hour Division of the Employment Standards Administration. The Act generally prevents employers engaged in interstate commerce from using lie detector tests either for pre-employment screening or during the course of employment, with certain exemptions. The Act, signed by the President on June 27, 1988,became effective on December 27, 1988.

Under the Act, the Secretary of Labor is directed to distribute a notice of the Act's protections, to issue rules and regulations, and to enforce the provisions of the Act. The Act empowers the Secretary of Labor to bring injunctive actions in U.S. district courts to restrain violations, and to assess civil money penalties up to $10,000 against employers who violate any provision of the Act. Employers are required to post notices summarizing the protections of the Act in their places of work.

Definitions

• A lie detector includes a polygraph, deceptograph, voice stress analyzer, psychological stress evaluator or similar device (whether mechanical or electrical) used to render a diagnostic opinion as to the honesty or dishonesty of an individual.

• A polygraph means an instrument that records continuously, visually, permanently, and simultaneously changes in cardiovascular, respiratory and electrodermal patterns as minimum instrumentation standards and is used to render a diagnostic opinion as to the honesty or dishonesty of as individual.

Prohibitions

An employer shall not:

• Require, request, suggest or cause an employee or prospective employee to take or submit to any lie detector test.

• Use, accept, refer to, or inquire about the results of any lie detector test of an employee or prospective employee.

• Discharge, discipline, discriminate against, deny employment or promotion, or threaten to take any such action against an employee or prospective employee for refusal to take a test, on the basis of the results of a test, for filing a complaint, for testifying in any proceeding or for exercising any rights afforded by the Act.

Exemptions

Federal, state and local governments are excluded. In addition, lie detector tests administered by the Federal Government to employees of Federal contractors engaged in national security intelligence or counterintelligence functions are exempt. The Act also includes limited exemptions where polygraph tests (but no other lie detector tests) may be administered in the private sector, subject to certain restrictions:

• To employees who are reasonably suspected of involvement in a workplace incident that results in economic loss to the employer and who had access to the property that is the subject of an investigation; and

• To prospective employees of armored car, security alarm, and security guard firms who protect facilities, materials or operations affecting health or safety, national security, or currency and other like instruments; and

• To prospective employees of pharmaceutical and other firms authorized to manufacture, distribute, or dispense controlled substances who will have direct access to such controlled substances, as well as current employee who had access to persons or property that are the subject of an ongoing investigation.

Qualifications of examiners

An examiner is required to have a valid and current license if required by a State in which the test is to be conducted, and must maintain a minimum of $50,000 bond or professional liability coverage.

Employee/prospective employee rights

An employee or prospective employee must be given a written notice explaining the employee's

or prospective employee's rights and the limitations imposed, such as prohibited areas of questioning and restriction on the use of test results. Among other rights, an employee or prospective employee may refuse to take a test, terminate a test at any time, or decline to take a test if he/she suffers from a medical condition. The results of a test alone cannot be disclosed to anyone other than the employer or employee/prospective employee without their consent or, pursuant to court order, to a court, government agency, arbitrator or mediator.

Under the exemption for ongoing investigations of work place incidents involving economic loss, a written or verbal statement must be provided to the employee prior to the polygraph test which explains the specific incident or activity being investigated and the basis for the employer's reasonable suspicion that the employee was involved in such incident or activity.

Where polygraph examinations are permitted under the Act, they are subject to strict standards concerning the conduct of the test, including the pre-test, testing and post-test phases of the examination.

Civil actions may be brought by an employee or prospective employee in Federal or State court against employers who violate the Act for legal or equitable relief, such as employment reinstatement, promotion, and payment of lost wages and benefits. The action must be brought within 3 years of the date of the alleged violation.

Where to Obtain Additional Information

For additional information, visit our Wage and Hour Division Website: http://www.wagehour.dol.gov and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243). This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210
1-866-4-USWAGE
TTY: 1-866-487-9243

Family and Medical Leave Act (U. S. DOL)

Overview

The FMLA entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave. Eligible employees are entitled to:

Twelve workweeks of leave in a 12-month period for:

the birth of a child and to care for the newborn child within one year of birth;

the placement with the employee of a child for adoption or foster care and to care for the newly placed child within one year of placement;

to care for the employee's spouse, child, or parent who has a serious health condition;

a serious health condition that makes the employee unable to perform the essential functions of his or her job;

any qualifying exigency arising out of the fact that the employee's spouse, son, daughter, or parent is a covered military member on "covered active duty;"

or

Twenty-six workweeks of leave during a single 12-month period to care for a covered servicemember with a serious injury or illness if the eligible employee is the servicemember's spouse, son, daughter, parent, or next of kin (military caregiver leave).

Wages: Overtime Pay Requirements (FLSA)

This fact sheet provides general information concerning the application of the overtime pay provisions of the FLSA.

Characteristics

An employer who requires or permits an employee to work overtime is generally required to pay the employee premium pay for such overtime work.

Requirements

Unless specifically exempted, employees covered by the Act must receive overtime pay for hours worked in excess of 40 in a workweek at a rate not less than time and one-half their

regular rates of pay. There is no limit in the Act on the number of hours employees aged 16 and older may work in any workweek. The Act does not require overtime pay for work on Saturdays, Sundays, holidays, or regular days of rest, as such.

The Act applies on a workweek basis. An employee's workweek is a fixed and regularly recurring period of 168 hours -- seven consecutive 24-hour periods. It need not coincide with the calendar week, but may begin on any day and at any hour of the day. Different workweeks may be established for different employees or groups of employees. Averaging of hours over two or more weeks is not permitted. Normally, overtime pay earned in a particular workweek must be paid on the regular pay day for the pay period in which the wages were earned.

The regular rate of pay cannot be less than the minimum wage. The regular rate includes all remuneration for employment except certain payments excluded by the Act itself. Payments which are not part of the regular rate include pay for expenses incurred on the employer's behalf, premium payments for overtime work or the true premiums paid for work on Saturdays, Sundays, and holidays, discretionary bonuses, gifts and payments in the nature of gifts on special occasions, and payments for occasional periods when no work is performed due to vacation, holidays, or illness.

Earnings may be determined on a piece-rate, salary, commission, or some other basis, but in all such cases the overtime pay due must be computed on the basis of the average hourly rate derived from such earnings. This is calculated by dividing the total pay for employment (except for the statutory exclusions noted above) in any workweek by the total number of hours actually worked.

Where an employee in a single workweek works at two or more different types of work for which different straight-time rates have been established, the regular rate for that week is the weighted average of such rates. That is, the earnings from all such rates are added together and this total is then divided by the total number of hours worked at all jobs. In addition, section 7(g)(2) of the FLSA allows, under specified conditions, the computation of overtime pay based on one and one-half times the hourly rate in effect when the overtime work is performed. The requirements for computing overtime pay pursuant to section 7(g)(2) are prescribed in 29 CFR 778.415 through 778.421.

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

Typical Problems

Fixed Sum for Varying Amounts of Overtime: A lump sum paid for work performed during overtime hours without regard to the number of overtime hours worked does not qualify as an overtime premium even though the amount of money paid is equal to or greater than the sum owed on a per-hour basis. For example, no part of a flat sum of $180 to employees who work overtime on Sunday will qualify as an overtime premium, even though the employees'

straight-time rate is $12.00 an hour and the employees always work less than 10 hours on Sunday. Similarly, where an agreement provides for 6 hours pay at $13.00 an hour regardless of the time actually spent for work on a job performed during overtime hours, the entire $78.00 must be included in determining the employees' regular rate.

Salary for Workweek Exceeding 40 Hours: A fixed salary for a regular workweek longer than 40 hours does not discharge FLSA statutory obligations. For example, an employee may be hired to work a 45 hour workweek for a weekly salary of $405. In this instance the regular rate is obtained by dividing the $405 straight-time salary by 45 hours, resulting in a regular rate of $9.00. The employee is then due additional overtime computed by multiplying the 5 overtime hours by one-half the regular rate of pay ($4.50 x 5 = $22.50).

Overtime Pay May Not Be Waived: The overtime requirement may not be waived by agreement between the employer and employees. An agreement that only 8 hours a day or only 40 hours a week will be counted as working time also fails the test of FLSA compliance. An announcement by the employer that no overtime work will be permitted, or that overtime work will not be paid for unless authorized in advance, also will not impair the employee's right to compensation for compensable overtime hours that are worked.

Where to Obtain Additional Information

For additional information, visit our Wage and Hour Division Website: http://www.wagehour.dol.gov and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).
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Wages and Hours Worked: Minimum Wage and Overtime Pay (FLSA)

Fair Labor Standards Act of 1938 (FLSA), as amended
(29 USC §201 et seq.; 29 CFR Parts 510 to 794)

Who is Covered

The Fair Labor Standards Act (FLSA) is administered by the Wage and Hour Division (WHD). The Act establishes standards for minimum wages, overtime pay, recordkeeping, and child labor. These standards affect more than 130 million workers, both full-time and part-time, in the private and public sectors.

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

than this amount of business).

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

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

In addition, the Act covers domestic service workers, such as day workers, housekeepers, chauffeurs, cooks, or full-time babysitters, if they receive at least $1,700 in 2009 in cash wages from one employer in a calendar year, or if they work a total of more than eight hours a week for one or more employers. (This calendar year threshold is adjusted by the Social Security Administration each year.) For additional coverage information, see the Wage and Hour Division Fact Sheet #14: Coverage Under the FLSA.

The Act exempts some employees from its overtime pay and minimum wage provisions, and it also exempts certain employees from the overtime pay provisions only. Because the exemptions are narrowly defined, employers should check the exact terms and conditions for each by contacting their local Wage and Hour Division office.

The following are examples of employees exempt from both the minimum wage and overtime pay requirements:

Executive, administrative, and professional employees (including teachers and academic administrative personnel in elementary and secondary schools), outside sales employees, and certain skilled computer professionals (as defined in the Department of Labor's regulations) 1
Employees of certain seasonal amusement or recreational establishments
Employees of certain small newspapers and switchboard operators of small telephone companies
Seamen employed on foreign vessels
Employees engaged in fishing operations
Employees engaged in newspaper delivery
Farm workers employed on small farms (i.e., those that used less than 500 "man-days" of farm labor in any calendar quarter of the preceding calendar year)
Casual babysitters and persons employed as companions to the elderly or infirm.

The following are examples of employees exempt from the overtime pay requirements only:

Certain commissioned employees of retail or service establishments
Auto, truck, trailer, farm implement, boat, or aircraft salespersons employed by non-manufacturing establishments primarily engaged in selling these items to ultimate

purchasers
Auto, truck, or farm implement parts-clerks and mechanics employed by non-manufacturing establishments primarily engaged in selling these items to ultimate purchasers
Railroad and air carrier employees, taxi drivers, certain employees of motor carriers, seamen on American vessels, and local delivery employees paid on approved trip rate plans
Announcers, news editors, and chief engineers of certain non-metropolitan broadcasting stations
Domestic service workers who reside in their employers' residences
Employees of motion picture theaters
Farmworkers

Certain employees may be partially exempt from the overtime pay requirements. These include:

Employees engaged in certain operations on agricultural commodities and employees of certain bulk petroleum distributors
Employees of hospitals and residential care establishments that have agreements with the employees that they will work 14-day periods in lieu of 7-day workweeks (if the employees are paid overtime premium pay within the requirements of the Act for all hours worked over eight in a day or 80 in the 14-day work period, whichever is the greater number of overtime hours)
Employees who lack a high school diploma, or who have not completed the eighth grade, who spend part of their workweeks in remedial reading or training in other basic skills that are not job specific. Employers may require such employees to engage in these activities up to 10 hours in a workweek. Employers must pay normal wages for the hours spent in such training but need not pay overtime premium pay for training hours

Basic Provisions/Requirements

The Act requires employers of covered employees who are not otherwise exempt to pay these employees a minimum wage of not less than $7.25 per hour effective July 24, 2009. Youths under 20 years of age may be paid a minimum wage of not less than $4.25 an hour during the first 90 consecutive calendar days of employment with an employer. Employers may not displace any employee to hire someone at the youth minimum wage. For additional information regarding the use of the youth minimum wage provisions, see the Wage and Hour Division Fact Sheet #32: Youth Minimum Wage – FLSA.

Employers may pay employees on a piece-rate basis, as long as they receive at least the equivalent of the required minimum hourly wage rate and overtime for hours worked in excess of 40 hours in a workweek. Employers of tipped employees (i.e., those who customarily and regularly receive more than $30 a month in tips) may consider such tips as part of their wages, but employers must pay a direct wage of at least $2.13 per hour if they claim a tip credit. They must also meet certain other requirements. For a full listing of the requirements an employer must meet to use the tip credit provision, see the Wage and Hour Division Fact Sheet #15: Tipped Employees Under the FLSA.

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

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

The Act does not limit either the number of hours in a day or the number of days in a week that an employer may require an employee to work, as long as the employee is at least 16 years old. Similarly, the Act does not limit the number of hours of overtime that may be scheduled. However, the Act requires employers to pay covered employees not less than one and one-half times their regular rate of pay for all hours worked in excess of 40 in a workweek, unless the employees are otherwise exempt. For additional information regarding overtime pay requirements, see the Wage and Hour Division Fact Sheet #23: Overtime Pay Requirements of the FLSA.

The Act prohibits performance of certain types of work in an employee's home unless the employer has obtained prior certification from the Department of Labor. Restrictions apply in the manufacture of knitted outerwear, gloves and mittens, buttons and buckles, handkerchiefs, embroideries, and jewelry (where safety and health hazards are not involved). Employers wishing to employ homeworkers in these industries are required to provide written assurances to the Department of Labor that they will comply with the Act's wage and hour requirements, among other things.

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

Special wage and hour provisions apply to state and local government employment. For these special provisions, see the Wage and Hour Division Fact Sheet #7: State and Local Governments Under the FLSA.

Employee Rights

Employees may find out how to file a complaint by contacting the local Wage and Hour Division office, or by calling the program's toll-free help line at 1-866-4USWAGE (1-866-487-9243). In addition, an employee may file a private suit, generally for the previous two years of back pay (three years in the case of a willful violation) and an equal amount as liquidated damages, plus attorney's fees and court costs.

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

Recordkeeping, Reporting, Notices and Posters

Notices and Posters

Every employer of employees subject to the FLSA's minimum wage provisions must post, and keep posted, a notice explaining the Act in a conspicuous place in all of their establishments. Although there is no size requirement for the poster, employees must be able to readily read it. The FLSA poster is also available in Spanish, Chinese, Russian, Thai, Hmong, Vietnamese, and Korean. There is no requirement to post the poster in languages other than English.

Covered employers are required to post the general Fair Labor Standards Act poster; however, certain industries have posters designed specifically for them. Employers of Agricultural Employees (PDF) and State & Local Government Employees (PDF) can either post the general Fair Labor Standards Act poster or their specific industry poster. There are also posters for American Samoa (PDF) and Northern Mariana Islands (PDF).

Every employer who employs workers with disabilities under special minimum wage certificates is also required to post the Employee Rights for Workers with Disabilities/Special Minimum Wage Poster.

Recordkeeping

Every employer covered by the FLSA must keep certain records for each covered, nonexempt worker. Employers must keep records on wages, hours, and other information as set forth in the Department of Labor's regulations. Most of this data is the type that employers generally maintain in ordinary business practice.

There is no required form for the records. However, the records must include accurate information about the employee and data about the hours worked and the wages earned. The following is a listing of the basic payroll records that an employer must maintain:

Employee's full name, as used for Social Security purposes, and on the same record, the employee's identifying symbol or number if such is used in place of name on any time, work, or payroll records
Address, including zip code
Birth date, if younger than 19
Sex and occupation
Time and day of week when employee's workweek begins
Hours worked each day and total hours worked each workweek
Basis on which employee's wages are paid (e.g., "$9 per hour", "$440 a week", "piecework")
Regular hourly pay rate
Total daily or weekly straight-time earnings
Total overtime earnings for the workweek
All additions to or deductions from the employee's wages

Total wages paid each pay period
Date of payment and the pay period covered by the payment
For a full listing of the basic records that an employer must maintain, see the Wage and Hour Division Fact Sheet #21: Recordkeeping Requirements Under the FLSA. Employers are required to preserve for at least three years payroll records, collective bargaining agreements, and sales and purchase records. Records on which wage computations are based should be retained for two years. These include time cards and piecework tickets, wage rate tables, work and time schedules, and records of additions to or deductions from wages.

Reporting

The FLSA does not contain any specific reporting requirements; however, the above referenced records must be open for inspection by the Wage and Hour Division's representatives, who may ask the employer to make extensions, computations, or transcriptions. The records may be kept at the place of employment or in a central records office.

Penalties/Sanctions

The Department of Labor uses a variety of remedies to enforce compliance with the Act's requirements. When Wage and Hour Division investigators encounter violations, they recommend changes in employment practices to bring the employer into compliance, and they request the payment of any back wages due to employees.

Willful violators may be prosecuted criminally and fined up to $10,000. A second conviction may result in imprisonment. Employers who willfully or repeatedly violate the minimum wage or overtime pay requirements are subject to civil money penalties of up to $1,100 per violation.

For child labor violations, employers are subject to a civil money penalty of up to $11,000 per worker for each violation of the child labor provisions. In addition, employers are subject to a civil money penalty of $50,000 for each violation occurring after May 21, 2008 that causes the death or serious injury of any minor employee – such penalty may be doubled, up to $100,000, when the violations are determined to be willful or repeated.

When the Department of Labor assesses a civil money penalty, the employer has the right to file an exception to the determination within 15 days of receipt of the notice. If an exception is filed, it is referred to an Administrative Law Judge for a hearing and determination as to whether the penalty is appropriate. If an exception is not filed, the penalty becomes final.

The Department of Labor may also bring suit for back pay and an equal amount in liquidated damages, and it may obtain injunctions to restrain persons from violating the Act.

The Act also prohibits the shipment of goods in interstate commerce that were produced in violation of the minimum wage, overtime pay, child labor, or special minimum wage provisions.

Relation to State, Local, and Other Federal Laws

State laws on wages and hours also apply to employment subject to this Act. When both this Act and a state law apply, the law setting the higher standards must be observed.

Compliance Assistance Available

More detailed information about the FLSA, including copies of explanatory brochures and regulatory and interpretative materials, is available on the Wage and Hour Division's Web site, or by contacting a local Wage and Hour Division office. Another compliance assistance resource, the elaws Fair Labor Standards Act Advisor, helps answers questions about workers and businesses that are subject to the FLSA.

The Department of Labor provides employers, workers, and others with clear and easy-to-access information and assistance on how to comply with the FLSA. Among the many resources available are:

The Handy Reference Guide to the FLSA
Fair Labor Standards Act (FLSA) Coverage and Employment Status Advisor: Helps employers and employees understand and determine coverage of employees under the FLSA.
Fair Labor Standards Act (FLSA) Hours Worked Advisor: Helps employers and employees determine which work-related activities are considered "hours worked" and thus hours for which employees must be paid.
Fair Labor Standards Act (FLSA) Overtime Security Advisor: Helps employees and employers determine whether a particular employee is exempt from the FLSA's minimum wage and overtime pay requirements.
Fair Labor Standards Act (FLSA) Overtime Calculator Advisor: Helps employers and employees compute the amount of overtime pay due in a sample pay period based on information from the user.
FLSA Fact Sheets: Topical Fact Sheet Index
Comprehensive FLSA Presentation (Microsoft® PowerPoint®)
Additional compliance assistance information is available on the Compliance Assistance “By Law” Web page.

DOL Contacts
Wage and Hour Division
Contact WHD
Tel: 1-866-4USWAGE (1-866-487-9243); TTY: 1-877-889-5627

The Employment Law Guide is offered as a public resource. It does not create new legal obligations and it is not a substitute for the U.S. Code, Federal Register, and Code of Federal Regulations as the official sources of applicable law. Every effort has been made to ensure that the information provided is complete and accurate as of the time of publication, and this will continue. Later versions of this Guide will be offered at www.dol.gov/compliance or by calling

our Toll-Free Help Line at 1-866-4-USA-DOL (1-866-487-2365) (1-866-487-2365).

Wages: Exemption for Administrative Employees
Under the Fair Labor Standards Act (FLSA)

This fact sheet provides general information on the exemption from minimum wage and overtime pay provided by Section 13(a)(1) of the Fair Labor Standards Act as defined by Regulations, 29 CFR Part 541.

The FLSA requires that most employees in the United States be paid at least the federal minimum wage for all hours worked and overtime pay at time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek.

However, Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, professional and outside sales employees. Section 13(a)(1) and Section 13(a)(17) also exempt certain computer employees. To qualify for exemption, employees generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than $455 per week. Job titles do not determine exempt status. In order for an exemption to apply, an employee's specific job duties and salary must meet all the requirements of the Department's regulations.

See other fact sheets in this series for more information on the exemptions for executive, professional, computer and outside sales employees, and for more information on the salary basis requirement.

Administrative Exemption

To qualify for the administrative employee exemption, all of the following tests must be met:
• The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week;

• The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and

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

Primary Duty

"Primary duty" means the principal, main, major or most important duty that the employee performs.Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole.

Directly Related to Management or General Business Operations

To meet the "directly related to management or general business operations" requirement, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example from working on a manufacturing production line or selling a product in a retail or service establishment. Work "directly related to management or general business operations" includes, but is not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations; government relations; computer network, Internet and database administration; legal and regulatory compliance; and similar activities.

Employer's Customers

An employee may qualify for the administrative exemption if the employee's primary duty is the performance of work directly related to the management or general business operations of the employer's customers. Thus, employees acting as advisors or consultants to their employer's clients or customers — as tax experts or financial consultants, for example — may be exempt.

Discretion and Independent Judgment

In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct and acting or making a decision after the various possibilities have been considered. The term must be applied in the light of all the facts involved in the employee's particular employment situation, and implies that the employee has authority to make an independent choice, free from immediate direction or supervision. Factors to consider include, but are not limited to: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval, and other factors set forth in the regulation. The fact that an employee's decisions are revised or reversed after review does not mean that theemployee is not exercising discretion and independent judgment. The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources.

Matters of Significance

The term "matters of significance" refers to the level of importance or consequence of the work performed. An employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly. Similarly, an employee who operates very expensive equipment does not exercise discretion and independent judgment with respect to matters of

significance merely because improper performance of the employee's duties may cause serious financial loss to the employer.

Educational Establishments and Administrative Functions

The administrative exemption is also available to employees compensated on a salary or fee basis at a rate not less than $455 a week, or on a salary basis which is at least equal to the entrance salary for teachers in the same educational establishment, and whose primary duty is performing administrative functions directly related to academic instruction or training in an educational establishment. Academic administrative functions include operations directly in the field of education, and do not include jobs relating to areas outside the educational field. Employees engaged in academic administrative functions include: the superintendent or other head of an elementary or secondary school system, and any assistants responsible for administration of such matters as curriculum, quality and methods of instructing, measuring and testing the learning potential and achievement of students, establishing and maintaining academic and grading standards, and other aspects of the teaching program; the principal and any vice-principals responsible for the operation of an elementary or secondary school; department heads in institutions of higher education responsible for the various subject matter departments; academic counselors and other employees with similar responsibilities. Having a primary duty of performing administrative functions directly related to academic instruction or training in an educational establishment includes, by its very nature, exercising discretion and independent judgment with respect to matters of significance.

Highly Compensated Employees

Highly compensated employees performing office or non-manual work and paid total annual compensation of $100,000 or more (which must include at least $455 per week paid on a salary or fee basis) are exempt from the FLSA if they customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee identified in the standard tests for exemption.

Where to Obtain Additional Information

For additional information, visit our Wage and Hour Division Website: http://www.wagehour.dol.gov and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).

When the state laws differ from the federal FLSA, an employer must comply with the standard most protective to employees. Links to your state labor department can be found at www.dol.gov/whd/contacts/state_of.htm.

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210
1-866-4-USWAGE
TTY: 1-866-487-9243

Wages: Exemption for Employees in Computer-Related Occupations Under the Fair Labor Standards Act (FLSA)

This fact sheet provides general information on the exemption from minimum wage and overtime pay for employees in the computer field under Sections 13(a)(1) and 13(a)(17) of the FLSA and Regulations 29 CFR Part 541.

The FLSA requires that most employees in the United States be paid at least the Federal minimum wage for all hours worked and overtime pay at time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek.

However, Section 13(a)(1) and Section 13(a)(17) of the FLSA provide an exemption from both minimum wage and overtime pay for computer systems analysts, computer programmers, software engineers, and other similarly skilled workers in the computer field who meet certain tests regarding their job duties and who are paid at least $455 per week on a salary basis or paid on an hourly basis, at a rate not less than $27.63 an hour.

Job titles do not determine exempt status. In order for this exemption to apply, an employee's specific job duties and compensation must meet all the requirements of the Department's regulations. The specific requirements for the computer employee exemption are summarized below.

See other fact sheets in this series for more information on the exemptions for executive, administrative, professional, and outside sales employees, and for more information on the salary basis requirement.

Computer Employee Exemption

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

- The employee must be compensated either on a salary or fee basis at a rate not less than $455 per week or, if compensated on an hourly basis, at a rate not less than $27.63 an hour;

- The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below;

- The employee's primary duty must consist of:

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

2) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;

3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or

4) A combination of the aforementioned duties, the performance of which requires the same level of skills.

The computer employee exemption does not include employees engaged in the manufacture or repair of computer hardware and related equipment. Employees whose work is highly dependent upon, or facilitated by, the use of computers and computer software programs (e.g., engineers, drafters and others skilled in computer design software), but who are not primarily engaged in computer systems analysis and programming or other similarly skilled computer-related occupations identified in the primary duties test described above, are also not exempt under the computer employee exemption.

Primary Duty

"Primary duty" means the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole.

Where to Obtain Additional Information

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When the state laws differ from the federal FLSA, an employer must comply with the standard most protective to employees. Links to your state labor department can be found at www.dol.gov/contacts/state_of.htm.
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Wages: Exemption for Executive Employees
Under the Fair Labor Standards Act (FLSA)

This fact sheet provides general information on the exemption from minimum wage and overtime pay provided by Section 13(a)(1) of the Fair Labor Standards Act as defined by Regulations, 29 CFR Part 541.

The FLSA requires that most employees in the United States be paid at least the federal minimum wage for all hours worked and overtime pay at time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek.

However, Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, professional and outside sales employees. Section 13(a)(1) and Section 13(a)(17) also exempt certain computer employees. To qualify for exemption, employees generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than $455 per week. Job titles do not determine exempt status. In order for an exemption to apply, an employee's specific job duties and salary must meet all the requirements of the Department's regulations.

See other fact sheets in this series for more information on the exemptions for administrative, professional, computer and outside sales employees, and for more information on the salary basis requirement.

Executive Exemption

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

- The employee must be compensated on a salary basis (as defined in the regulations) at a rate not less than $455 per week;

- The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;

- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and

- The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

Primary Duty

"Primary duty" means the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole.

Management

Generally, "management" includes, but is not limited to, activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.

Department or Subdivision

The phrase "a customarily recognized department or subdivision" is intended to distinguish between a mere collection of employees assigned from time to time to a specific job or series of jobs and a unit with permanent status and function.

Customarily and Regularly

The phrase "customarily and regularly" means greater than occasional but less than constant; it includes work normally done every workweek, but does not include isolated or one-time tasks.

Two or More

The phrase "two or more other employees" means two full-time employees or their equivalent. For example, one full-time and two half-time employees are equivalent to two full-time employees. The supervision can be distributed among two, three or more employees, but each such employee must customarily and regularly direct the work of two or more other full-time employees or the equivalent. For example, a department with five fulltime nonexempt workers may have up to two exempt supervisors if each supervisor directs the work of two of those workers.

Particular Weight

Factors to be considered in determining whether an employee's recommendations as to hiring, firing, advancement, promotion or any other change of status are given "particular weight" include, but are not limited to, whether it is part of the employee's job duties to make such recommendations, and the frequency with which such recommendations are made, requested, and relied upon. Generally, an executive's recommendations must pertain to employees whom the executive customarily and regularly directs. It does not include occasional suggestions. An employee's recommendations may still be deemed to have "particular weight" even if a higher level

manager's recommendation has more importance and even if the employee does not have authority to make the ultimate decision as to the employee's change in status.

Exemption of Business Owners

Under a special rule for business owners, an employee who owns at least a bona fide 20-percent equity interest in the enterprise in which employed, regardless of the type of business organization (e.g., corporation, partnership, or other), and who is actively engaged in its management, is considered a bona fide exempt executive.

Highly Compensated Employees

Highly compensated employees performing office or non-manual work and paid total annual compensation of $100,000 or more (which must include at least $455 per week paid on a salary or fee basis) are exempt from the FLSA if they customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee identified in the standard tests for exemption.

Where to Obtain Additional Information

For additional information, visit our Wage and Hour Division Website: http://www.wagehour.dol.gov and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).
When the state laws differ from the federal FLSA, an employer must comply with the standard most protective to employees. Links to your state labor department can be found at www.dol.gov/contacts/state_of.htm.

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Wages: Exemption for Professional Employees
Under the Fair Labor Standards Act (FLSA)

This fact sheet provides general information on the exemption from minimum wage and overtime pay provided by Section 13(a)(1) of the Fair Labor Standards Act as defined by Regulations, 29 CFR Part 541.

The FLSA requires that most employees in the United States be paid at least the federal minimum wage for all hours worked and overtime pay at time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek.

However, Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, professional and outside sales employees. Section 13(a)(1) and Section 13(a)(17) also exempt certain computer employees. To qualify for exemption, employees generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than $455 per week. Job titles do not determine exempt status. In order for an exemption to apply, an employee's specific job duties and salary must meet all the requirements of the Department's regulations.

The specific requirements for exemption as a bona fide professional employee are summarized below. There are two general types of exempt professional employees: learned professionals and creative professionals.

See other fact sheets in this series for more information on the exemptions for executive, administrative, computer and outside sales employees, and for more information on the salary basis requirement.

Learned Professional Exemption

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

• The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week;

• The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;

• The advanced knowledge must be in a field of science or learning; and

• The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

Primary Duty

"Primary duty" means the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole.

Work Requiring Advanced Knowledge

"Work requiring advanced knowledge" means work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment. Professional work is therefore distinguished from work involving routine mental, manual,

mechanical or physical work. A professional employee generally uses the advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances. Advanced knowledge cannot be attained at the high school level.

Field of Science or Learning

Fields of science or learning include law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other occupations that have a recognized professional status and are distinguishable from the mechanical arts or skilled trades where the knowledge could be of a fairly advanced type, but is not in a field of science or learning.

Customarily Acquired by a Prolonged Course of Specialized Intellectual Instruction

The learned professional exemption is restricted to professions where specialized academic training is a standard prerequisite for entrance into the profession. The best evidence of meeting this requirement is having the appropriate academic degree. However, the word "customarily" means the exemption may be available to employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction. This exemption does not apply to occupations in which most employees acquire their skill by experience rather than by advanced specialized intellectual instruction.

Creative Professional Exemption

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

• The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week;

• The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

Invention, Imagination, Originality or Talent

This requirement distinguishes the creative professions from work that primarily depends on intelligence, diligence and accuracy. Exemption as a creative professional depends on the extent of the invention, imagination, originality or talent exercised by the employee. Whether the exemption applies, therefore, must be determined on a case-by-case basis. The requirements are generally met by actors, musicians, composers, soloists, certain painters, writers, cartoonists, essayists, novelists, and others as set forth in the regulations.
Journalists may satisfy the duties requirements for the creative professional exemption if their primary duty is work requiring invention, imagination, originality or talent. Journalists are not exempt creative professionals if they only collect, organize and record information that is routine

or already public, or if they do not contribute a unique interpretation or analysis to a news product.

Recognized Field of Artistic or Creative Endeavor

This includes such fields as, for example, music, writing, acting and the graphic arts.

Teachers

Teachers are exempt if their primary duty is teaching, tutoring, instructing or lecturing in the activity of imparting knowledge, and if they are employed and engaged in this activity as a teacher in an educational establishment. Exempt teachers include, but are not limited to, regular academic teachers; kindergarten or nursery school teachers; teachers of gifted or disabled children; teachers of skilled and semi-skilled trades and occupations; teachers engaged in automobile driving instruction; aircraft flight instructors; home economics teachers; and vocal or instrument music teachers. The salary and salary basis requirements do not apply to bona fide teachers. Having a primary duty of teaching, tutoring, instructing or lecturing in the activity of imparting knowledge includes, by its very nature, exercising discretion and judgment.

Practice of Law or Medicine

An employee holding a valid license or certificate permitting the practice of law or medicine is exempt if the employee is actually engaged in such a practice. An employee who holds the requisite academic degree for the general practice of medicine is also exempt if he or she is engaged in an internship or resident program for the profession. The salary and salary basis requirements do not apply to bona fide practitioners of law or medicine.

Highly Compensated Employees

Highly compensated employees performing office or non-manual work and paid total annual compensation of $100,000 or more (which must include at least $455 per week paid on a salary or fee basis) are exempt from the FLSA if they customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee identified in the standard tests for exemption.

Where to Obtain Additional Information

For additional information, visit our Wage and Hour Division Website: http://www.wagehour.dol.gov and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).

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Pennsylvania Employment of Minors Child Labor Act (Pa. Dept. L & I)

The Department of Labor and Industry, through the Bureau of Labor Law Compliance, is responsible for the administration and enforcement of the Child Labor Law (Act of 2012 P.L. 1209, No 151), and the Regulations Governing the Employment of Minors in Industry (R-1).

The Child Labor Act provides for the health, safety and welfare of minors by:

prohibiting their employment or work in certain establishments and occupations;
under certain ages, restricting their hours of labor;
regulating certain conditions of their employment; and,
requiring employment certificates (general or vacation) for minors under the age of 18.

Summary of Minimum Age:

Minors under 14 years of age may not be employed or permitted to work in any occupation, except children employed on farms or in domestic service in private homes. No minor under 14 years of age may be employed on a farm by a person other than the farmer. Under certain restrictions, caddies may be employed at the age of 12, news carriers at 11 years of age, and juvenile performers in the entertainment field.

For individuals who are under 16 years of age, a written statement by the minor's parent or legal guardian acknowledging understanding of the duties and hours of employment and granting permission to work is required. This downloadable form is one way to satisfy that requirement.

LLC-75, Parental Acknowledgement of Minor's Duties and Hours of Employment

For the employment of any minor under 18, in compliance with the Pennsylvania Child Labor Act in a performance where a minor models or renders artistic creative expression in a live performance, radio, television, movie, Internet, publication, documentary, reality programming, or other broadcast medium that is transmitted to an audience, please download the Application for Minors in Performances.

LLC-12, Application for minors in performances

If you wish to request a waiver from entertainment provisions of the Child Labor Act, please fill out the Special Waiver Request for Entertainment Performances and send it to the Bureau no later than 48 hours prior to the time needed for the waiver to be acted on.

For additional information regarding employment certificates, record keeping, hours of employment (including night work), prohibited occupations, and penalties, please download a copy of the LLC-5, Abstract of the Child Labor Act, Revised 1/13. Form No. LLC-5 (ESP) (1-13)

Pennsylvania Human Relations Act: Employment Discrimination (PHRC)

Employment discrimination happens in the job recruiting or hiring process or in the workplace. It happens when employment decisions such as hiring, layoffs, pay or other work terms or conditions are based on factors other than qualifications or job performance.

For employment discrimination to be illegal in PA, it must be based on someone's race; color; sex; age (over 40); ancestry; national origin; religious creed; having a GED rather than a high school diploma; handicap or disability, or the use of a guide or support animal for disability, or relationship to a person with a disability. In hospital and healthcare settings, it is illegal to discriminate against employees based on their participate in or refusal to participate in abortion or sterilization procedures.

Discrimination based on other factors may be unfair or unethical, but not specifically prohibited by law.

It is important to know that it is also illegal to discriminate against someone because they have opposed illegal discrimination, filed a complaint, or assisted in an investigation. This is called retaliation, and the law protects those who oppose illegal behavior.

Who commits employment discrimination?

You may be the victim of discrimination by a boss, supervisor or co-worker, but a specific person is not always the offender. A company's policies or practices or the way they are applied may be discriminatory.

In employment, PA law applies to companies with four or more employees, and does not apply to federal agencies, law enforcement agencies and certain other entities.

Examples of discriminatory actions*:

firing or demoting someone based on factors* other than job performance

lowering someone's pay or paying them less than a co-worker with a comparable job, if the pay

difference is based on their race, sex, etc.

applying a policy that negatively affects one group of people more than others (i.e. hurts only women or only men; or hurts a minority group or people of a specific religion or national origin)
offering different discipline, work terms, conditions, benefits or pay to one group* than to others
refusing to make a reasonable accommodation for a worker with a disability

**Remember, for discrimination to be illegal, it must be based on the characteristics or factors listed in the second paragraph on this page. These factors are sometimes called "protected classes."*

Employment discrimination includes discriminatory job ads, racial harassment, sexual harassment, unequal pay, age discrimination and pregnancy discrimination among many other examples.

Pennsylvania Unemployment Compensation Eligibility Issues
Bureau of UC Benefits and Allowances

This pamphlet provides information about issues that affect eligibility for unemployment compensation (UC). It also contains information about facts that each party - employer and claimant - is responsible to establish when an issue arises.

This pamphlet was prepared to provide general information only. It is not an official statement of the law.

VOLUNTARY QUIT

Section 402(b) of the Pennsylvania UC Law provides, in part, that a claimant shall be ineligible for benefits for any week in which his/her unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature. A claimant who voluntarily quits continuing work has the burden of proof in establishing good cause for quitting; and, that such cause was real and substantial, leaving the claimant no other alternative. The burden is on the claimant to show that, prior to quitting continuing employment, he/she made every reasonable effort to maintain the employer-employee relationship.

Following are examples of some common voluntary quit situations.

Health reasons - To be eligible, the claimant must inform the employer of his/her health limitations prior to quitting so that the employer has an opportunity to offer suitable work within the claimant's limitations. The claimant must also be able and available for suggested accommodations. If the employer fails to offer suitable work, the claimant may be eligible for UC.

Transportation problems - To be eligible, the claimant must show that the loss of the

transportation was through no fault of his/her own and rendered his/her problem virtually insurmountable. He/she must attempt to secure alternate transportation prior to quitting. The claimant must also be able and available for suitable work in the local labor market consistent with his/her limitations.

Spouse following spouse - To be eligible, the claimant must show that the reason for the spouse's relocation was beyond the spouse's control, and that such relocation created economic circumstances which could not be overcome or that it was economically impossible to maintain two residences.

Leaving work due to personal reasons - To be eligible, the claimant must show that he/she quit due to personal circumstances that left him/her no reasonable alternative. The claimant must show that, prior to quitting, he/she made a reasonable attempt to maintain the employer-employee relationship. The claimant must also be able and available for suitable work.

To attend school - Quitting a job to attend school is not considered a cause of a necessitous and compelling nature, unless it is to attend school or training provided under the Trade Adjustment Assistance (TAA). If the claimant quits to attend TAA-approved training, he/she must show that the job he/she quit was not suitable work to be eligible for UC. Suitable work for the purposes of this exception to Section 402(b) means work of a substantially equal or higher skill level than the claimant's past "adversely affected employment," and wages of such work are not less than 80% of the worker's "average weekly wage."

Due to unsuitable work - When an employee accepts a position, he/she admits to the initial suitability of the position with respect to its wages and the conditions of employment. When a claimant quits because he/she feels the job was unsuitable, the claimant must show there were changes in the conditions of employment, to which he/she did not agree upon, that made the job unsuitable, or there was deception on the part of the employer with regard to the conditions of employment at the time of hire, or he/she shall be considered ineligible. The suitability of the work will be determined by considering factors such as the degree of risk involved to the claimant's health, safety and morals; the claimant's physical fitness; the claimant's prior training and experience; the distance of the available work from the claimant's residence; the prevailing condition of the labor market; and the prevailing wage rates in the trade or occupation.

Job not the same as what was anticipated - To be eligible, the claimant must show that the monetary expectations of employment were not fulfilled through no fault of the claimant. For example, a claimant takes a job selling vacuum cleaners because he/she has been told he/she could make $50,000 per year through commission sales. After three weeks, the claimant quits the job because he/she was unable to make any sales and the personal expenses exceeded the income, thereby warranting the allowance of benefits.

DISCHARGE

Section 402(e) provides that an individual who is discharged from employment for reasons that are considered to be willful misconduct connected with his/her work, is not eligible to receive

benefits. The employer must show that the employee's actions rose to the level of willful misconduct.

"Willful misconduct" is considered an act of wanton or willful disregard of the employer's interests, the deliberate violation of rules, the disregard of standards of behavior which an employer can rightfully expect from an employee, or negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard of the employer's interests or of the employee's duties and obligations. While it is the employer's prerogative to discharge an employee, an employee is not ineligible for UC benefits unless the discharge is due to willful misconduct.

Pennsylvania's courts have provided guidance in determining an individual's eligibility in specific situations involving a discharge for willful misconduct. Following are examples of some common discharge situations.

Absenteeism/Tardiness - Prior to being discharged for absenteeism or tardiness, the claimant must have been warned about such conduct. In addition, there have been cases where one absence was sufficient to show willful misconduct. The reason for the last occurrence will be taken into consideration in determining if the claimant had a good reason for being tardy or absent. Absenteeism alone may justify a discharge, but without a showing of wanton and willful disregard of the employer's interests, benefits cannot be denied. Generally, if an individual has good cause for missing work, such as being ill or having an ill child, and reports off according to the employer's policy, that individual's conduct does not rise to the level of willful misconduct. However, there can be factors that may affect the eligibility determination, such as the employer's rule for calling off, the method which the individual used in calling off, the reason for the last incident, the nature of the work, past attendance record, and previous warnings for absenteeism or tardiness. When the employer has a progressive discipline point system and an individual is discharged due to accumulating points as a result of absenteeism/tardiness, all absences/tardiness will be reviewed to determine if any of the absences were justified. Willful misconduct is not established if the claimant had good cause for any of the absences.

Rule violation - Deliberate violation of an employer’s rule which is known to the employee constitutes willful misconduct if the employer’s rule is reasonable and the employee’s conduct, in violating the rule, was not motivated by good cause. The employer must show the existence of the rule and that the rule was violated. The employer must also show that the claimant was aware, or should have been aware, of the rule. If this is established, the claimant must show that the rule was not reasonable, or that he/she had good cause for violating the rule.

Attitude toward employer or disruptive influence - Disregard of standards of behavior which an employer can rightfully expect from his/her employee constitutes willful misconduct. However, where a claimant is discharged due to his/her attitude toward the employer or due to being a disruptive influence, the employer must show specific conduct adverse to the employer’s interests.

Damage to equipment or property - Negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard of the employer's interests or of the employee's duties and obligations constitutes willful misconduct. Where the negligence results in damage to equipment, damage caused by the worker to equipment or materials is not usually misconduct. The employer must show that the action which caused the damage was willful or due to willful carelessness; or, to show that the claimant would not have damaged the equipment if he/she had used reasonable care of which he/she was capable in order for the action to be willful misconduct.

Unsatisfactory work performance - Unsatisfactory work performance is not considered willful misconduct where the claimant is working to the best of his/her ability. However, it is willful misconduct where the employer shows that the claimant was capable of doing the work, but was not performing up to standards despite warnings and admonitions. This is conduct showing an intentional and substantial disregard of the employer's interests.

Drug and alcohol testing - The UC Law provides for the denial of benefits for failure to submit (to) and/or pass a drug or alcohol test, provided the test is lawful and not in disagreement with an existing labor agreement. In order to be eligible for UC, the claimant must show that the test was unlawful, violated an existing labor agreement, or was inaccurate.

OTHER ELIGIBILITY ISSUES

Following are examples of eligibility issues that are not related to the claimant's separation from employment.

Able and Available

Compensation shall be payable to any employee who is or becomes unemployed, and is able to work and available for suitable work.

The claimant must prove a realistic attachment to the local labor market as a whole, as indicated by the claimant's readiness, willingness, and ability to accept some substantial and suitable work. The claimant must certify that he/she is able to accept and is available for suitable work during each week for which he/she files a claim for benefits.

Active Search for Work

Effective with applications for benefits dated Jan. 1, 2012, and after with some exceptions, the claimant is required to register for employment search services offered by the Pennsylvania CareerLink®, apply for positions that offer employment and wages similar to those the individual had prior to becoming unemployed, participate in work search activities, and keep a weekly record of the efforts made to find work.

This is a week-to-week test. The claimant must meet the requirements for each week in order to qualify for benefits.

Self-Employment During the Base Year

Services performed in self-employment do not qualify as base-year employment and will not be used to establish financial eligibility for benefits. Independent contractors are self-employed. The following two factors must exist for a claimant to be considered self-employed.
The individual has been and will continue to be free from control or direction over the performance of his/her services, both under his/her contract of hire and in fact.

As to such services, the individual is customarily engaged in an independently established trade, occupation, profession or business.

If the claimant alleges an employer-employee relationship, but the employer states that the claimant is self-employed, the employer must prove that the claimant is free from control over the performance of the service and customarily engaged in an independently established trade, occupation, profession or business.

Self-Employment While Claiming Benefits

Section 402(h) provides that a claimant is ineligible for any week in which he/she is engaged in self-employment. When a claimant is starting a new business, the claimant becomes self-employed with the first positive step toward starting the business. For example, the claimant would become self-employed when he/she began advertising for business, rented an office, purchased equipment/property, etc.

Self-Employment/Sideline Business

There is an exception in Section 402(h) for the operation of a sideline business. The courts have provided a four-pronged test for eligibility for an individual engaged in a sideline business. An employee who has a proprietary interest in a sideline business may still receive benefits if it is proven that all four of the following conditions are met:
Concurrency - the self-employment activities must have been conducted while engaged in employment.

Primary source of income - the earnings from employment must exceed the net profit from the self-employment activities.

There cannot be a substantial increase in involvement in self-employment.

The claimant must be able and available for full-time suitable work.
The burden of proof in a situation involving a sideline business rests with the claimant. The claimant must provide information and documents showing that the self-employment venture is a sideline business and that the claimant is separated from employment that constituted the individual's major source of income.

Corporate Officers

The UC Law was never intended to provide benefits to those individuals who become "unemployed" by reason of the failure of their own business ventures. An individual, who, through ownership of stock and his/her position in the corporation, exercises a "substantial degree of control" over its operation, must be considered a self-employed businessperson. The claimant must provide information showing that he/she is not a self-employed businessperson to be eligible.

The only exception with respect to ineligibility of corporate officers is provided in Section 402.4 of the Law. If the corporation has been forced into involuntary bankruptcy under the provisions of Chapter 7, Title 11, of the United States Code, the officers of the corporation would not be ineligible for benefits.

Refusal of Suitable Work

Section 402(a) provides, in part, that an employee shall be ineligible for compensation for any week in which his/her unemployment is due to failure, without good cause, either to apply for suitable work at such time and in such manner as the department may prescribe, or to accept suitable work when offered to him/her by the employment office or by any employer. The employer must notify the department within 7 days of the offer of work.

Section 402(a.1) provides a claimant is ineligible for compensation for any week in which the unemployment is due to failure to accept an offer of suitable full-time work in order to pursue seasonal or part-time employment.

The responsibility rests with the department to determine whether the work that was offered was suitable. If the work is determined to be suitable, the claimant must show that he/she had good cause to refuse the referral or to refuse the offer of suitable work to be eligible.

Incarcerated Employees

Section 402.6 provides, in part, that an employee shall not be eligible for any weeks of unemployment during which the employee is incarcerated after a conviction.

The party who carries the burden of proof is dependent on who alleges that the claimant is both convicted and incarcerated.
If an employer alleges that the claimant is convicted and incarcerated, the employer must show that the claimant meets both requirements for ineligibility under Section 402.6, in that he/she is both convicted and incarcerated.

Where the bureau investigates potential ineligibility under Section 402.6 without information from an employer or claimant, the bureau must show that the claimant is both convicted and incarcerated.

If the claimant provides information, which indicates there is a potential issue under Section 402.6, the claimant must show that he/she is not both convicted and incarcerated.

Severance Payments

Section 404(d)(1) of the PA UC Law provides, in part, that benefits shall be paid to an otherwise eligible employee, compensation in an amount equal to his/her weekly benefit rate less the total amount of severance pay that is attributed to the week.

Severance pay in an amount greater than 40% of the average annual wage will be attributed to the weeks immediately after the claimant's separation from employment. The claimant's weekly benefit rate will be reduced for a certain number of weeks, but not to an amount less than zero. The number of weeks will depend on the amount of the severance payment and the claimant's regular full-time wage.

Pensions

Pensions and retirement payments are deducted from UC if a base-year employer maintained or contributed to the pension plan and base-year employment affected the claimant's eligibility for, or increase the amount of, the pension. 50% of the pro-rated, weekly pension amount is deducted if the claimant contributed in any amount to the pension plan. If the pension is entirely employer funded, 100% of the pro-rated, weekly pension amount is deducted from the claimant's weekly UC payment.

Social Security and Railroad Retirement pensions are not deducted from UC benefit payments.

A lump-sum pension payment is not deducted from UC, unless the claimant had the option of taking a monthly pension. In addition, a lump-sum pension is not deductible if the claimant "rolls over" the lump-sum into an eligible retirement plan such as an Individual Retirement Account (IRA) within 60 days of receipt.

Predetermination of Claims

Please note that eligibility for UC benefits is not predetermined. Eligibility determinations are made only after an application for benefits has been filed, and are based on the individual circumstances of each case. If you have a question regarding your claim or the claim of a former employee, please contact a UC Service Center at 1-888-313-7284.

Understanding the Determination

If you have any questions or do not understand any part of a UC determination, please feel free to contact the UC Service Center to request an explanation. For example, if you do not understand the provision of the Law, or if there are findings of fact that you question, the UC Service Center will provide you with information so that you may have a better understanding of the determination.

Appeal Rights

If you are the claimant, you may appeal if the determination denies benefits and you think you should be eligible for benefits, or the determination grants benefits and you think you should be eligible for more benefits.

If you are the employer, you may appeal if the determination grants benefits and you think the claimant should be ineligible for benefits or eligible for fewer benefits.

SUMMARY OF THE WAGE PAYMENT AND COLLECTION LAW (Pa. Dept. L & I)

Act No. 329 of July 14, 1961

COVERAGE

All men, women and minors employed within the Commonwealth by an employer are protected by this Law.

REGULAR PAYDAY

Every employer shall pay all wages, other than fringe benefits and wage supplements, due his/her
employees on regularly scheduled paydays designated in advance by the employer. The employer
shall pay in cash or by bank check. Employers must notify each employee at the time of hiring of the time and place of payment and rate of pay and the amount of any fringe benefits or wage supplements to be paid to the employee, a third party, or a fund for the benefit of the employee.

The waiting time between the end of a pay period and payday must not exceed: (a) the time specified in a written contract between employer and employee, or (b) the standard time lapse customary in the trade, or © 15 days.

Pay for overtime must be included with wages for the next following pay period.

Fringe benefits and wage supplements must be paid within 10 days after payment is required or within 60 days after the proper claim is filed by the employee.

DEDUCTIONS

Employers may make deductions from wages as provided by law or by regulation for the convenience of the employee. (Copies of regulations itemizing permissible deductions are

available from the Department of Labor and Industry.)

LIQUIDATED DAMAGES

Every employee with a bona fide claim of wages due and not paid within 30 days after the regularly scheduled payday, or within 60 days beyond filing of proper claim, is entitled to claim 25 percent of the unpaid wages or $500, whichever is greater.

COLLECTION OF UNPAID WAGES

Any employee or group of employees, labor organization or party to whom any type of wages is payable may take legal action to recover wages due plus liquidated damages.
An employee or group of employees, labor organization or party to whom any type of wages is payable may also file a bona fide claim with the Department of Labor and Industry. The Department shall, if the claim appears to be just, immediately notify the employer by certified mail.

Payment or satisfactory explanation for non-payment is required within 10 days after receipt of the certified notification.

The Secretary of Labor and Industry may bring legal action necessary to collect the claim. Such a
claim is subject to any right of the employer to a set-off or counter-claim against the assigning employee.

The Secretary of Labor and Industry may require the employer to post bond or security to secure payment of the claim.

In any legal action, the Court shall allow costs and reasonable fees, including attorney's fees, in addition to any judgment awarded.

PENALTIES

The employer shall be liable to a penalty of 10 percent of the bona fide wage claim if he/she fails to pay or make satisfactory explanation to the Secretary of Labor and Industry within 10 days after receiving notification of the claim.

In addition to liability for unpaid wages, fringe benefits and wage supplements due, and liquidated damages, an employer who wilfully violates any provision of this Law is subject to a fine of not more than $300 or by imprisonment up to 90 days or both for each offense.

THIS SUMMARY IS ISSUED FOR INFORMATION ONLY.
IT DOES NOT HAVE THE FORCE OF LAW OR REGULATION.

PA Workers' Compensation Employer Information

This pamphlet is intended to provide Pennsylvania employers with general information regarding their rights and duties under the state's workers' compensation program.

Workers' compensation (WC) is mandatory, employer-financed, no-fault insurance which ensures that employees disabled due to a work-related injury or disease will be compensated for lost wages and provides necessary medical treatment to return them to the workforce.

The workers' compensation system provides an "exclusive remedy" to employers and employees and is designed to simultaneously achieve the goals of safer workplaces, prompt compensation and treatment of those it protects and reduced litigation costs to all parties.

PA WC Coverage Requirements

The requirement to insure workers' compensation liability is mandatory for any employer who:

employs at least one employee who could be injured or develop a work-related disease in this state, or

could be injured outside the state if the employment is principally localized in Pennsylvania,

or could be injured outside the state, while under a contract of hire made in Pennsylvania, if the employment is not principally localized in any state, if the employment is principally localized in a state whose workers' compensation laws do not apply, or the employment is outside the United States and Canada,

UNLESS **all** employees are excluded from the provisions of Pennsylvania's workers' compensation laws.

Exclusions to the Coverage Requirements

In Pennsylvania, an employer may be excluded from the requirement to insure its workers' compensation liability only if ALL workers employed by it fall into one or more of the following categories:

Federal Workers

Longshoremen

Railroad Workers

Casual workers whose employment is casual in character AND not in the regular course of the business of the employer.

Persons who work out of their own homes or other premises not under the control or management of the enterprise AND make up, clean, wash, alter, ornament, finish, repair, or adapt articles or materials for sale that are given to them.

Agricultural laborers earning under $1200 per person per calendar year AND no one agricultural laborer works 30 days or more per calendar year AND/OR the agricultural labor is provided by the employer's spouse or child(ren) under the age of 18 who have not sought inclusion under Pennsylvania's workers' compensation laws by filing an express written contract of hire with the Department of Labor & Industry.

Domestic workers who have not elected with the Department of Labor & Industry to come under the provisions of the Workers' Compensation Act.

Sole proprietor or general partners.

Persons granted exemption due to their religious beliefs by the Department of Labor & Industry.

Executive officers who have been granted exclusion by the Department of Labor & Industry.

Licensed real estate salespersons or associate real estate brokers affiliated with a licensed real estate broker or licensed insurance agents affiliated with a licensed insurance agency, under a written agreement, remunerated on a commission-only basis and qualifying as independent contractors for state tax purposes or for federal tax purposes under the Internal Revenue Code of 1986.

NOTE: Unless ALL employees meet one or more of the above exclusions, the employer must insure its workers' compensation liability, even if the employees are working limited part-time hours or are family members such as a spouse or children.

Questions as to how categories would apply to specific workers should be directed to your personal attorney for interpretation.

Failure to Carry WC Coverage

In the event an employer is uninsured at the time an employee suffers a compensable work-related injury, the department will pursue reimbursement from the employer of monies paid from the Uninsured Employers Guaranty Fund in relation to the claim. Reimbursement will include costs, interest, penalties, fees under section 440 of the Worker's Compensation Act and attorneys fees. The department will also pursue prosecution against the uninsured employer under section 305 of the Act.

In addition, an uninsured employer faces grave civil and criminal risks for failing to maintain continuous workers' compensation coverage. Not only can the employee sue the employer in tort for work-related injuries or diseases, in which suit the employee may recover amounts in excess of those allowed under workers' compensation, but the employer and those individuals

responsible to act on its behalf may each be criminally charged for **each day's** failure to maintain continuous workers' compensation coverage.

Misdemeanor convictions can result in the potential imposition of a $2,500 fine and up to one year imprisonment for **each day** the employer is in violation of the requirement to maintain worker's compensation coverage. Felony convictions can result in the potential imposition of a $15,000 fine and up to seven years imprisonment for **each day** the employer intentionally violated this requirement. Further, the employer and those individuals responsible to act on its behalf may be required to pay all benefits awarded by a workers' compensation judge.

The Bureau of Workers' Compensation investigates employer compliance with workers' compensation laws and may initiate the filing of charges against employers and individuals responsible to act on its behalf if workers' compensation coverage is not continuously maintained.

Further, any individual, including competitors, may seek county district attorney approval to file a private criminal complaint against an employer who fails to maintain worker's compensation coverage when required to do so.

Posting Notice

An employer is required by law to post, in a prominent and easily accessible place, at its primary place of business and its sites of employment, a notice such as the LIBC-500, containing the name, address and telephone number of the insurer or other appropriate party to contact regarding workers' compensation claims or to request information.
Insuring WC Liability

An employer may insure its workers' compensation liability by:
Purchasing a workers' compensation policy from the State Workers' Insurance Fund (SWIF).

Call SWIF at 570.963.4635.
-OR-

Through an insurance company.

Visit the PA Insurance Department's Web site for carriers approved to offer workers' compensation insurance in PA.

-OR-

By securing Department of Labor & Industry approval to self-insure individually or as a group.

For more information on how to self insure, contact the bureau's Self-Insurance Division at 717.783.4476.

An employer seeking approval to self-insure must submit its latest audited financial statements along with an application fee with each application. Self-insured employers are required to set aside funds to pay workers' compensation claims and post security for future claims.

Self-insured employers are also required to maintain an accident and illness prevention program as a prerequisite for retention of self-insured status and to file an annual program report with their renewal application. An employer may also self-insure as a member of a certified group, which is restricted to businesses of a similar nature.

Cost of WC Insurance

An insured employer is assigned a classification indicating the employer's line of work. Employer classifications are determined by the PA Compensation Rating Bureau, a non-government agency licensed and regulated by the PA Insurance Department. The employer's basic premium is based on its classification code, the carrier's rate for the classification and the employer's annual payroll.

Insurance rates may vary so employers may want to contact several different authorized insurance carriers for information on their rates.

Employers Can Reduce WC Costs

Develop a certified workplace safety program.

Employers with a functioning workplace safety committee, certified by the bureau, are eligible to receive a 5 percent annual workers' compensation policy premium discount.

Offer job openings to injured workers.

An employer is obligated by law to offer available jobs to its injured workers if the worker is capable of performing the job.

Have a list of designated medical providers.

The employer may be relieved of its liability to pay for medical services rendered during the first 90 days of treatment if it posts a list of six or more health care providers (at least three of which must be physicians and no more than four of which may be coordinated care organizations), the list meets certain other legal requirements and the employee fails to treat with a medical provider on the list.

The employer is required to inform its employees in writing of their rights and duties regarding the provider list and to have employees acknowledge in writing that they understand those rights and duties. After the initial 90-day treatment period, the employee has the option of choosing his or her own doctor. The employee is required to notify the employer within five days of a visit to a non-designated provider.

Strive for an injury-free workplace.

The Workers' Compensation Act encourages employers to provide safe working environments by providing premium discounts to employers who have not experienced a compensable lost-time injury in the preceding two years.

Corporations may seek exception from the requirements for certain executive officers.

Executive officers who have an ownership interest in a Subchapter S corporation, or at least a 5 percent ownership interest in a Subchapter C corporation, or who serve voluntarily, without pay, in a non-profit corporation, may apply for exclusion with their workers' compensation carrier or, if no insurance, to the Bureau of Workers' Compensation.

Report suspected workers' compensation fraud.

Fraud contributes to the cost of doing business. Anyone who commits fraud may be subject to civil or criminal penalties.

An employer commits fraud by understating payroll or misclassifying employee job codes in order to reduce premiums, thus making it difficult for the honest employer to compete in its market. Medical providers and others may also engage in fraudulent activity by billing for services that were not provided. Reports of these types of fraud should be directed to the PA Insurance Fraud Prevention Authority at 1-888-565-IFPA.

An employee commits fraud by knowingly and intentionally collecting total disability benefits or partial disability benefits in excess of the amount permitted by law while employed or receiving wages and/or by knowingly and intentionally failing to report wages, unemployment compensation, social security, severance or pension plan benefits while receiving workers' compensation benefits.

If you suspect that someone collecting workers' compensation benefits is doing so fraudulently, send written correspondence to the Compliance Section, Bureau of Workers' Compensation. Be sure to include the full name and address of the person collecting workers' compensation benefits, the name of the employer by whom the individual became eligible to receive the benefits (if known) and your reasons for believing the individual is collecting benefits fraudulently. If you are willing to provide additional information to the insurance carrier, include your name and address or telephone number, including area code.

If the information you provide enables the Compliance Section to locate an insurance carrier paying benefits, your response will be forwarded to that carrier so that it may conduct an investigation.

Reporting Injuries

Unless the employer has knowledge of the injury or the employee gives notice within 21 days of the injury, no compensation is due until notice is given. Notice must be given no later than 120 days after the injury for compensation to be allowed.

The employer is required to immediately report all injuries to its insurer or, if self-insured, the individual responsible for management of its workers' compensation program.

For injuries resulting in the loss of a day, shift or turn (or more) of work, the employer must also submit a First Report of Injury electronically, either via Electronic Data Interchange or the Internet (www.dli.state.pa.us, Keyword: workers comp) to the bureau within seven days of injury. However, First Reports for injuries resulting in death must be filed with the bureau within 48 hours. Copies of First Reports must also be provided to the injured worker and the employer's insurer.

Employee Compensation Benefits

Injured employees are entitled to employer-paid medical treatment and, if cumulative period(s) of disability exceed seven days, wage-loss benefits. Wage-loss benefits must commence within 21 days of the employer's knowledge or notice of injury resulting in disability, unless the claim is denied within that time period.

Disability for workers' compensation purposes refers to wage loss; that is, an employee's inability to return to work at his/her prior earnings or occupation. Wage-loss benefits are based on the employee's pre-injury average weekly wage. Wages include employer-provided room and board, bonuses or incentive pay, vacation pay and gratuities reported for income tax purposes.

If the calculated benefit is less than 50 percent of the established annual statewide average weekly wage, the benefit payable is the lower of 50 percent of the statewide average weekly wage or 90 percent of the worker's average weekly wage. Otherwise, the benefit is 66-2/3 percent of the pre-injury average weekly wage, up to an established statewide maximum.

Wage-loss benefits can be reduced by wages received through employment and self-employment. Wage-loss benefits for injuries occurring after August 31, 1993 can be reduced by unemployment compensation benefits received. Wage-loss benefits for injuries sustained after June 24, 1996 can be reduced by 50 percent of "old age" Social Security benefits received, as well as employer-paid severance and pension plan benefits.

Workers' compensation benefits are not due during periods of incarceration following conviction or when the employee is receiving wages equal to or more than his/her pre-injury wages.

The Workers' Compensation Act also permits insurers or self-insured employers to require that employees injured on or after June 24, 1996 be examined for an impairment rating when they have received 104 weeks of total disability benefits. A worker found less than 50 percent

impaired may be placed in a partial disability status. A partial disability status limits the injured worker to receiving a maximum of 500 weeks of partial disability benefits.

Bureau Contacts

Bureau of WC	717.783.5421
Employer Services Helpline	717.772.3702
Claims Information Helpline	
Toll Free Inside PA	800.482-2383
Local and Outside PA	717.772-4447
Health and Safety Division	717.772-1917
Self-Insurance Division	717.783-4476
Compliance Section	717.787-3567
E-mail address	ra-li-bwc-helpline@pa.gov
BWC Web Information	www.dli.state.pa.us

Reference Materials

The WC Act is available in soft form online at www.dli.state.pa.us and in hard copy from the State Bookstore of PA, Commonwealth Keystone Building, Plaza Level, 400 North Street, Harrisburg, PA 17120, telephone number 717.787.5109.

Visit the Web for other workers' compensation informational material, including the PA WC Annual Report, the most frequently asked workers' compensation questions, and safety committee information.

For information to start a small business, call the Small Business Resource Center at 800.280.3801 or 717.783.5700.

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